UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,	)	
Plaintiff,	)	Civil Action No. 16-1170-RBW
v.	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	)	
Defendants.		

DEFENDANTS' MEMORANDUM AND POINTS OF AUTHORITIES IN SUPPORT OF THE MOTION TO DISMISS

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INTRODUCTION

The Executive has longstanding authority under the immigration laws to set the conditions for all nonimmigrant visas, including student visas issued pursuant to 8 U.S.C. § 1101(a)(15)(F)(i). 8 U.S.C. §§ 1103, 1184. Since the 1940s, the Executive has exercised its statutory authority to permit student-visa-holders to supplement their academic education with on-the-job optional practical training (OPT). Congress has repeatedly amended many aspects of the student-visa-program, buy has never restricted the Executive's authority to allow foreign students to work as part of their pedagogical experience in the United States. Plaintiff Washington Alliance of Technology Workers (Washtech) nevertheless asserts that twelve Presidential Administrations have acted unlawfully by providing foreign students the option to obtain practical training in the United States after graduation instead of forcing them to leave the country immediately.

Washtech alleges that the 12-month OPT Program, last amended in 1992, *see Pre-Completion Interval Training; F-1 Student Work Authorization*, 57 Fed. Reg. 31,954 (July 20, 1992) (OPT Rule or 1992 Rule), and the 2016 Rule issued by the Department of Homeland Security (DHS) allowing an additional 24-month OPT period for a limited class of students with qualifying science, technology, engineering, or mathematics (STEM) degrees, *see Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students*, 81 Fed. Reg. 13040 (March 11, 2016) (STEM OPT Rule or 2016 Rule), violate the Administrative Procedure Act (APA). Specifically, Washtech, an organizational plaintiff purporting to represent the interests of domestic computer programmers, alleges the 1992 OPT Rule (Count I) and the 2016 STEM OPT Rule (Count II) exceed DHS's statutory authority under the Immigration and Nationality Act (INA), that the 2016 Rule was issued in violation of the Congressional Review Act (CRA), without notice and comment, and without complying with incorporation by reference requirements (Count III), and that the 2016

Rule is arbitrary and capricious (Count IV).

As explained below, these claims fail at the threshold. First, Washtech does not identify any member possessing Article III standing, let alone any basis to conclude that any alleged injury was caused by the 2016 or 1992 Rules or is redressable by a decision in their favor. Indeed, it bears noting that Washtech's allegations concerning the alleged harm caused by the 2016 Rule rely entirely on cookie-cutter allegations they previously raised concerning their separate challenge to the 2008 version of this Rule. *None* of these allegations refer to the 2016 Rule in any way, and thus by definition cannot have been *caused* by the 2016 Rule. Allegations concerning a defunct regulatory regime cannot serve as the basis for Article III standing to challenge the regime that replaced it. Second, Plaintiff's challenge to the 1992 Rule is time-barred, and its challenge to the 2016 Rule fails under ripeness principles. Finally, even assuming justiciability, Plaintiff fails to allege any plausible claim for relief as to all counts as Plaintiff is not within the zone-of-interests protected by § 1101(a)(15)(F)(i), and because it fails to plead facts satisfying Rule 12(b)(6)'s plausibility standard as to their APA claims. Thus, the case may not proceed.

FACTUAL AND PROCEDURAL BACKGROUND

I. Background of F-1 Visa and OPT Program

In 1952, Congress, through 8 U.S.C. § 1103(a), delegated to the Attorney General "sweeping" authority to establish regulations and perform any actions necessary for the implementation and administration of the Immigration and Nationality Act (INA). *Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir. 1984). In 2002, Congress created DHS, transferring this authority to the Secretary, and charging him with administering and enforcing the INA and all other laws relating to the immigration and naturalization of aliens. *See* Pub. L. No. 107-296, Div. L, § 1517, 116 Stat. 2135; 6 U.S.C. § 557. As presently codified, Section 1103(a) constitutes a similar delegation of broad authority to issue regulations, including broad powers to enforce the INA and

a directive to issue rules governing nonimmigrants. *See* 8 U.S.C. § 1103(a)(1) ("The Secretary [] shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens"); *id.* § 1103(a)(3) ("[The Secretary] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the INA]."). Among the Secretary's delegated duties is determining the conditions upon which classes of nonimmigrant aliens, as defined by Congress, *see* 8 U.S.C. § 1101(a)(15), may be admitted and allowed to maintain nonimmigrant status in the United States. *See id.* § 1184(a)(1) ("admission" "shall be for such time and under such conditions as the Attorney General may by regulations prescribe").

Congress also charged DHS with protecting the physical and economic integrity of the United States, including "ensur[ing] that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland." Pub. L. No. 107-296 § 101(b)(1)(F) (codified at 6 U.S.C. § 111(b)(1)(F)). This includes a mandate to advance research and development, and to ensure the enhancement of programs at colleges and universities for information security and engineering. *Id.* §§ 101, 301, 302(4), (10), 308(b)(2).

A. History of Admission and Employment Authorization of Nonimmigrant Students

Certain foreign students who come to the United States to study are defined as nonimmigrants and receive "F-1" status for a timeframe authorized by the Secretary. *See* 8 U.S.C. § 1101(a)(15)(F)(i); 8 C.F.R. § 214.2(f)(5)(i). "[A]t least since 1947, federal agencies dealing with immigration have interpreted § 1101(a)(15)(F)(i) to allow a student to engage in on-the-job training to supplement his in-the-classroom training." *Programmers Guild, Inc. v. Chertoff*, 338 Fed. Appx. 239, 244 (3d Cir. 2009); *see* 8 C.F.R. § 125.15(b) (1947). And for decades, the Attorney General's (through legacy INS) and now Secretary's regulations defined a foreign

student's duration of status as "the time during which an F-1 student is pursuing a full course of study at an educational institution approved by the Service [now DHS] for attendance by foreign students, or engaging in authorized practical training following completion of studies." 48 Fed. Reg. 14,575, 14,583-84 (Apr. 5, 1983).

Since 1947, Congress has from time to time returned to the issue of "practical training" and foreign students in the U.S. workforce, without once altering the basic contours of the regulatory program and its provision for OPT. *See* Pub. L. No. 111-306, § 1, 124 Stat. 3280, 3280 (Dec. 14, 2010); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §§ 501-502, 116 Stat. 543, 560-63; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 625, 110 Stat. 3009-546, 3009-699; Immigration Act of 1990 § 221(a), Pub. L. No. 101-649. Congress has also frequently recognized and discussed the OPT component of the F-1 program.[1] Thus, although the OPT program has changed over time in terms of the length of time temporary student employment is permitted – between 6 and 18 months – and whether this training may occur during or following their studies, consistently since 1992, nonimmigrant students could, through OPT, engage in 12 months of employment during and following a full-time course-load in a U.S. educational institution. *See* 8 C.F.R. § 214.2(f)(10); 57 Fed. Reg. 31,954.

In April 2008, DHS issued an interim final rule with request for comments extending the 12-month OPT program by 17 months for F-1 nonimmigrants with qualifying STEM degrees, to a total of 29 months. *See Extending Period of Optional Practical Training by 17 Months for F–1*

[1] *See Immigration Policy: An Overview: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 15-16 (2001); *Immigration Reform: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary on S. 358 and S. 448*, 101st Cong. 485-86 (1989); *Immigration Reform and Control Act of 1983: Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary on H.R. 1510*, 98th Cong. 687, 695, 698 (1983); *Illegal Aliens: Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 92d Cong. 265-66 (1971).

Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F–1 Students With Pending H–1B Petitions, 73 Fed. Reg. 18,944 (2008). The rule was prompted by concern from a wide range of stakeholders that immigration and employment practices in the United States were adversely affecting the ability of U.S. schools to attract talented foreign students for STEM study programs. 73 Fed. Reg. at 18,947.

B. Prior Litigation History

The 2008 STEM OPT Rule produced two separate challenges to DHS's authority to issue the regulation and the reasonableness of that regulation, which set the stage for the instant litigation. The first, *Programmers Guild, Inc. v. Chertoff*, 338 Fed. Appx. 239, 244 (3d Cir. 2009), was filed in 2008 by Washtech's present counsel on behalf of domestic workers in or about to enter the STEM job market and organizations representing them. *See id.* at 241. Plaintiffs there alleged, among other things and much like Plaintiff here, that DHS exceeded its statutory authority in issuing the Rule and that the rule violated the APA on procedural and substantive grounds. *Id.* Relying on the D.C. Circuit's decision in *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897 (D.C. Cir. 1996) (*FAIR*), the Third Circuit dismissed the lawsuit, reasoning that domestic computer workers were not within the INA's zone-of-interests because nothing in the INA indicated "that protection of domestic workers was [] among Congress's concerns in enacting and re-enacting the F-1 status provision." *Id.* at 244.

In March, 2014, Plaintiff in this litigation, represented by the same counsel, filed suit again, challenging both the 2008 STEM OPT Rule at issue in *Programmers*, and the 1992 OPT Rule. *See Wash. Alliance of Tech. Workers v. DHS*, 74 F. Supp. 3d 247 (D.D.C. 2014) (*Washtech I*). Plaintiff alleged that both the 1992 and 2008 Rules exceeded DHS's statutory authority and conflicted with the INA and separately alleged the 2008 extension was arbitrary and capricious. issued without good cause to forego notice and comment, and in violation of regulations

governing incorporation by reference. *Id.* at 250. The Government moved to dismiss for lack of jurisdiction. *Id.* The district court found no jurisdiction over Washtech's challenge to the 1992 Rule given the absence of a single Washtech member alleging injury from the rule, and because the claims were time-barred pursuant to 28 U.S.C. § 2401. *Id.* at 250-53 & n.3. However, the court assumed Washtech's claims of injury for the remaining counts were true, holding it "reasonable to infer that the named members, who have technology-related degrees in the computer programming field and have applied for STEM employment during the relevant time period, were in direct and current competition with OPT students on a STEM extension." *Id.* at 253. The court did not address causation or redressability. *Id.* at 250-53.

On summary judgment, DHS renewed its standing objection, and argued that: the Secretary's promulgation of the 2008 Rule was entitled to *Chevron* deference, the rule was not arbitrary or capricious, and DHS had good cause to issue the rule without notice and comment. *Washtech I*, 2015 U.S. Dist. LEXIS 105602, *7-54. The district court issued a decision on August 12, 2015. Relying on the affidavits of three Washtech members – Messrs. Sawade, Blatt, and Smith – asserting they were computer programmers who had applied for computer jobs following issuance of the 2008 Rule, between 2008-2014, and the existence of job advertisements from technology employers soliciting STEM OPT students, among other applicants, the court found that Washtech had demonstrated injury by showing that the affiants were "part of the computer programming labor market," had "sought out a wide variety of STEM positions with numerous employers, but [had] failed to obtain those positions following the promulgation of the OPT STEM extension in 2008." *Id.* at *12. The court again did not address causation or redressability.

As to zone-of-interests, the court declined to follow the D.C. Circuit's guidance in *FAIR*, 93 F.3d 897, or the persuasive authority of the Third Circuit in *Programmers*, 338 F. App'x at 235, concluding instead that the F-1 provision, which lacks language designed to protect domestic

labor, was "integrally related" to the H-1B provision, which does contain such language, such that Washtech was within § 1101(a)(15)(F)(i)'s zone-of-interests by virtue of § 1101(a)(15)(H)(1)(B)'s separate reference to domestic labor markets. *Id.* at *16-26.

However, on the merits, *Washtech I* readily rejected Washtech's claims. Citing 8 U.S.C. §§ 1103 and 1184, the court held that "Congress has delegated substantial authority to DHS to issue immigration regulations. This delegation includes broad powers to enforce the INA and a narrower directive to issue rules governing nonimmigrants." *Id.* at *28. The court reasoned that *Chevron* applied because the 2008 STEM OPT rule was promulgated as an exercise of this authority. *Id.* at *29. The court then concluded that Congress had not directly addressed the precise question at issue – *i.e.* whether the term "student" could include an individual engaging in on-the-job education or is solely restricted to classroom education. *Id.* at *29-34. Looking to the text of section 1101(a)(15)(F)(i), other INA provisions, dictionary definitions, and legislative history, the court concluded that the term "student" was ambiguous under *Chevron* step-one, and that Congress had delegated authority to DHS to define its scope. *Id.*

The court then found *Chevron* step-two satisfied because the 2008 Rule was a reasonable interpretation of DHS's authority under the INA, and because of "Congress' longstanding acquiescence" to that interpretation. *Id.* at *34-35. The court noted that "[s]ince at least 1947, INS and DHS have interpreted the immigration laws to allow foreign students to engage in employment for practical training purposes," and this longstanding interpretation was entitled to deference. *Id.* at *35-37. The court then concluded that "Congress has repeatedly and substantially amended the relevant statutes without disturbing this interpretation." *Id.* at *41. Canvassing those amendments, the court noted that Congress addressed the subject of F-1 nonimmigrants and OPT through statute and written and oral testimony on many occasions, such that "congressional familiarity with the administrative interpretation at issue" was indisputable. *Id.* at *41-44. The

court rejected any claim DHS exceeded its authority, noting "[o]ne of DHS's statutorily enumerated goals is to 'ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland," and that "a significant purpose of immigration policy is to balance the productivity gains that aliens provide to our nation against the potential threat to the domestic labor market." *Id.* at *44-45.

Finally, the court concluded that DHS was not exempt from notice-and-comment rulemaking, but reasoned that immediate *vacatur* was unwarranted under *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Instead, given "the seriously disruptive" consequences to American technology employers and F-1 students with STEM degrees of placing the immigration status of tens of thousands of individuals into question, the court vacated the 2008 Rule, but stayed *vacatur* until February 12, 2016, to allow DHS to either re-issue the rule with notice and comment, or to take other corrective action, including issuing a new rule.[2] *Id.* at *55-58; *accord Washtech I*, 153 F. Supp. 3d 93, *17-18.

Washtech appealed, challenging the district court's ruling on the merits of its substantive APA claims and decision to not immediately vacate the 2008 OPT- STEM Rule. *See Washington Alliance of Technology Workers v. DHS*, No. 15-5239, 2016 WL 3041029 (May 13, 2016); Br. of Appellant, 2016 WL 722135 (Feb 23, 2016).

C. The 2016 STEM OPT Rulemaking

Meanwhile, DHS prepared for a fresh round of notice-and-comment on the subject. On October 19, 2015, a little over two months after the district court's decision, DHS issued a notice of proposed rulemaking, *Improving and Expanding Training Opportunities for F–1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F–1 Students*,

[2] The Court did not decide whether the 2008 Rule violated the incorporation by reference regulation or substantively unreasonable.

80 Fed. Reg. 63,376 (Oct. 19, 2015) (2015 STEM OPT NPRM or NPRM), requesting comments on all issues discussed in the NPRM by November 18, 2015. *Id.* The NPRM proposed to amend the F-1 nonimmigrant student visa regulations for certain students with STEM degrees from U.S. institutions to "allow such F–1 STEM students who have elected to pursue 12 months of OPT in the United States to extend the OPT period by 24 months." *Id*. As DHS explained "[t]his 24-month extension would effectively replace the 17-month STEM OPT extension currently available to certain STEM students," *id*., which was the subject of *Washtech I*. The NPRM clarified that unlike the 2008 OPT-STEM Rule, the proposed rule would improve oversight over the integrity of STEM OPT extensions by, among other things, requiring the implementation of training plans by employers that draw the connection between the F-1 nonimmigrant's STEM degree and the assignments with the employer, explicitly confirming the Department's site visit authority to conduct reviews of STEM OPT at employer worksites, adding wage and other protections for STEM OPT students and U.S. workers, and allowing extensions only to students with degrees from accredited schools. *Id.* Separately, the NPRM re-proposed "'Cap-Gap' relief[,] first introduced in 2008 for any F-1 student with a timely filed H-1B petition and request for change of status," which allows "such students to automatically extend the duration of F–1 status and any current employment authorization until October 1 of the fiscal year for which such H–1B visa is being requested." *Id.* The NPRM discussed these proposed changes in detail. *See id.* at 63,379-63,394.

The NPRM's introduction clarified that the proposed rule's purposes included responding to *Washtech I*, as well as implementing changes to the 2008 OPT- STEM Rule to "further enhance the academic benefit, provided by STEM OPT extensions and increase oversight, which will better ensure that students gain valuable practical STEM experience that supplements knowledge gained through their academic studies, while preventing adverse effects to U.S. workers," while

also "ensur[ing] that the nation's colleges and universities remain globally competitive in attracting international STEM students to study and lawfully remain in the United States." *Id.* To ensure public notice of what fields are covered by the new Rule, DHS proposed to create a "general definition of 'STEM fields'" and to create a process for "notification in the Federal Register when DHS updates" the list of eligible STEM fields consistent with the definition of STEM in the proposed Rule. *Id.* at 63,386. The NPRM made clear that DHS was requesting and welcomed comments on all aspects of the proposed rule, *see, e.g.*, 80 Fed. Reg. at 63,376, 63,377, 63,381, including on the issue of whether to allow any extension beyond a year.[3]

On March 11, 2016, DHS issued the final version of the rule, *Improving and Expanding Training Opportunities for F–1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F–1 Students*, 81 Fed. Reg. 13,040 (March 11, 2016), effective May 10, 2016.[4] *Id.* DHS began by explaining the basis and purpose of regulatory action, including: (1) the benefits of international students in the United States; (2) the increased competition for international students globally; (3) the necessity for improving the existing STEM OPT extension (the 2008 Rule). *Id.* at 13,047-49. After laying out this information in general terms, DHS then devoted over 60 pages of single-spaced text explaining in careful and reasoned detail the basis and purpose of each feature

[3] *See, e.g.*, *id.* at 63,382 ("Although, as described in more detail below, many commenters recommended specific changes to the STEM OPT extension and some commenters objected to the 2008 IFR altogether . . . . DHS continues to believe that practical training is frequently a key element of F–1 students' educational experience, and that STEM students in particular may benefit from an extended period of time in practical training"), *id.* at 63,385 (requesting "public comment and the submission of empirical data in relation to" DHS's proposed duration of the new extension); *id.* at 63,394 ("In preparing the preferred regulatory approach proposed in the NPRM, DHS examined three options . . . . Under the first option, DHS would take no regulatory action. The STEM OPT extension would no longer be available to F–1 STEM students after February 2016."). As the Final Rule notes, during the comment period, DHS received approximately 50,500 comments from various stakeholders, including U.S. and international students, U.S. workers, schools and universities, professional associations, labor organizations, advocacy groups, businesses, members of Congress, and others. 81 Fed. Reg. at 13,046-47.

[4] On January 23, 2016, Judge Huvelle issued an order staying her initial order of vacatur until May 10, 2016. *See* 153 F. Supp. 3d at *19.

of the 2016 STEM OPT Rule, including many changes from the proposed rule, through extensive written responses to the approximately 50,500 comments. *Id.* at 13,049-13,109. Among other things, DHS received many comments on whether the OPT program should be expanded beyond a year, and "whether STEM OPT extensions should be authorized at all." *Id.* at 13,050 (describing scope and number of comments challenging extending OPT by any duration in specific circumstances). Among the comments on this specific issue were those of Plaintiff's counsel in this case, John Miano and Michael Hethmon, as well as the comments from other groups opposing nonimmigrant labor, including the Federation of Immigration Reform, and the Center for Immigration Studies.[5] Although the issues raised by Messrs. Miano, Hethmon, and others concerning whether the OPT program should be expanded beyond a year were beyond the scope of the NPRM, DHS responded to those specific comments, as well as all comments there were within the scope of the NPRM. *See, e.g.*, 80 Fed. Reg. at 13,059-62, 13,088-89.

D. Factual and Procedural Background

On May 13, 2016, three days after the 2016 STEM OPT Rule went into effect, the D.C. Circuit issued a decision finding Plaintiff's challenge to the 2008 Rule moot because the 2016 Rule had superseded that rule. *Washington Alliance of Technology Workers v. DHS*, No. 15-5239, 2016 WL 3041029 (May 13, 2016). The panel vacated the judgment of the district court and dismissed the action in its entirety. *Id.* One month later, on June 17, 2016, Plaintiff initiated the instant action raising an identical challenge to the 1992 OPT Rule, and similar challenges to the 2016 STEM OPT Rule. In particular Washtech alleges the 1992 OPT Rule (Count I) and the 2016 STEM OPT Rule (Count II) exceed DHS's statutory authority under the INA, that the 2016 STEM OPT Rule was issued in violation of the CRA, without notice and comment, and without

[5] *See* https://www.regulations.gov/document?D=ICEB-2015-0002-9797 (Miano), https://www.regulations.gov/document?D=ICEB-2015-0002-39656 (Hethmon); *accord* https://www.regulations.gov/document?D=ICEB-2015-0002-40752, https://www.regulations.gov/document?D=ICEB-2015-0002-40752.

complying with incorporation by reference requirements (Count III), and that the 2016 STEM OPT Rule is arbitrary and capricious (Count IV). Washtech bases each of these Counts on alleged injuries suffered by three Washtech members, Sawade, Blatt, and Smith. ECF 1 at ¶¶ 98-219. The Government now moves to dismiss all four Counts in their entirety for lack of subject matter jurisdiction and failure to state a claim.

STANDARD OF REVIEW

A party filing a complaint in federal court must demonstrate that it possesses Article III standing to raise its claims and that the court has subject matter jurisdiction over those claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Although generally courts "accept as true all material allegations of the Complaint, and must construe the Complaint in favor of the complaining party," *Ord v. Dist. of Columbia,* 587 F.3d 1136, 1140 (D.C. Cir. 2009), the court "may look beyond the allegations contained in the complaint to decide a facial challenge, as long as it still accepts the factual allegations in the complaint as true." *Flores v. District of Columbia*, 437 F. Supp. 2d 22, 29 (D.D.C. 2006). "The court need not accept inferences drawn by the plaintiff [] if those inferences are unsupported by facts alleged in the complaint or amount merely to legal conclusions." *Arpaio v. Obama*, 27 F. Supp. 3d 185, 208 (D.D.C. 2015). And, "the court, when necessary, may undertake an independent investigation to assure itself of its own . . . jurisdiction and consider[s] facts developed in the record beyond the complaint."[6] *Id*.

Also, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court need not accept as true "a legal conclusion couched as a factual allegation," nor an inference

[6] Should Plaintiff attach evidentiary matter to its response regarding its Article III standing, a different standard would apply. *See, e.g., Finca Santa Elena, Inc. v. United States Army Corps of Engrs.*, 873 F. Supp. 2d 363, 368 (D.D.C. 2012). Defendants reserve the right to invoke this standard in the event Plaintiff submits evidentiary matter in support of its Article III standing.

unsupported by the facts set forth in the Complaint. *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006). Regardless of facts alleged, the Court may dismiss claims not legally cognizable.[7] *See Doe v. Metro. Police Dep't*, 445 F.3d 460, 467 (D.C. Cir. 2006).

ARGUMENT

I. Plaintiff's Challenge to the 2016 STEM OPT Rule is non-justiciable

Plaintiff devotes nearly the entirety of their Complaint to alleging that the 2016 STEM OPT Rule violates the APA. However, they fail to articulate a cognizable theory of injury for Article III purposes, let alone one that is traceable to DHS and redressable by this Court. Moreover, even assuming standing, Plaintiff's Complaint, filed a mere month after the 2016 Rule became effective, lacks any plausible allegation of any actual action taken under the 2016 Rule as to any F-1 nonimmigrant, let alone in a way that affects Plaintiff, such that their dispute is nothing more than an abstract disagreement that fails elementary ripeness principles. Indeed, at the outset it must be noted that whether Plaintiff has demonstrated standing to challenge the 2016 Rule must be based on the *2016 Rule* and not alleged past injuries allegedly caused by a prior, defunct Rule. *See Transp. Workers Union of Am. v. Transp. Sec. Admin.*, 492 F.3d 471, 75-77 (D.C. Cir. 2007) (injury must be caused by "the conduct complained of," and not prior conduct). Allegations of injury that pre-date the effective date of the 2016 Rule – May 10, 2016 – cannot support a finding of actual or imminent injury where those allegations are unrelated to, and not caused by, the actual Rule being challenged. The fundamental defect in Plaintiff's complaint as to *every* theory of injury is that no Washtech member has alleged any cognizable harm traceable to the 2016 Rule,

[7] Defendants cite public record documents, including the 2016 Rule and 2015 NPRM, which Plaintiff incorporates by reference into its Complaint, as well as public comments made in response to the NPRM and legislative history concerning the F-1 nonimmigrant visa and H-1B programs. All of these documents are properly the subject of judicial notice, and their consideration in this motion does not convert it into one for summary judgment. *See Banner Health v. Sebelius*, 797 F. Supp. 2d 97, 112 (D.D.C. 2012); 44 U.S.C. § 1507; *cf. Washtech I*, 74 F. Supp. 3d at 249-50 (considering legislative history and Federal Register materials).

as opposed to the now defunct 2008 Rule.

A. Plaintiff fails to demonstrate Article III standing to challenge the 2016 STEM OPT Rule (Counts II-IV)

It is axiomatic that standing requires "a 'concrete and particularized' injury that is: (1) 'actual or imminent'; (2) caused by, or fairly traceable to, an act that the litigant challenges in the instant litigation; and (3) redressable by the court." *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc). Plaintiff "must demonstrate standing for each claim," *Payne v. Salazar*, 619 F.3d 56, 61 (D.C. Cir. 2010), and must "identify members who have suffered the requisite harm" for each claim. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2000). Moreover, where, as here, Plaintiff's "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else" not before the Court – employers or students regulated by the 2016 Rule – standing is "substantially more difficult to establish." *Lujan*, 504 U.S. at 561-62. In its Complaint, Plaintiff invokes five theories of Article III injury. ECF 1 at ¶¶ 85-89. As explained below, each of these theories fail to articulate any basis for this court to find Plaintiff has Article III standing to challenge the 2016 Rule.

1. Plaintiff's fail to demonstrate competitive injury

Plaintiff's first three injury theories, that the 2016 Rule "deprives Washtech members of statutory labor protective arrangements," "allows increased competition" between "Washtech [m]embers [and] foreign workers," and "creates unfair competition with foreign workers," *Id.* ¶¶ 85-87, 96-223, invoke the D.C. Circuit's "competitor standing" case law.[8] *See Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014); *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1997); *Washtech I*, 74 F. Supp. 3d at 252-54 (addressing identical theories under

[8] If Plaintiff's claim alleging deprivation of statutory protections does not invoke competitor standing, then it "goes to the merits," and cannot serve as the basis of Plaintiff's injury theory. *Sherley v. Sebelius*, 610 F.3d 69, 73-74 (D.C. Cir. 2010).

competitor standing); *Washtech I*, 2015 U.S. Dist. LEXIS 105602, *7-16 (same). Under that body of law, Plaintiff must demonstrate that the 2016 Rule "lift[ed] regulatory restrictions on their competitors or otherwise allow[ed] increased competition," and has "the clear and immediate potential" to increase competition. *La. Energy*, 141 F.3d at 367.

Although the "clear and immediate" standard is imprecise, *Sherley*, 610 F.3d at 73 ("cases addressing competitor standing have articulated various formulations of the standard"), at the least it requires "demonstrat[ing] that [Washtech] is a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action," *Mendoza*, 754 F.3d at 1013 (emphasis added), and that the competitive injury must be "certainly impending," *Nat'l Treas. Employees Union v. U.S.*, 101 F.3d 1423, 1427 (D.C. Cir. 1996), which requires more than "imagin[ing] circumstances [where] it could be affected by the agency's action." *Northwest Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986). "Claiming that regulatory action creates a skewed playing field," is insufficient; such claims are "bare assertion[s] of competition." *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 13 (D.C. Cir. 2006). Moreover, Plaintiff must demonstrate certainly impending injury as of the date the Complaint is filed. *See Lujan*, 504 U.S. at 569 n.4; *Equal Rights Ctr. v. Post Props.*, 633 F.3d 1136, 1141 (D.C. Cir. 2011).

Under these standards, Plaintiff fails to allege any cognizable injury, let alone injury traceable to the 2016 OPT STEM Rule redressable by this Court. The Complaint alleges injury based on allegations concerning *past* actions by Messrs. Sawade, Blatt, and Smith, and the alleged existence of job advertisements soliciting OPT workers. ECF 1 at ¶¶ 98-219. In particular, Sawade, Blatt, and Smith each allege that: (1) they are "computer programmer[s,]" or a "computer systems and networking administrator," with degrees in "computer science," "information technology," or "business administration," *id.* ¶¶ 106, 137, 184-85; (2) employers such as IBM, have in the past placed recruitment advertisements that make OPT status a job

requirement (apparently sometime prior to Sept. 26, 2013), *id.* ¶¶ 101-03; and (3) "taxation treatment makes workers on OPT inherently cheaper to employ than Washtech member" because aliens on F-1 visas are "classified as Non-Resident Aliens so that they and their employers do not pay Medicare and Social Security taxes as is required for Washtech members." *Id.* ¶¶ 220-21. None of these allegations in fact demonstrate any Washtech member is a *direct* and *current* competitor with any beneficiary of an F-1 visa and work authorization issued pursuant to the 2016 Rule, as opposed to a *past* competitor under the 2008 Rule. *See Mendoza*, 754 F.3d at 1013.

Plaintiff also attempts to demonstrate injury by reciting the employment history of three members. Sawade avers that as of June 2015, he was employed full-time, ECF 1, ¶ 107, and that between April 19, 2010 and June, 2014, he applied and interviewed for computer jobs with various firms alleged to have sought OPT students during the same time period. *Id.*, ¶¶ 109-137.Blatt avers that he currently works as a contract computer programmer and that between some unspecified date beginning in 2010 and March 2016, he applied for programming jobs with various companies. *Id.*, ¶¶ 137-83. And Smith avers that he has had a job as "temporary employee" with a company since January, 2015, and that between April, 2008 and May 2015, he applied for various programming jobs. *Id.*, ¶¶ 184-219. The fundamental difficulty with this set of allegations is that they provide no basis for concluding Sawade, Blatt, or Smith "personally compete[] in the same arena" as beneficiaries of the 2016 Rule, *see Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998), let alone that they do so *directly* and *currently*. *Mendoza*, 754 F.3d at 1012-13. The D.C. Circuit's *Mendoza* decision, 754 F.3d 1002, demonstrates why. In *Mendoza*, three American sheepherders challenged the Department of Labor's publication without notice-and-comment of two guidance letters that the Court believed decreased wages and working conditions by setting minimum wage requirements for sheepherders. *Id.* at 1009-12. That alone distinguishes this case, as OPT students are not subject to a specific wage requirement, but are

free to agree to compensation of their choosing so long as it is commensurate with the employer's similarly situated domestic workers. *See* 8 C.F.R. § 214.2(f)(10)-(12). In short, the *Mendoza* plaintiffs could clearly show how the challenged guidance harmed their wages and working conditions; Sawade, Blatt, and Smith cannot draw such a connection, let alone actually show that wages in STEM fields have been depressed by the 2016 Rule. *See Mobile*, 457 F.3d at 13.

Even assuming such a showing, the *Mendoza* plaintiffs also were required to demonstrate they were participants in the relevant market – herding – by proving that their "bottom line" was "affected by the challenged government action," and that they were qualified to hold the herding positions at issue and actively involved in the relevant market. 754 F.3d at 1013. Plaintiffs alleged that their wages as herders would not be lower but for the presence of foreign-born herders by "attest[ing] to specific experience that qualifie[d] them to work as herders; the particular working conditions that led them to leave the industry; the specific wages and conditions they would require to accept new employment as workers; the manner in which they have kept abreast of conditions in the industry; and, . . . a specific possible avenue for obtaining reemployment as a herder." 754 F.3d at 1014. Accordingly, *Mendoza* found that plaintiffs were active and ongoing participants in the relevant market and were "willing and available to work as herders" in the precise *types* of jobs foreign laborers had *already taken* at depressed wages, 754 F.3d at 1013-14, 1015 & n. 8; *accord Int'l Union of Bricklayers & Allied Craftsmen v. Meese* ("*Bricklayers*"), 761 F.2d 798 (D.C. Cir. 1985) (standing to challenge admission of aliens for employment purposes on visa that did not permit employment where plaintiff showed members "ready, willing and able" to perform work on at least two projects that went to aliens instead).

Such allegations are fatally absent here. Sawade, Blatt, and Smith respectively last sought employment in June, 2014, March, 2016, and May, 2015, 23 months, 2 months, and 12 months prior to the effective date of the 2016 STEM OPT Rule. Thus none of their allegations remotely

demonstrate an ongoing or imminent injury as of the date of the Complaint – June 17, 2016 – traceable to the 2016 Rule. The allegations fail to show that Washtech members might someday seek employment in direct competition with STEM OPT students subject to the 2016 Rule, or that any "certainly impending" injury loomed on June 17, 2016. Their situation is no different than the "some day" intentions rejected by the Supreme Court as a basis for injury in *Lujan*. 504 U.S. at 564. Without more, Plaintiff essentially asserts that past, failed efforts at securing preferable employment demonstrate injury. But past conduct alone never "show[s] a present case or controversy regarding injunctive relief" if unaccompanied by "continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). Claims of past job applications do "nothing to establish a real and immediate threat that [its members] would again be [injured in the future.]" *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Thus, past job applications are insufficient, because at a minimum, Plaintiff "must make a concrete showing that it is in fact likely to suffer financial injury as a result of the challenged action" going forward. *KERM, Inc. v. FCC*, 353 F.3d 57, 60-61 (D.C. Cir. 2004); *see Snake River Farmers' Ass'n*, 9 F.3d 792, 796-98 (9th Cir. 1993) (speculative possibility of future employment insufficient).

Plaintiff similarly attempts to demonstrate "certainly impending" competitive injury by citing *past* instances of job advertisements issued by technology employers of headhunters seeking, albeit not necessarily exclusively, employees with STEM OPT status,[9] and past instances of similar companies allegedly filing applications for OPT extensions during some unspecified period of time preceding the 2016 Rule.[10] But the existence of *past* job opportunities that allegedly may have been affected by a defunct Rule does not by itself demonstrate that Washtech

[9] ECF 1, ¶¶ 101-02, 11, 118-19, 121, 124, 126, 129, 131, 140, 142, 145, 149, 152, 158, 190, 193, 198, 201, 207, 213.
[10] *Id.*, ¶¶ 110, 113, 115, 117, 120, 122, 128, 130, 139, 143, 146, 147, 150, 153, 155, 157, 189, 192, 195, 197, 200, 204, 206, 210, 215.

members are presently in *direct* and *current* competition with STEM OPT students benefitting from the 2016 Rule. For example, that Sawade alleges he applied to a job at Microsoft in 2010, *id.* ¶ 110, and that headhunting firms allegedly issued advertisements around the same time seeking, non-exclusively (according to Plaintiff), applicants with OPT status, does not remotely indicate *direct* and *current* competition with *any* F-1 nonimmigrant beneficiaries of the 2016 Rule some *six* years later. Plaintiff's Complaint is riddled with such speculative, backward looking allegations which fail to show injury now, let alone then. *See* notes 9-10, *infra*.

Indeed, none of the alleged advertisements—which all pre-date the filing of the complaint, apparently by years, as well as the effective date of the 2016 Rule—show that Sawade, Blatt, or Smith are direct and current competitors in any relevant job market in which F-1 nonimmigrants benefiting from a 2016 STEM OPT extension are competing. At best, they demonstrate that employers, often through headhunters and other third parties, sought *in the past* to employ students in various job categories with a broad set of job requirements, in different disciplines, and in different geographic locations nationwide. *See id*. And as the 2016 Rule, unlike the 2008 Rule, explicitly requires that the "duties, hours and compensation" of any STEM OPT position "be commensurate with those provided to the employer's similarly situated U.S. workers," it is speculative that Sawade, Blatt, and Smith will ever be able to allege competitive injury premised on a theory that STEM workers are somehow cheaper to employ than U.S. workers. [11] *See* 81 Fed. Reg. at 13,081.

[11] Plaintiff appears to assume without any basis in fact that any alleged harm caused by the 2008 Rule will continue under the new regime. But that assumption lacks any support in the case law. *See, e.g.*, *Lyons*, 461 U.S. at 105. *Transp. Workers*, 492 F.3d at 475. Even were that not so, the fact remains that the 2016 Rule differs significantly from the 2008 Rule; it imposes different eligibility requirements, includes new worker protections, and generally offers different benefits and burdens to participating students, employers, and educational institutions. *See, e.g.*, 81 Fed. Reg. at 13,901 (summarizing and responding to comments objecting to "new and more stringent requirements like the [Training Plan]."). Any harm then from the 2008 Rule cannot be transmogrified into harm flowing from the 2016 Rule.

Even setting these timing difficulties aside, the Complaint fails to allege any nexus between the advertisements and Sawade, Blatt, or Smith. Nothing they allege demonstrates they were in fact in direct and current competition with the STEM OPT students headhunters solicited, as they neither demonstrate that they applied to any headhunters, that they were willing to relocate literally *anywhere* in the United States as required, that they were willing to and applied for the many entry-level positions advertised, or that the headhunters were filling positions in Washtech's members' desired skill and experience level. Without more, the allegations only imply the existence of jobs that Sawade, Blatt, and Smith never expressed any interest in, or intent to relocate for.

Judge Huvelle's decision at the motion to dismiss stage in *Washtech I* demonstrates the failure of Plaintiff's allegations.[12] In *Washtech I*, Plaintiff's affiants alleged far more concerning their actual *direct* and *current* competition with STEM OPT beneficiaries subject to the now defunct 2008 Rule. *See* 74 F. Supp. 3d at 250-53. In particular they alleged that: (1) "they have sought out a wide variety of STEM positions with numerous employers, but have failed to obtain these positions following the promulgation of the OPT STEM extension in 2008," (2) "the specific employers with whom these members sought STEM positions" in fact "employed students who applied to DHS for STEM extensions during the relevant time frame," such that it was "reasonable to infer that the named members, who have technology-related degrees in the computer programming field and have applied for STEM employment *during the relevant time* period, were in direct and current competition with OPT students on a STEM extension." *Id.* at 252-53 (emphasis added). As compared to *Washtech I*, Messrs. Sawade, Blatt, and Smith allege nothing remotely comparing to the specificity of job applications over the relevant period of time.

[12] The Government maintains that Judge Huvelle erred in her Article III standing analysis, *see* Br. for Appellee, 2016 WL 750712, at *19-33. But even assuming Judge Huvelle's decisions are correct, they are readily distinguishable from Plaintiff's allegations here.

Indeed, they do not allege a single example of a job they applied to or a job advertisement on which they relied during the "relevant period," *i.e.* after the effective date of the 2016 Rule. All of their allegations are similar if not identical to their allegations concerning the 2008 Rule in *Washtech I*, in that they specifically invoke the period of 2008-2016 subject to that Rule. *See id.*; 2015 U.S. Dist. LEXIS 105602 at *7-16. But allegations of injury traceable to a defunct regulatory regime cannot serve as the basis of a finding that Plaintiff's affiants are in *direct* and *current* competition with F-1 nonimmigrants subject to and benefitting from the current Rule.

Ultimately, the crux of Plaintiff's argument is its members in the *past* applied for "STEM Jobs," a generalized category that may include over 150 occupations according to Department of Labor databases. *See* O*Net Online, http://www.onetonline.org/find/stem?t=0&g=Go (last visited Aug. 19, 2016). This includes not just jobs Washtech members claim to have sought between 2008-2014, but jobs in the sciences, engineering, mathematics, and the military, among others. The D.C. Circuit has never applied the presumption of competitive injury to a labor market of such breadth without requiring some factual showing of actual, current, ongoing competition. For example, the D.C. Circuit's *Mendoza* and *Bricklayers* precedents addressed situations involving apple-to-apple comparisons of foreign and domestic herders and masons, respectively. 754 F.3d at 1013-14; 761 F.2d 798. The simplicity of the labor market permitted application of binary economic logic: foreign herders and masons working American jobs means domestic herders and masons actually applying for those same jobs cannot. *See United Transp. Union v. ICC*, 891 F.2d 908, 913 n.7 (D.C. Cir. 1989).

But the broad, dynamic nature of the "STEM" designation does not support apple-to-apple comparisons of over 150 STEM occupations and their competitive effects. Plaintiff's injury theory ignores obvious distinctions between occupations, and postulates instead that it may sue on the generalized theory that its members in the *past* applied for programming jobs, regardless of

whether they were the same jobs Plaintiff refers to in its Complaint, or whether its members were qualified and willing to relocate anywhere in the country, or to seek the same, often entry-level, employment that F-1 nonimmigrant students would be eligible for, let alone whether they are *currently* applying for the same programming jobs as STEM OPT students subject to the 2016 Rule. *See New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002). Without such an evidentiary requirement, competitor standing provides *every* domestic worker who at some point in their life applied for, but did not receive, *any* job standing to sue on the theory that the only explanation for their past failures must be the *current* or *future* presence of foreign workers. That is not the law. *See Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 731 (2013) (rejecting "boundless theory of standing[;]" "[t]aken to its logical conclusion, [plaintiff's] theory seems to be that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful").

2. The alleged competitive injuries do not satisfy causation

Even assuming Washtech has plead competitive injury as to the 2016 Rule, Washtech cannot show its members' inability to secure preferable jobs between 2008-2016, prior to that Rule's promulgation and effective date, was caused by competition from F-1 nonimmigrants, let alone from STEM OPT participants subject to the 2016 Rule or that their underemployment would cease if the 2016 Rule no longer existed. *See Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015). Nothing in the Complaint demonstrates that the 2016 Rule is responsible for Plaintiff's members' underemployment. "The mere possibility that causation is present is not enough; the presence of an independent variable between either the harm and the relief or the harm and the conduct makes causation sufficiently tenuous that standing should be denied." *Id.* at 20. Instead, "substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress," is required *Id.*

Plaintiff fails this standard. The 2016 Rule does not increase the number of H-1B visas available to highly skilled foreign workers; F-1 OPT participants must still compete with the rest of the world for limited H-1B visas. The 2016 Rule's extension of time under the cap-gap provision simply allows them to avoid the hardship of leaving the country to obtain H-1B status if they are otherwise eligible. Even if the 2016 Rule were invalidated, Plaintiff's members would face competition from OPT participants here under the 12-month OPT program last altered in 1992, other employment-authorized nonimmigrants, *see* 8 C.F.R. § 274a.12, and countless other job market participants. Indeed, Plaintiff's members' underemployment may be due to their insufficient qualifications or skills, macroeconomic trends, increased industry demand for entry-level rather than experienced computer programmers or other factors. Which is to say, Plaintiff's members' underemployment and past failure to secure preferable jobs can be attributed to myriad potential and interlocking causes, none of which can "be easily described as true or false." *See Florida*, 94 F.3d at 670. Plaintiff's simplified theory of causation ignores this, relying instead on "speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury." *Id.* The advertisements the Complaint cites suffer the same flaw. The OPT program has existed for years, and nothing in the Complaint distinguishes the pre-2016 program from the 2016 extension for causation purposes. That either might have caused the advertisements severs any causal connection between Plaintiff's underemployment and these *past* advertisements. *See Renal Physicians Ass'n v. HHS*, 489 F.3d 1267, 1277 (D.C. Cir. 2007).

3. The alleged competitive injuries do not satisfy redressability

Even assuming causation, Plaintiff's alleged injuries are unlikely to be redressed by a favorable decision – invalidating the 2016 STEM OPT extension would neither eliminate competition for computer jobs, nor guarantee improved economic conditions or job opportunities. The Complaint lacks any allegation, let alone evidence, sufficient to show that but for the 2016

STEM OPT extension, STEM employers would make different choices concerning hiring or change their preference for entry-level students vs. experienced programmers or otherwise respond to current economic realities differently. Indeed, with over 150 occupations potentially within the Rule's scope, *see supra*, the elimination of STEM OPT may harm Washtech by undermining the multiplier effect the presence of F-1 STEM-trained students has on the technology sector. Ruling in Plaintiff's favor would not just end the OPT program for computer programmers, but also for occupations such as software developers and video game designers. *See* http://www.onetonline.org/find/stem?t=0&g=Go (last visited Aug. 19, 2016). Talented individuals in those occupations "[d]evelop, create, and modify general computer applications software or specialized utility programs," *See* http://www.onetonline.org/link/summary/15-1132.00 (last visited Aug. 19, 2016), which require implementation by more STEM-professionals, creating new job opportunities, including perhaps computer programmers with Washtech. Washtech's desired result of immediate banishment of F-1 nonimmigrants following graduation may diminish (rather than increase) opportunities for computer programmers by undermining the effect of F-1 nonimmigrants on the growth of the technology sector as a whole. *See* 80 Fed. Reg. at 63,383 (describing multiplier effect: foreign-born STEM-workers "are fundamental inputs in scientific innovation and technological adoption, critical drivers of productivity growth in the United States"); 81 Fed. Reg. at 13,048, n. 27 (same).

Without plausible allegations of how STEM employers might respond to elimination of the 24-month extension, the Court cannot "wade into this morass of marketplace analysis, and emerge with the conclusion" that Plaintiff's members' difficulties in securing employment in their preferred positions would be redressed. *Crete Carrier Corp. v. EPA*, 363 F.3d 490, 494 (D.C. Cir. 2004). Regardless, "[t]here might be some circumstances in which governmental action is a substantial contributing factor in bringing about a specific harm, but the undoing of the

governmental action will not undo the harm, because the new status quo is held in place by other forces." *Renal*, 489 F.3d at 1278. Here, the programming market is affected by multiple variables, none of which the parties or Court can predict. It is no binary construct, such that the absence of the 24-month extension in any predictable way necessitates decreased competition for Washtech's members, or an increase in the likelihood its members may secure future jobs. *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ*., 366 F.3d 930, 944 (D.C. Cir. 2004). Plaintiff therefore fails to demonstrate causation or redressabilty under any competitive injury theory.

B. Plaintiff's remaining injury theories fail.

Plaintiff appears to invoke three additional, non-cognizable theories of injury: (a) injury premised on the supposed different tax treatment of F-1 nonimmigrants and Washtech members, (b) alleged "employment discrimination" Washtech members suffer because the 2016 Rule provides for mentoring to STEM OPT participants and/or because employers have allegedly in the past sought out F-1 nonimmigrants, and (c) an alleged procedural injury caused by DHS not providing notice and comment on the issue of whether the OPT program should be expanded beyond one year. ECF 1 at ¶¶ 4, 101, 220-226. Each theory is meritless.

First, Plaintiff's taxation theory is simply wrong. The tax laws do not make STEM OPT workers inherently cheaper than U.S. workers. And even if the tax laws result in differential tax treatment some of the time, the Complaint alleges no facts suggesting that this has harmed Plaintiff or imminently will do so. Washtech cites 26 U.S.C. § 3121(b)(19), ECF 1, ¶ 220, which with 26 U.S.C. § 3306(c)(19) and 42 U.S.C. § 410(a)(19), exempts employers from paying Medicare, Social Security, and FICA taxes for certain aliens present in the United States on F, J, M, or Q nonimmigrant visas. As relevant here, they exempt work performed by certain F-1 nonimmigrants from the definition of "employment" in those respective statutes, effectively exempting employers of F-1 nonimmigrants from paying withholding taxes for Medicare, Social

Security, and FICA, among other things, in certain situations. *See* Internal Revenue Service, *Social Security/Medicare and Self-Employment Tax Liability of Foreign Students, Scholars, Teachers, Researchers, and Trainees, at* https://www.irs.gov/Individuals/International-Taxpayers/Foreign-Student-Liability-for-Social-Security-and-Medicare-Taxes (last accessed Aug. 20, 2016). These statutes pre-date the litigation by decades, and clearly show that Congress understood by 1961 that F-1 nonimmigrants were regularly employed and acted to exempt them and their employers from certain payroll taxes.[13]

Washtech perfunctorily references one of these provisions, suggesting it operates monolithically to render all F-1 nonimmigrants "inherently cheaper to employ than Washtech members." ECF 1, ¶ 221. Washtech offers no evidence for this proposition, and for good reason: it vastly oversimplifies the tax code. Under the cited statutory provisions, if an F-1 nonimmigrant is exempt from payroll taxes, the employer saves an amount equal to 6.2 percent of the F-1 nonimmigrant's salary up to the taxable wage base ($118,500 in 2016) and an additional 1.45 percent of the total salary that would have been the employer contribution to the Social Security and Medicare trust funds. 26 U.S.C. §§ 3101, *et seq*.; 26 U.S.C. § 3121(b)(19); 26 C.F.R. § 31.3121(b)(19)-1(a)(1). The F-1 nonimmigrant similarly saves a deduction from his or her salary in the same amount that would have been the employee contribution. *Id.*

However, these provisions are temporally limited. Contrary to Plaintiff's assertion that all aliens on F-1 visas are classified as "Non-Resident Aliens," ECF 1 at ¶ 220, pursuant to the Internal Revenue Code, aliens temporarily in the United States are resident aliens, rather than nonresident aliens, for Federal tax purposes, when they satisfy a substantial presence test based on physical presence in the United States. 26 U.S.C. § 7701(b). Temporarily present F-1

[13] Congress added each in 1961. P.L. 87-256, § 110(b) (26 U.S.C. § 3121(b)(19); P.L. 87-256, § 110(f)(3) (26 U.S.C. § 3306(c)(19)); P.L. 87-256, § 110(e)(1), (f)(3) (42 U.S.C. § 410(a)(19)).

nonimmigrants who substantially comply with the requirements of the visa classification are, however, "exempt[ed] individual[s]," 26 U.S.C. § 7701(b)(5)(D)(i)(I), meaning their physical presence does not count toward the substantial presence test for five calendar years. 26 C.F.R. § 301.7701(b)-3(b)(4), (7)(iii). In short, under these provisions, an individual who is an F-1 nonimmigrant generally is exempt from payroll taxes only during the first five calendar years in which the individual holds F-1 nonimmigrant status.

Given this background, Washtech's taxation theory is fundamentally flawed. First, Washtech's burden is not to show the potential, "some day" existence of unfair competition; it is to show the actual or certainly impending existence of competition. But as noted, Washtech fails to identify a single holder of an F-1 nonimmigrant visa subject to the 2016 Rule with whom they are in direct and current competition with and who is in fact exempt from payroll taxes currently employed in a position Washtech members would apply to. More importantly, the fact is that while employers may be exempt from paying certain taxes when they employ certain F-1 nonimmigrants, that state of affairs is indisputably caused by express Acts of Congress seeking to effectuate that result, not by any DHS action. *See* 26 U.S.C. §§ 3121(b)(19), 3306(c)(19); 42 U.S.C. § 410(a)(19). Congress exempted employers from paying Medicare, Social Security, and FICA taxes when employing F-1 nonimmigrants in s circumstances in 1961. These exemptions have thus stood for over fifty years, and any challenge to these Acts of Congress is plainly time-barred. *See* 28 U.S.C. § 2401. Of course, Washtech does not challenge 26 U.S.C. §§ 3121(b)(19), and 3306(c)(19) or 42 U.S.C. § 410(a)(19) directly under any cognizable theory, and it most certainly cannot challenge Acts of Congress under the APA. *See* 5 U.S.C. §§ 551(1)(A), 702. Thus time-barred or not, no party has an APA claim to challenge Congress's decision to exempt employers from paying certain taxes with respect to F-1 nonimmigrants.

Even assuming such a compound injury theory – *i.e.* Congressional mandate *plus*

voluntary third-party (employer) conduct *plus* DHS action could present cognizable, imminent *injury* under some theory of standing as of the date Washtech filed its Complaint – no action from this Court will redress that injury. As Washtech must recognize, a federal court may "act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 41-42 (1976). Here, that third party is no less than Congress, and it is its "action," legislation that explicitly exempts employers of F-1 nonimmigrants from paying certain taxes, at issue. That is to say nothing of the third-party action of hypothetical employers. Thus Washtech must present "substantial evidence of a causal relationship between the government policy and the third-party conduct," *i.e.* the 2016 STEM OPT Rule, the Acts of Congress at issue, and the actions of employers – "leaving little doubt as to causation and the likelihood of redress." *Arpaio*, 797 F.3d at 21.

That Washtech cannot do. Even if the 2016 STEM OPT Rule ceased to exist, the 1992 Rule would remain on the books, *see supra*, as do the Acts of Congress exempting employers from paying certain taxes when they employ F-1 nonimmigrants in certain situations. *See, e.g.*, *Comite De Apoyo a Los Trabajadores Agricolas v. Peres* (CATA), 2016 U.S. Dist. LEXIS 104690, *9, n.5 (D.N.J. Aug 9 2016) (where Act of Congress requires action, "any such injury would be traceable to the statute itself," and not to the challenge regulation, so "alleged imminent injury" does not arise from regulation). The absence of the 2016 STEM OPT rule thus in no way eliminates the purported injury of an "incentive" for employers to hire F-1 nonimmigrants. That incentive remains, both because the Acts of Congress exempting certain taxes predate that Rule by nearly fifty years, and because the 1992 Rule permitting post-completion employment for at least twelve months remains. Both are independent variables "between either the harm and the relief or the harm and the conduct," such that causation is "sufficiently tenuous that standing

should be denied." *Id.* An Act of Congress caused any purported "taxation" injury, and thus causation as to DHS is lacking. *See, e.g., Transp. Workers Union of Am. v. Transp. Sec. Admin.*, 492 F.3d 471, 475 (D.C. Cir 2007); *Von Aulock v. Smith*, 720 F.2d 176, 181-84 (D.C. Cir. 1983). In other words, the "challenged agency rule" that "permitted the activity that allegedly injured" Washtech, would not "have been illegal otherwise." *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 440-41 (D.C. Cir 1998).

Finally, Washtech's blanket assumption of monolithic application of the tax laws further undermines its argument because it fails to proffer any evidence or allegations supporting that assumption. *Arpaio*, 797 F.3d at 21. Washtech fails to recognize that employers do not commonly have access to specific documentation confirming whether a job applicant was an F-1 nonimmigrant during the recruitment process, because requesting such evidence is typically barred as an unfair immigration-related employment practice. *See* Office of Special Counsel, *Technical Assistance Letter on Pre-employment Inquiries Related to Immigration Status*, *at* http://www.justice.gov/sites/default/files/crt/legacy/2013/09/11/171.pdf (last accessed Aug. 21, 2016). Washtech assumes that both OPT STEM participants all are cheaper to employ than American workers. But that is not so. Moreover, OPT STEM participants are not uniformly exempt from taxes. The exemption, if it applies at all, only applies if the F-1 nonimmigrant has been present in the United States for fewer than five years. For example, an individual studying in a five-year degree program will have reached that limitation before ever engaging in post-completion OPT. And while some advanced degrees may require two years, many STEM degrees require longer, such that many OPT STEM participants will also not be exempt from any taxes. And some F-1 nonimmigrants will be *more* expensive than U.S. workers, despite differential tax treatment, because of the legal and administrative costs of obtaining and retaining F-1 nonimmigrant students over several years and the uncertainty associated with employing

temporary workers. Lastly, some F-1 nonimmigrants might be exempt from tax treatment because of tax treaty provisions. *See* Internal Revenue Service, *Tax Treaties, at* https://www.irs.gov/Individuals/International-Taxpayers/Tax-Treaties (last accessed Aug. 19, 2016).

Given these myriad potential and interlocking variables, Washtech must do substantially more than baldy assert that for tax purposes, all F-1 nonimmigrants are cheaper than all American workers. *See Arpaio*, 797 F.3d at 21. Washtech's perfunctory, one-line invocation of "taxation" standing does not come close to doing so, and does not even provide evidence specific to OPT STEM students addressing the question of whether or not they are exempt from taxes or not as a class or specifically under the statutory framework outlined above. Washtech therefore fails to demonstrate causation on this theory.[14] *Crete*, 363 F.3d at, 494.

Plaintiff's last two theories are also meritless. Washtech's assertion of injury premised on "employment discrimination" is absurd. Plaintiff's members have no "legally protected interest" in receiving "mentoring programs" simply because someone else in the population benefits from such programs. *See Lujan*, 504 U.S. at 560. By Plaintiff's logic, any person has standing to sue on an employment discrimination theory whenever Federal law results in a benefit for some subset of the population . That is not the law. *See Nike, Inc.*, 133 S. Ct. at 731. Moreover, the final rule does

[14] Even assuming that is not so, redressability as to Washtech's "taxation" injury theory is also lacking, given that enjoining the 2016 OPT-STEM extension does not eliminate whatever incentive *Congress*, not DHS, has created for employers to employ F-1 nonimmigrants in limited circumstances through the tax provisions. *See Renal*, 489 F.3d at 1278; *Nat'l Wrestling*, 366 F.3d at 944. Any suggestion that elimination of the 2016 Rule alone, without more, will eliminate that incentive beggars common sense, and in any event is far too speculative to satisfy redressability, given that both Acts of Congress and other rules authorizing employment of F-1 nonimmigrants, including the 1992 Rule, break any direct link between the OPT-STEM Rule and taxation incentives. *See Comite* 2016 U.S. Dist. LEXIS 104690 at *9, n.5. Eliminate the rule, and the incentives remain, to whatever extent they exist, *see Renal*, 489 F.3d at 1278, such that the Court "cannot wade into this morass of marketplace analysis, and emerge with the conclusion" that Plaintiff's members' difficulties in securing employment in their preferred positions would be redressed. *Crete*, 363 F.3d at 494. And that is to say nothing of the many OPT STEM participants who, for reasons discussed *supra*, will not be tax exempt at all.

not actually require "mentoring" programs, and instead mandates training pans which target students, not experienced workers like Washtech's members.[15] It is difficult to imagine why Sawade, Blatt, or Smith would seek such training, and such increased regulation of certain F-1 nonimmigrants does not support Plaintiff's standing. *See State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015).

Separately, Plaintiff's assertion that *employers* may be advertising for positions allegedly seeking workers "on OPT exclusively," ECF 1, ¶ 101, cannot establish standing as to *DHS*. First, Plaintiff's allegations on this score all pre-date the 2016 Rule by years. *Id.*, ¶¶ 100-1, and so the 2016 Rule cannot be the "cause" of those alleged injuries. Moreover, even assuming some employer is in fact *presently* posting advertisements seeking OPT workers exclusively, that would be illegal under the INA, *see* 8 U.S.C. § 1324b, and generally, *see* 42 U.S.C. § 2000e-2, such that the 2016 Rule in no way can be said to "permit[] or authorize[] third-party conduct" involving discrimination. *See National Wrestling*, 366 F.3d at 940. It is elementary that the alleged illegal acts of third parties do not create Article III standing to challenge a rule that does not permit the acts to occur. *See Arpaio*, 797 F.3d at 22 (rejecting standing premised on theory that government action "will lead to increased unlawful behavior"); *accord CATA*, 148 F. Supp. 3d at 373 n.2 ("unlawful actions" of third party employers "is not fairly traceable to" challenged Rule). And more generally, Washtech cannot assert a hypothetical national origin discrimination claim on behalf of third parties. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982). In any case, the 2016 Rule explicitly requires participating employers to certify that training conducted under the rule complies with all applicable Federal and State requirements relating to employment.

[15] Plaintiff repeatedly refers to a "mentoring program" obligation even though the 2016 rule does not formally establish one. *See* 81 Fed. Reg. at 13,093. In many cases, Plaintiff's references to "mentoring" are best read as referring to the 2016 Rule's "training plan" obligation.

Finally, Plaintiff's procedural injury theory is illogical. Plaintiff alleges that DHS violated Washtech's "procedural rights" by "failing to put the question of whether the OPT program should be expanded beyond a year to notice and comment." ECF 1, ¶ 116. There are two flaws with this argument. First, even assuming DHS had not in fact subjected the 2016 Rule to notice and comment, Plaintiff would still have to establish an injury-in-fact flowing from the 2016 Rule under the procedural injury doctrine, something the foregoing makes clear it cannot do. *See Ctr. for Law*, 396 F.3d at 1157. But more importantly, the claim beggars the facts. As noted, DHS explicitly sought notice and comment on precisely this issue, *see* 80 Fed. Reg. at 63,382, 63,385, 63,394, and many commenters commented on exactly this issue, including Plaintiffs' two counsel in this case. As the D.C. Circuit sitting *en banc* explained, these facts are fatal to any procedural injury theory of standing because Plaintiff cannot in fact show, as required, "that the defendant's acts *omitted some procedural requirement* . . . ." *Florida Audubon*, 94 F.3d at 664-65 (emphasis added). That is, because Plaintiff's procedural injury claim is contrary to fact, it cannot demonstrate procedural injury as a matter of law. *See Ctr. For Law*, 396 F.3d at 1160. For all these reasons, Plaintiff lacks standing to challenge the 2016 Rule.

C. Plaintiffs Challenge to the 2016 Rule is not Ripe (Counts II-IV)

Even assuming standing to challenge the 2016 Rule, the Court should dismiss Counts II-IV because that challenge is not ripe for adjudication. Even if a case presents an injury-in-fact for Article III purposes, the prudential aspect of ripeness may provide an independent basis for finding no jurisdiction. *See Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 807-08 (2003). The purpose of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v.*

Gardner, 387 U.S. 136, 148-49 (1967).

A textbook example of lack of ripeness is where (as here) a court has no possible way of determining whether the alleged harm Plaintiffs claims the 2016 Rule will cause will ever come to pass. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 161-63 (1967). That analysis turns on evaluating the "fitness of the issue for judicial decision" and "the hardship to the parties of withholding [its] consideration." *Id*. at 149. Fitness is not satisfied where "[j]udicial resolution of these issues would benefit significantly from having the scope of the controversy reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the petitioners' situation in a fashion that harms or threatens to harm them." *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1205 (D.C. Cir. 1998). Thus, where "there are too many imponderables," like whether in Sawade, Blatt or Smith will ever compete *directly* and *currently* with an F-1 nonimmigrant subject to the 2016 Rule or whether those three ever applied for any jobs F-1 nonimmigrants would ever be eligible for or apply to, the case is not fit for review. *Id*. at 1205. And hardship requires "that the contested action impose an impact on the parties sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Alascom, v. FCC*, 727 F.2d 1212, 1217 (D.C. Cir. 1984).

These decisions require dismissal of this case. The case is not fit for review because it requires too much conjecture and speculation by the Court given Plaintiff's sparse and unconvincing allegations concerning injury that fail to allege any cognizable harm. *Clean Air*, 150 F.3d at 1205. "[I]f and when [an actual injury] does come to pass, judicial review of the issue 'is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.'" *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 119 (D.C. Cir. 2004) (quoting *Toilet Goods*, 387 U.S. at 164). And hardship is not satisfied because Plaintiff complains about a regulation it can only speculate might

impact its members. Such speculation cannot satisfy the ripeness standard as "[t]he primary injury alleged by plaintiff is not a present hardship resulting from the regulations themselves, but rather a future injury that may result from enforcement of the regulations." *Cronin v. FAA*, 73 F.3d 1126, 1131 (D.C. Cir. 1996). As such, an F-1 nonimmigrant's possible future use of the STEM OPT extension does not satisfy ripeness. *See Delta Air Lines, Inc. v. Export-Import Bank*, 85 F. Supp. 3d 250, (D.D.C. 2015) (competitor standing challenge to agency action unripe if "Court has not yet been afforded an opportunity to understand if and how the specific application of the [agency action] might affect Plaintiffs").

In short, reviewing the 2016 Rule's validity based on the Plaintiff's non-existent record and speculative assertions would be tantamount to expending "resources on what amounts to shadow boxing." *Devia v. NRC*, 492 F.3d 421, 424-25 (D.C. Cir. 2007). The record is devoid of any allegations or evidence concerning job applications, employers, or STEM OPT employees under the new Rule, that, even now, months after the rule went into effect, Plaintiff's members have had to engage in or refrain from any conduct, including competing with beneficiaries of the STEM OPT extension. *See Devia*, 492 F.3d at 424 ("if a plaintiff's claim, though predominantly legal in character, depends on future events that may never come to pass, or that may not occur in the form forecasted, then the claim is unripe"). That lack of evidence strongly indicates that *this* Plaintiff is not the appropriate party to bring this action: the "factual components" of *its* case, through its affiants, remain to be "fleshed out," and no "concrete action applying the regulation to [their] situation in a fashion that harms or threatens to harm them" presently exists. *Clean Air*, 150 F.3d at 1205. Without more than mere speculation of hypothetical, future harm, the case is unripe. *See Tenn. Gas Pipeline Co. v. FERC*, 736 F.2d 747, 750 (D.C. Cir. 1984).

II. Plaintiff's Challenge to the 1992 Rule is Non-Justiciable and Time-Barred (Count I)

Plaintiff utterly fails to satisfy any element of Article III standing as to its challenge to the

1992 Rule. Plaintiff addresses the 1992 Rule and OPT program at paragraphs 55-61 of its Complaint. Not a single allegation of injury to Washtech caused by the 1992 Rule and redressable by an order of this Court can be found there, or anywhere in the Complaint for that matter. Indeed, as discussed previously, each and every single allegation of alleged injury Plaintiff articulates arose after 2008 and directly invokes the 2008 STEM OPT Rule. ECF 1, ¶¶ 85-226. Plaintiff has not identified a single member suffering a cognizable, let alone redressable, injury caused specifically by the pre-2008 OPT program, *i.e.* the availability of *any* post-completion practical training for foreign students. Nothing in the Complaint articulates factual matter connecting any alleged injury to the OPT program, and therefore Plaintiffs lack standing to challenge the 1992 Rule or the OPT program generally. *See Washtech I*, 74 F. Supp. 3d at 252.

Regardless, Count 1 is time-barred. As Plaintiff concedes, the OPT program has been in effect since 1992, ECF 1, ¶ 41, and thus the six-year limitations period ran long ago. *See* 28 U.S.C. § 2401.[16] Plaintiff asserts the limitations period does not apply because DHS allegedly "reopened the question of whether the policy of allowing aliens to work on student visas after graduation is lawful in the 2016 OPT Rule." *Id.*, ¶ 61. Plaintiff's allegation invokes the so-called "re-opener" doctrine, which permits an otherwise time-barred challenge to a prior rule if "the agency has undertaken a serious, substantive reconsideration of the existing rule or substantively changed it." *See Mendoza*, 754 F.3d at 1019. But DHS did not seek comment on and never reconsidered the substantive provisions of the 12-month OPT program in 2016. Rather, the 2015 NPRM sought comment on a separate 24-month extension of OPT for a limited group of F-1 nonimmigrants, which would be subject to different eligibility, training, reporting, and

[16] "§ 2401(a) creates a jurisdictional condition attached to the government's waiver of sovereign immunity." *Mendoza*, 754 F.3d at 1018. Although the D.C. Circuit has recently questioned whether the time-bar is a jurisdictional or merits issue, *see id.*, it has not yet overruled its prior precedent. *See In re Navy Chaplaincy*, 2016 U.S. Dist. LEXIS 15294, *8 (D.D.C. Feb. 9, 2016).

enforcement requirements than generic 12-month OPT. *See Washtech I*, 74 F. Supp. 3d at 252, n.3 (applying same reasoning to Plaintiff's prior version of this argument). Nothing in the NPRM purports to question the 12-month OPT program, implies any intent to alter or reconsider it, or seeks any comment on the subject. *See, e.g.*, 80 Fed. Reg. at 63,377 (purpose of NPRM is to "make changes to the current OPT program by lengthening the extension of the OPT period for certain F–1 students who have earned STEM degrees.").

Plaintiff cites to a number of pages in the Final Rule, rather than the NPRM, suggesting they demonstrate an "explicit[]" intent to reopen the question of whether the OPT program itself is lawful. ECF 1, ¶ 59. This contention is difficult to square with reality, given that DHS declined to seek such comments, 80 Fed. Reg. at 63,377, and then, when commenters made them anyway, explicitly stated that "[t]o the extent that comments challenging DHS's legal authority concerned the OPT program generally, such comments are outside the scope of this rulemaking, which relates specifically to the availability of STEM OPT extensions." 81 Fed. Reg. at 13,059. DHS then stated that "DHS did not propose to modify the general post-completion OPT program in the proposed rule." *Id.* Accordingly, Plaintiff's assertions to the contrary are baseless. *See Nat'l Ass'n of Mfrs. v. DOI*, 134 F.3d 1095, 1103 (D.C. Cir. 1998) ("the 'reopening rule' is not a license for bootstrap procedures by which petitioners can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue. . . . when the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review.").[17]

[17] Although Plaintiff conceded to the D.C. Circuit during its appeal of *Washtech I*, that "the appropriate way to challenge a longstanding regulation on the ground that it is violative of statute is ordinarily by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition,'" *see* Br. of App., 2016 WL 722135, *49, Plaintiff now reverses course, asserting such a petition is not a necessary prerequisite to their lawsuit because DHS rejected such requests with the 2016 Rule. ECF 1, ¶ 58. However, DHS never sought

Thus, because the 2016 Rule adds nothing new substantively to the OPT program generally, and expressly disclaims reconsideration of that program, the re-opener doctrine has no application here, and Plaintiff's challenge to the 1992 Rule remains time-barred.

III. Plaintiff Fails to Plead Plausible Claims for Relief Under Rule 12(b)(6)

A. Plaintiff is not within 8 U.S.C. § 1101(a)(15)(F)(i)'s zone-of-interests (Count I, II)

Plaintiff's alleged competitive injury is not "within the zone of interests to be protected or regulated by the statute that [it] says was violated," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)—*i.e.* 8 U.S.C. § 1101(a)(15)(F)(i).[18] The Court "appl[ies] traditional principles of statutory interpretation" to assess "whether [plaintiff] has a cause of action under the statute." *Lexmark*, 134 S. Ct. at 1387-88. "In determining whether a petitioner falls within the 'zone of interests' to be protected by a statute, we do not look at the specific provision said to have been violated in complete isolation, but rather in combination with other provisions to which it bears an integral relationship." *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002). "[T]he injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests.'" *Mountain States Legal v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996).

In two perfunctory sentences, Plaintiff appears to assert that the statutes integrally related to its claim are 8 U.S.C. §§ 1101(a)(15)(F)(i) and (H)(i)(b), and separately 8 U.S.C. §§ 1182(n) and 1184(g). ECF 1, at ¶¶ 61, 63. As an initial matter, such generalized, "kitchen-sink" invocation of the INA cannot satisfy the zone-of-interests test. *See Vemuri v. Napolitano*, 845 F. Supp. 2d 125, 13-31(D.D.C. 2012). Rather, Plaintiff must identify "the relevant provisions [of the INA]

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comments on the issue in the first place, so by definition cannot be said to have rejected such a request. *See* 81 Fed. Reg. 13,059. D.C. Circuit law on this is clear: Plaintiff cannot raise their time-barred challenge to DHS's predecessor agency's statutory authority to issue the 1992 OPT Rule. *See Kennecott Utah Copper Corp. v. DOI*, 88 F.3d 1191, 1214-15 (D.C. Cir. 1996).

[18] Zone-of-interests is now a merits question. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014).

with some particularity" *Id.*; *accord Amgen, Inc. v. Smith*, 357 F.3d 103, 109-10 (D.C. Cir. 2004) (concluding district court erred by "focus[ing] on the broad purpose of the Medicare Act" as a whole rather than "the more specific interest protected by" the relevant subsection of the "statutory provision whose violation forms the basis for the complaint"). Moreover, the argument conflicts with binding precedent, *see FAIR*, 93 F.3d at 903-04, and with the only Court of Appeals to address the merits question presented, *Programmers*, 338 Fed. Appx. at 243-44.

In *FAIR*, the Attorney General implemented an agreement between the United States and Cuba allowing 20,000 Cubans to enter the country as legal immigrants yearly by paroling several thousand Cubans each year through 8 U.S.C. § 1182(d)(5) and then permitting them to apply for lawful permanent resident status. 93 F.3d at 889. A group purporting to ensure "that levels of legal immigration are consistent with the absorptive capacity of the local areas where immigrants are likely to settle," alleged the plan "contravenes various provisions of the INA," and "diminish[es] employment opportunities and crowd[s] public schools and other government facilities and services." *Id.* Relying on *Air Courier Conference of America v. American Postal Workers Union AFL-CIO*, 498 U.S. 517 (1991), the D.C. Circuit held plaintiff was not within the zone-of-interests of relevant INA provisions because the parole provision did not bear an integral relationship with the INA's provisions aimed at protecting domestic labor, including 8 U.S.C § 1182(a)(14), an earlier version of labor protections codified at 8 U.S.C. § 1182(a)(5)(A). The Court held that the INA's numerical limitations and domestic-labor protections were not intended to protect "those persons for whom more immigration may imply a prospect of increased competition in the job market—and thus a lower wage or an increased risk of unemployment." *Id.* at 903. The Third Circuit, relying on *FAIR*, rejected Plaintiff's precise claim in this case, reasoning that section 1101(a)(15)(F)(i) was not integrally related to §§ 1101(H)(i)(b) or 1182(n). *Programmers*, 338 Fed. Appx. at 242-45 ("the labor-certification provisions are not 'integral[ly]

relat[ed]' to the F-1 status provision . . . and therefore do not enter into our zone-of-interests analysis. The provisions address different subjects.").

FAIR and *Programmers* apply here. Plaintiff claims the 2016 STEM OPT extension circumvents the numerical limitations and labor protections that apply to H-1B nonimmigrants. ECF 1, ¶¶ 19-32, 96-97. But unlike the H-1B provision, *see* 8 U.S.C. § 1101(a)(15)(i)(b), the F-1 provision contains no language conditioning entry into the United States on noninterference with domestic labor. *Cf. Mendoza*, 754 F.3d at 1017 (relying on existence of explicit statutory text in relevant visa provision protecting U.S. workers). Indeed, as noted, Congress has explicitly sought to *exempt* F-1 nonimmigrants from certain wage taxes, which is hardly consistent with any alleged intent to protect domestic labor from F-1 nonimmigrants. 26 U.S.C. §§ 3121(b)(19), 3306(c)(19); 42 U.S.C. § 410(a)(19). And although Congress has repeatedly amended the F-1 provision, including a number of times after it added the H-1B numerical limitation in 1990, *see* Pub. L. No. 101-649, § 221(a), or other visa-specific labor protections, including six months *after* DHS implemented the 2008 STEM OPT Rule, Pub. L. No. 110-391, § 2(a)-(b), 122 Stat. 4193, 4193-94 (amending § 1101(a); leaving § (15)(F)(i) intact), it has never added language mandating that OPT students not adversely affect similarly-employed domestic workers.

Even when Congress reenacted § 1101(a)(15)(F)(i) in December 2010, it took no action to limit the employment of F-1 students or establish domestic labor protections within the statute. And most recently, the Senate Committee on the Judiciary took testimony concerning the F-1 nonimmigrant visa, including testimony from Plaintiff's counsel asserting that STEM OPT "circumvent[s] the statutory limits on H-1B visas." *See* Testimony of John Miano at 2, Senate Committee on the Judiciary, March 17, 2015, *at* https://www.judiciary.senate.gov/imo/media/doc/Miano%20Testimony.pdf. That fact is significant because in December 2015, Congress explicitly amended the H-1B provision to increase application fees based on concern that H-1B

employers were abusing the H-1B program. *See* 2016 DHS Appropriations Act, P.L. 114-113; Div. H, Title I, §411, at https://www.congress.gov/114/bills/hr2029/BILLS-114hr2029enr.pdf. Yet again, Congress, fully aware of the STEM OPT program and its alleged effect on STEM employment, explicitly declined to make any changes to the F-1 nonimmigrant visa. *See Creekstone Farms Premium Beef, L.L.C. v. Dep't of Agric*., 539 F.3d 492, 500 (D.C. Cir. 2008) (that Congress chose to leave a pertinent interpretation "undisturbed is persuasive evidence that it is consistent with congressional intent"). This all suggests "that protection of domestic workers was not among Congress's concerns in enacting and re-enacting the F-1 status provision, and it tends to suggest that Congress [] was concerned with increasing the country's pool of available STEM workers." *Programmers,* 338 Fed. Appx. at 244.

Moreover, that Congress has included such language in defining other nonimmigrant categories explicitly, *e.g.*, §§ 1101(a)(15)(E)(iii), (Q), 1182(n) & (t), shows Congress knows how to legislate labor protections. That is particularly so here. In 1990, when Congress temporarily *expanded* F-1 employment beyond the INS's OPT program to permit F-1 nonimmigrants to work in fields *unrelated* to their course of study, it included domestic labor protections similar to those covering H-1B nonimmigrants. *See* Immigration Act of 1990 § 205 (H-1B); *id.* § 221 (F-1). That Congress elected such requirements *only* for F-1 employment *unrelated* to a course of study and explicitly *outside* the OPT program make clear that the H-1B labor protections have no connection to the F-1 provision as currently drafted.[19] *See* H.R. Rep. No. 101-723, pt. 1, 1990 WL 200418, *6746 (indicating that this legislation "expand[ed] the current authority of students to work off-campus," rather than supplanting or otherwise superseding that authority).

Plaintiff overlooks this by suggesting that the sole purpose of immigration law is "to

[19] *Mendoza* and *Bricklayers* turn on express statutory language aimed at protecting American workers, absent here. *See* 754 F.3d at 1017; 761 F.2d at 804-05.

protect domestic workers (including Washtech members) from foreign labor. ECF 1, ¶ 93. But this singular focus on abstract concern with job preservation misconstrues the INA, which "affects basically foreign policy, constitutional guarantees, public welfare, the health, the economy, and the productivity of the Nation" and does not exist solely for the "purpose of preventing any aliens without labor certification from being authorized to accept employment."[20] Congressional and Administrative News, 82nd Congress, Second Session, 1952, v. 2, p. 1750. Indeed, in a more relevant (and recent) statute, 6 U.S.C. § 111(b)(1)(F), Congress made clear its intent that DHS "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland."

Plaintiff's contrary view appears to be that because the INA lacks explicit statutory language authorizing F-1 nonimmigrants to work, it bars such aliens from working, and therefore their claims must be within the zone-of-interests protected by the F-1 provision. But that interpretation cannot be correct for two fundamental reasons. First, an interpretation that provisions of the INA prohibit anything not expressly permitted runs counter to the Secretary's delegated authority to administer the INA--indeed, it implies that the Secretary has no discretion to authorize anything not already permitted by the INA itself. That is plainly contrary to Congress's express indication otherwise in delegating broad and sweeping authority to the Secretary to administer the INA and set the terms and conditions of nonimmigrants aliens' presence in the United States. *See* 8 U.S.C. § § 1103(a), 1184(a)(1). Second, Plaintiff's reliance on negative implication would "deprive the zone-of-interests test of virtually all meaning." *Air Courier*, 498 U.S. at 530. Any plaintiff with an injury-in-fact would also have prudential standing

[20] Maintaining a strong student-visa-program serves a variety of purposes in advancing the national interest. *See* Congressional Research Service, *Foreign Students in the United States: Policies and Legislation* 1, 19 (Jan 31, 2008), https://www.fas.org/sgp/crs/misc/RL31146.pdf; 80 Fed. Reg. at 63,382-84; 81 Fed. Reg. at 13,046-49.

because either his grievance would be addressed by the text of the statute (and thus be within the statute's zone of interests), or it would not (in which case, plaintiffs would say, the omission bespeaks an interest in withholding permission). *See Vemuri*, 845 F. Supp. 2d at 133 (such a reading "would render the [zone-of-interests] requirement meaningless as anyone who could claim an injury in fact fairly traceable to the conduct at issue would by definition be 'affected' by the conduct in question"). In short, the INA is not monolithically the protectionist statute Plaintiff alleges it to be, and its challenge to DHS's efforts to implement Congress's intent is thus not within § 1101(a)(15)(F)(i)'s zone-of-interests.

B. Plaintiff fails to plead plausible facts supporting its procedural claims (Count III)

Plaintiff's three procedural claims are meritless. First, Washtech alleges that the 2016 Rule violates the CRA, 5 U.S.C. §§ 801–08, because "a final rule may not got [sic] into effect until at least sixty days after publication in the Federal Register or receipt of the rule by Congress." ECF 1, ¶ 65. Even assuming Congress did not receive the rule By March 11, which the Government does not concede, the CRA explicitly bars any claim or relief premised on a "determination, finding, action, or omission" of any CRA requirement, and flatly bars any "judicial review" of such issues. 5 U.S.C. § 805. The claim is thus non-cognizable and must be dismissed. *See Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009) ("§ 805 is unequivocal and precludes review of this claim."). Second, the allegation that DHS failed "to subject the question of whether the OPT program should be expanded beyond a year to actual notice and comment" as part of the 2016 Rule, ECF 1, ¶ 67, is facially absurd. DHS explicitly sought notice and comment on this issue, *see* 80 Fed. Reg. at 63,382, 63,385, 63,394, and responded to comments on it. *See* 81 Fed. Reg. at 13,050. Plaintiff cannot allege specious facts flatly contradicted by the 2016 Rule, which it has incorporated by reference into its Complaint; Plaintiff's claim is not just implausible, but frivolous.

Third, Plaintiff's invocation of the "incorporation by reference" regulation, 1 C.F.R. 51, *et seq*., ECF 1, ¶¶ 69-80, does not allege a cognizable claim. Plaintiff appears to complain that the 2016 Rule refers to a list of STEM fields subject to the Rule, which DHS will update and publish on a web site, and may separately publish in the Federal Register. *Id.*, ¶ 71 (citing 8 C.F.R. 214.2(f)(1)(ii)(C)(2)(ii). Plaintiff construes the weblink in the Rule as an attempt at "incorporation by reference," although, as Plaintiff concedes, the 2016 Rule does not claim to effect such a result; indeed the Rule does not invoke 1 C.F.R. 51. To the extent 1 C.F.R. 51 may provide a cause of action, if at all, it is only with respect to those documents "required to be published in the *Federal Register* and not so published," and only when the person challenging nonpublication did not have "actual and timely notice" of the document and would "be required to resort to, or be adversely affected by," the document.[21] *See, e.g.*, 5 U.S.C. § 552(a)(1); *New York v. Lyng*, 829 F.2d 346 (2d Cir. 1987) (rejecting challenge because plaintiff would not "be adversely affected by [the] non-publication"). But the Complaint fails to allege that (1) the STEM list is required to be published in full in the Federal Register (which it is not), (2) Washtech lacked actual and timely notice of the STEM list (which it had[22]), or (3) *how* Washtech's members have been adversely affected by DHS's inserting a weblink into its Rule. ECF 1, ¶¶ 69–80. Thus, this claim also fails.

C. Plaintiff fails to plead a plausible substantive APA claim (Count II, IV)

Washtech also asserts that the 2016 OPT STEM rule is *ultra vires* because it is "in excess of DHS authority" and "conflicts with the statutory provisions of 8 U.S.C. §§ 1182(a)(5), 1182(n), 1184(a)(1), 1184(g), and 1227(a)(1)(C)(i)," (Count II), and that it "is arbitrary and capricious"

[21] The pleading requirement is similar to the APA's general proscription on setting aside an agency rule *absent a showing of prejudice to the plaintiff*. *See* 5 U.S.C. § 706.

[22] Most prominently, Washtech previously sued DHS on the exact same STEM list that DHS subjected to notice and comment in October 2015. *See* 14-529, ECF 20, ¶¶ 250-278; 80 Fed. Reg. at 63,386 & n.51. Washtech's counsel read DHS's October 2015 proposal and commented on it. *See supra*. So Washtech cannot allege that it lacked actual and timely notice of the list. *See State of Mich. v. Thomas*, 805 F.2d 176 (6th Cir. 1986) (no claim if had actual and timely notice).

because it "requires employers to provide" F-1 nonimmigrants "mentoring programs without requiring that such program be provided to American workers," and because the rule "singles out STEM occupations for an increase in foreign labor . . . with no justification" (Count IV). ECF 1, ¶¶ 63, 82-84. This is the sum-total of Plaintiff's allegations directed *specifically* at the 2016 Rule -- the remaining allegations in this section address Plaintiff's alleged standing to sue. *Id.*, ¶¶ 85-226. These four sentences do not come close to alleging a plausible claim for substantive APA relief; the fact that Plaintiff disagrees with DHS's policy choices, without more, does not make those choices inconsistent with the discretion vested in it by law, *Bowman Transp. v. Arkansas–Best Freight Sys.*, 419 U.S. 281, 286 (1974), let alone actionable under the APA. But disagreement is all Plaintiff provides – with a policy decision to require employers participating in the STEM OPT program to provide F-1 nonimmigrants training (which Plaintiff erroneously labels as "mentoring programs"), ECF, ¶ 82, with a policy choice to extend the period an F-1 nonimmigrant can work under OPT if they possess a STEM degree, *id.*, ¶ 83, and with a policy decision to implement its authority, 6 U.S.C. § 111(b)(1)(F), 8 U.S.C. § 1103(a), 1184(a)(1), to benefit the U.S. educational system, employers, and the broader U.S. economy. *See Id.*, ¶ 63.

Surely to state Plaintiff's claims is to refute them. Plaintiff claims the Rule is arbitrary and capricious because it does not provide "American workers, including Washtech members," with "mentoring programs." ECF 1, ¶ 82. Setting aside that the Rule requires *training* and not mentoring, *see supra*, the Rule only requires training as a condition for F-1 students to receive a benefit that Plaintiff's members *already have*. In any event, the fact that a Rule issued by a government agency does not provide individuals not regulated by it some alleged benefit does not present a cognizable legal claim. It is not enough for Plaintiff to restate an eligibility requirement and complain that Plaintiff will not reap that requirement's benefits; instead, Plaintiff must provide some notice of *why* a court might find it arbitrary and capricious for DHS to require F-1

students to plan, document, and engage in training as a condition of receiving a benefit, without guaranteeing the same training to the entire U.S. worker population. This Plaintiff has not done.

Plaintiff's claim that the 2016 Rule is unreasonable because it was issued "with no justification" is simply bizarre, given that the Final Rule, approximately 80 pages of single-spaced text, provided many a justification and reasoned analysis concerning DHS's regulatory choices. *See* 81 Fed. Reg. at 13,040-122. Plaintiff's failure to allege a single "justification" that is somehow unreasonable renders this claim implausible on its face, and utterly fails to plead a claim that the final rule is not reasonable. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And Plaintiff's single, conclusory sentence in paragraph 63 asserting the Final Rule exceeds DHS's statutory authority (Count II) without more is facially implausible given the absence of any alleged facts supporting this conclusory legal claim.

Indeed, Plaintiff's scant allegations and conclusory policy disagreements with DHS at bottom are no more than a claim that Plaintiff does not like the 2016 Rule. But permitting APA challenges to regulatory action to proceed on this slim basis would turn the plausibility standard on its head and fling open the courthouse door to all manner of frivolous policy complaints. Such claims are inherently unsuited to judicial resolution, *see Florida Audubon*, 94 F.3d at 667 n.4, and the plausibility standard ensures such claims are screened at the earliest possible moment and disposed of. Where, as here, Plaintiff has plead insufficient facts to convert his policy disagreement into a plausible, concrete cause of action, the substantive APA claims must be dismissed.[23] *See Green v. McHugh*, 793 F. Supp. 2d 346, 350-51 (D.D.C. 2011).

CONCLUSION

For these reasons, the Court should dismiss the Complaint in its entirety.

[23] To the extent the Court deems both justiciable and plausible, the Government will address their merits on a motion for summary judgment. Notably, Count II was rejected by Judge Huvelle in the context of the 2008 challenge previously, *see Washtech I*, 2015 U.S. Dist. LEXIS 105602, *28-45, although she did not address Count IV as applied to that Rule.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this August 26, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

s/ *Erez Reuveni*
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