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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

The Programmers Guild, Inc., American Engineering Association, Inc., Bright Future Jobs, Michael Amanti, Mark Blackburn, Toni L. Chester, David Huber, John G. Marson, P. Harrison Picot II, Paul E. Polak, Mike Rothschild, Robert Sanchez, Stephen Berry, Stephanie Berry Plaintiffs, v. Michael Chertoff in his capacity as Secretary of Homeland Security, United States Department of Homeland Security Defendants.	**Hon. Faith S. Hochberg** **Civil Action No. 2:08-cv-2666** **Motion Hearing Date: Oct. 6, 2008** **Memorandum of Law in Opposition to Defendants' Motion to Dismiss**

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BACKGROUND

Plaintiffs are individuals who work in or will work upon graduation in Science, Technology, Engineering or Mathematics (STEM) fields, and professional organizations whose members work in these fields. Plaintiffs challenge as unlawful one specific rule promulgated by Defendants. The purpose of the rule is to increase the supply of alien labor in STEM fields. Extending Period of Optional Practical Training by 17-Months for F-1 Nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding CapGap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944-18,956 (proposed April 8, 2008)(codified at 8 C.F.R. § 214, 274a).

Plaintiffs have pled that the rule is in conflict with the statutory authorization of 8 U.S.C. § 1101(a)(15)(F)(i) such that the Rule exceeds the statutory jurisdiction and authority of the Secretary of Homeland Security, and limitations thereon, in violation of 5 U.S.C. § 706(2)(C); the implementation of the Rule by Defendants was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of 5 U.S.C. § 706(2)(A); and that Defendants implemented the changes to rules 8 CFR §§ 214, 274a under 73 Fed. Reg. 18944-18956 without observance of procedure required by law, in violation of 5 U.S.C. § 706(2)(D). First Amended Com-

plaint ("FAC") ¶¶ 40-51. The Rule injures Plaintiffs by placing them in economic competition with the larger pool of foreign workers that the Rule creates.

ARGUMENT

I. Plaintiffs pleadings meet the standard for standing.

"Constitutional standing requires (1) injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" *Danvers v. Ford*, 432 F.3d 286,290-291 (3d Cir. 2005) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

A. Plaintiffs have pled the recognized injury-in-fact of economic competition.

"The injury-in-fact requirement exists to assure that litigants have a 'personal stake' in the litigation." *Danvers*, 432 F.3d at 291 (3d Cir. 2005). "The contours of the injury-in-fact requirement, while not precisely defined, are very generous. Once a plaintiff has alleged some specific, 'identifiable trifle' of injury, that is fairly traceable to the defendant's conduct the requirement of a constitutionally adequate stake in the controversy is satis-

fied." *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982) (citations omitted). "Injury-in-fact is not Mount Everest." *Danvers*, 432 F.3d at 294. "To state an injury-in-fact sufficient to survive a motion to dismiss, [Plaintiffs] must simply plead that they suffered some concrete form of harm" *Id at* 291 (citing *Lujan*, 504 U.S. at 561).

Plaintiffs have pled their injury from the Rule. FAC ¶¶ 3-17. Plaintiffs have pled they are STEM workers, will be STEM workers upon graduation, or are organizations that represent STEM workers. *Id*. The purpose of the Rule is to increase the supply of foreign labor in STEM fields. 73 Fed. Reg. 18,951. Increasing the supply of workers in the fields in which Plaintiffs work creates the injury-in-fact of increased economic competition. Plaintiffs have specified four specific harms to themselves resulting from the injury-in-fact: competition with foreign workers for jobs, discrimination in hiring, displacement from jobs, and wage depression. FAC ¶¶3-16. Several of the individual Plaintiffs (Marson, Blackburn, Chester, Huber, Rothschild) and many of the organizational Plaintiffs' members work on a contract basis as business entities (e.g. sole proprietorship, corporation, limited liability corporation), so the competition is both for jobs as employees and for the sale of services as small businesses.

B. Increased Competition is an injury-in-fact under the law.

The standard for standing with any economic injury is very broad. “While it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms.” *Danvers*, 432 F.3d at 291. “The [Supreme] Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy the Article III 'injury-in-fact' requirement . . . . It follows logically that any . . . petitioner who is likely to suffer economic injury as a result of governmental action that changes market conditions satisfies this part of the standing test.” *Clinton v. New York*, 524 U.S. 417, 433 (1998).

Where an administrative rule change creates additional competition for a plaintiff, the competition itself is an injury-in-fact giving rise to standing under what is frequently referred to as the “Competitor Standing Doctrine” (sometimes “Competitive Standing Doctrine”). “[T]he regulatory allowance of increased competition in a plaintiff's market has been established in our circuit as a clear injury-in-fact, *even when such competition is inchoate*.”(Emphasis added) *Texas Cable and Telecommunications Assoc. v. Hudson*, 265 Fed. Appx. 210, 217 (5th Cir. 2008). The D.C. Circuit applies “‘competitor standing’ doctrine to an agency action that itself imposes a competitive injury, i.e., that provides benefits to an existing competitor or

expands the number of entrants in the petitioner's market." (Emphasis added) *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002). See also *UPS v. U.S. Postal Service*, 66 F.3d 621, 626 (3d Cir. 1995) (Regulation allowing Postal Service to enter business's market was an injury-in-fact), *Schering v. FDA*, 51 F.3d 390 (3d Cir. 1995) (Approval of competing generic drugs was an injury-in-fact).

In *Adams v. Watson*, 10 F.3d 915, 922 (1st Circ 1993), the court surveyed the precedent establishing competition as injury-in-fact and observed,

> "that many cases uphold 'competitor standing' based on 'unadorned allegations' of latent economic injury. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152, 154, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970) (sellers of data processing services "no doubt" had standing to test ruling allowing national banks to sell data processing services; injury-in-fact element met by allegations that competition from national banks "might entail some future loss of profits" and that respondent bank was preparing to perform data processing services for two of plaintiffs' customers); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 45-46, 27 L. Ed. 2d 179, 91 S. Ct. 158 (1970) (holding that travel agents had "competitor standing" to test ruling allowing national banks to provide travel services); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 620-21, 28 L. Ed. 2d 367, 91 S. Ct. 1091 (1971) (finding "competitor standing," on the part of investment companies, to test a regulatory ruling authorizing national banks to operate collective investment funds)."[1]

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[1] The Court in *Adams*, continued its survey of competitor standing in a footnote as follows (with court's emphasis): *Associated Gas Distribs. v. Federal Energy Regulatory Comm'n*, 283 U.S. App. D.C. 265, 899 F.2d 1250, 1258 (D.C. Cir. 1990) (holding that, even if no "specific instances of

existing competition" had been asserted, FERC's decision authorizes transportation and sale of gas which "threaten AGD's members competitively, because AGD's members include local distribution companies who *may lose* business to allegedly illegal transactions") (emphasis added); *Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1038 (2d Cir. 1989) (securities dealers sufficiently alleged competitive injury-in-fact for "standing" to test regulatory ruling allowing banks to sell mortgage pass-through certificates), cert denied, 493 U.S. 1070, 107 L. Ed. 2d 1021, 110 S. Ct. 1113 (1990); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 506 (9th Cir. 1988) (film distributors and exporters alleged sufficient injury-in-fact to test custom duties that "put[] their films at a competitive disadvantage in the international marketplace . . . ., although plaintiffs did not produce evidence that the payment of custom duties . . . caused decreased sales or profits"); *National Coal Ass'n v. Hodel*, 263 U.S. App. D.C. 386, 825 F.2d 523, 526 (D.C. Cir. 1987) (holding that Secretary of Interior's decision to allow land exchange so that plaintiff's competitor could mine "a large tract of previously unmineable land . . . *undoubtedly* satisfies constitutional standing requirements") (emphasis added); *Investment Co. Inst. and Securities Indus. Ass'n v. Federal Deposit Ins. Corp.*, 259 U.S. App. D.C. 339, 815 F.2d 1540, 1543 (D.C. Cir.) (holding that FDIC ruling allowing insured nonmember banks to enter securities field will deal petitioners, who represent mutual fund companies and investment bankers, a "competitive injury"), cert denied, 484 U.S. 847, 98 L. Ed. 2d 99, 108 S. Ct. 143 (1987); *Sea-Land Serv., Inc. v. Dole*, 232 U.S. App. D.C. 449, 723 F.2d 975, 977 (D.C. Cir. 1983) (concluding that plaintiff, which operated vessels on nonsubsidized trade routes, had alleged sufficient "competitive harm" to test a decision by Department of Transportation allowing subsidized carrier to call on ports off its subsidized route), cert. denied, 469 U.S. 824, 83 L. Ed. 2d 47, 105 S. Ct. 103 (1984); *Peoples Gas, Light & Coke Co. v. U.S. Postal Serv.*, 658 F.2d 1182, 1194 & n.9 (7th Cir. 1981) (finding that plaintiff, a gas company, which alleged "a loss of future revenue" from postal service's plan to install electric instead of gas system, had suffered a non-"speculative" competitive injury; judicial invalidation of first bidding procedure "offers at least a likelihood" that plaintiff, a potential bidder, would ultimately be awarded the government contract); *P.A.M. News Corp. v. Hardin*, 142 U.S. App. D.C. 227, 440 F.2d 255, 257 (D.C. Cir. 1971) (concluding that plaintiff alleged competitive injury from Department of Agriculture's decision to allow free access to agricultural data, since plaintiffs previously compiled and sold information to public); cf. *Simmons*

The generality of the *Lujan* standard for injury-in-fact can set up interesting academic arguments questioning whether or not economic competition should be an injury-in-fact. Looking at competition as an injury-in-fact under Article III is like closely examining a ball bearing. Under a magnifying glass, the ball bearing looks perfectly smooth. Put it under an electron microscope and the smooth surface turns into mountainous terrain. *First Nat'l Bank & Trust Co. v. NCUA*, 988 F.2d. 1272 (D.C. Cir. 1993), cert. denied, 510 U.S. 907 (1993)(appeal of dismissal for lack of standing on prudential grounds), presented a standing issue nearly identical to that in the present case. In *First Nat'l Bank & Trust Co.* just five North Carolina banks challenged a rule that allowed unrelated persons to join credit unions.

Look at the facts under a magnifying class. Allowing unrelated people to join created unions created more alternatives to banks for consumers. So the rule increased the competitiveness of credit unions in relation to banks, including the plaintiff banks. If one accepts the new competition as the injury-in-fact, standing is obvious.

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v. Interstate Commerce Comm'n, 900 F.2d 1023, 1026 (7th Cir. 1990) (holding that rival shippers alleged sufficient injury-in-fact to contest ICC decision to permit abandonment of rail line, where plaintiffs' competitor's line remains open, although injury was not ultimately redressable by judicial action), cert. denied, 499 U.S. 919, 113 L. Ed. 2d 242, 111 S. Ct. 1308 (1991).

Now put the same facts under an electron microscope. When the case was filed in 1991 there were 14,488 FDIC insured banks in the United States. http://www4.fdic.gov/HSOB. So the plaintiffs represented just 0.03% of the banks in the country. There was no way to determine, as a result of the rule, how many people in the entire nation would have stopped doing business at banks, reduced business at banks or not done business with banks that they might otherwise have done in favor of credit unions; let alone determine how much business would have been lost by the specific plaintiff banks to credit unions. Arguing standing in this case from the point of view of trying to identify specific losses of business raises the question of whether the injury is concrete and particularized, and actual or imminent, not conjectural or hypothetical. Where standing is clear under the magnifying glass, it becomes blurred under the electron microscope.

As in all other similar published precedent, the D.C. Circuit (and eventually the Supreme Court in *NCAU v. First National Bank*, 522 U.S. 479 (1998)), applied the magnifying glass to the standing question, accepting competition as the injury-in-fact. The D.C. Circuit stated in reversing the trial court, "It should be noted that no one questions appellants' Article III

standing; that appellants will suffer competitive or economic injury is not in doubt."[2] *NCUA*, 988 F.2d at 1275.

The law has firmly established that economic competition is an injury-in-fact. The exercise of identifying specific economic losses is a purely academic one. See *supra* and, for example, *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) ("We repeatedly have held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition."), *Hollingsworth v. Harris*, 608 F.2d 1026, 1028 (5th Cir. 1979) (finding "[e]conomic 'injury' in the form of increased competition" adequate for standing where nursing home owner challenged administrative decision that would have allowed entry of competitor into market but where competition had not yet taken place). See also *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319 (Fed. Cir. 2008) (Competitor standing did not require empirical analysis to demonstrate link to harms). There is simply no dispute in the law here: Increased competition resulting from an administrative action is an injury-in-fact for Article III standing.

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[2] The trial court had held there was no standing on prudential grounds and did not address Article III standing. *First National Bank v. NCUA*, 772 F. Supp. 609 (D.C. Dist. 1991).

The extent to which competition gives rise to Article III 'competitor standing' is rather striking, especially when compared to cases alleging non-economic injury. "The Supreme Court found 'competitor standing' in the *Camp* cases based on an alleged potential for heightened competition in a national marketplace." *Adams*, 10 F.3d at 922. Since the *Camp* cases[3], competitor standing has even been expanded from economic competition to political competition as well. See for *example Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.C. Dist. 2000).

The Competitor Standing Doctrine does have a few bounds. To apply, competition must be likely. See for example *El Paso Natural Gas Company v. FERC*, 50 F.3d 23, 27-28 (D.C. Cir. 1995) (The possibility of future changes in regulation that might create competitive disadvantage did not create standing), *Energy Transp. Group, Inc. v. Maritime Admin.*, 956 F.2d 1206, 1215 (D.C. Cir. 1992) (finding that a disgruntled contract bidder, although generally engaged in the fuel transportation business, failed to allege sufficient "competitive injury" where it could not presently, or within prescribed future period, perform the particular types of services required by the contract at issue). It does not grant standing to employees when it is their

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[3] *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970) and *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971).

employer who is in competition. *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517 (1990). None of these situations applies to the present case, as Plaintiffs are already working (or upon graduation will work) in STEM fields and the competition created by the Rule is directly with Plaintiffs themselves.

Plaintiffs pled that they are workers in STEM fields, organizations representing STEM workers, or that they are college students who will enter STEM fields upon graduation. FAC ¶¶3-16. They are challenging a Rule whose stated purpose is to increase the number of workers in STEM fields. 73 Fed. Reg. 18,951. Plaintiffs pled that they are and will be competing with these additional workers for jobs and business. FAC ¶¶3-16. Since the Rule specifically targets the fields in which Plaintiffs work, the injury is not speculative – it is intended. Defendants' action has deliberately created economic competition with Plaintiffs for the purpose of benefiting mutual employers. As such, Plaintiffs have pled an injury-in-fact under the Competitor Doctrine.

C. The Rule puts Plaintiffs at a competitive disadvantage.

What is more, the competition created by this rule is unfair competition. Not only does the Rule increase the supply of workers in Plaintiffs fields, but allowing student visa holders to supply labor to industry (i.e. as

guest workers) puts Plaintiffs at a competitive disadvantage for jobs as well. Individuals employed while on F-1 student visas are exempt from Social Security and Medicare payments, as are their employers. 26 U.S.C. § 3121 (b)(19). On the other hand, each and every Plaintiff and his or her employer must pay those taxes. 26 U.S.C. § 3121 (a). Currently the Social Security Tax for employers is 6.2% and Medicare Tax rate is 1.45%. 26 U.S.C. § 3111 (a)-(b). This gives a 7.65% cost savings in taxes alone for employers to hire the aliens under this rule over hiring Plaintiffs. Since both the employer and employee pay these taxes, for equivalent take-home pay, the cost savings for an employer is double that or 15.3%.

What is more, there is no labor certification requirement under the Rule, as is the case with foreigners employed on H-1B guest worker visas. 8 U.S.C. § 1182(n). As such, there is no prevailing wage requirement, nor is there a prohibition on OPT workers being used during strikes or lockouts. 73 Fed. Reg. 18,944-18,956. The Rule thus provides clear incentives for employers to hire the additional OPT workers instead of Plaintiffs.

D. The Pled harms are consistent with the injury

The harms Plaintiffs have alleged from the injury are consistent with established science and past practice. "An increase in labor supply will, other things being equal, tend to depress wage rates." Samuelson, Paul A. &

Nordhaus, William D., Economics, p. 680 (13th Ed. 1989) (Addressing the effect of immigration policy on wages). While the question of whether the effects from the basic economic principles of supply and demand are conjectural or hypothetical in regard to competitor standing provides excellent fodder for journal articles, these fundamental principles are accepted to establish standing. "Economics is a cross between an art and a science, which is to say, both an imperfect art and an imperfect science. While the law of supply and demand may sometimes be suspended by unpredictable marketplace decisions, and even lesser fortuities like bovine obstinacy, basic economic theory quite consistently transcends utter randomness by positing elemental laws of cause and effect predicated on actual market experience and probable market behavior. Indeed, most 'competitor standing' cases depend on such core economic postulates." *Adams*, 10 F.3d at 922.

It is also self-evident that increasing the number of job seekers in the same fields as Plaintiffs will limit the opportunities open to Plaintiffs. The practice of employers using foreign guest workers to replace STEM workers has been documented for over a decade. *See* e.g. Exhibit G, William Branigin, *White-Collar Visas: Back Door for Cheap Labor?*, The Washington Post, Oct. 21, 1995 at A1 (Documenting the practice of replacing U.S. workers with lower paid foreign workers). Increasing the supply of foreign

workers available to employers increases the number of U.S. workers that can be replaced. The discrimination against Plaintiffs resulting from the Rule is already apparent on the job market. The pled harms to Plaintiffs are very real.

E. Defendants intended the injury to Plaintiffs.

Plaintiffs have met the remaining two prongs of the *Lujan* test, causal connection and redressability, as well. The STEM worker Plaintiffs pled competitor injury from an increased supply of foreign workers added to their job market. Defendants admitted, "[T]his rule will increase the availability of qualified workers in science, technology, engineering, and mathematical fields." 73 Fed. Reg. 18,951. The connection between the injury and the action is self-evident, as Defendants are purposely causing the increase in competition Plaintiffs face as a result of this Rule.

F. Declaring the Rule to be unlawful would redress Plaintiffs' injury.

Redressibility in this case is equally self-evident. Prevailing in this matter and having the Rule declared unlawful would reduce the number of

OPT workers in STEM fields by 59%[4] of those who use the extension, now and in the future. See for example *UPS v. U.S. Postal Service*, 66 F.3d 621 (1995). The fact that it will not remove *all* foreign guest workers or even all OPT workers is irrelevant. "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury." *Larson v. Valente*, 456 U.S. 228 (1982).The Rule "significantly" increases the number of workers competing with Plaintiffs. 73 Fed. Reg. 18,953. Eliminating that competition relieves Plaintiffs' injuries by significantly reducing the number of workers in competition with them.

G. Plaintiffs seek to protect a recognized interest under the law.

Commentators have noted that, in cases where an administrative rule change exposes the plaintiff to economic competition, in practice the standing bar is so low that the prudential zone-of-interest test is the only real hurdle.[5] In *UPS v. U.S. Postal Service*, 66 F.3d 621 (3d Cir. 1995) there was "no dispute" that a rule creating competition was an injury in fact; the only

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[4] This rough estimate (17-months divided by 29-months) that does not include the unemployed OPT "students" on the job market allowed under the Rule who would be removed from competition with the Plaintiffs as well.

[5] See for example Jim Wedeking, *Addressing Judicial Resistance to Reciprocal Reliance Standing in Administrative Challenges to Environmental Regulations*, 14 N.Y.U. Envtl. L.J. 535,539-540 (2006).

dispute being the zone of interest. The same was true in *First National Bank & Trust v. NCUA*, 988 F.2d. 1272 (D.C. Cir. 1993), cert. denied, 510 U.S. 907 (1993). Even in the *Camp* cases, there was "no doubt" that competition was an injury-in-fact, with the Supreme Court deciding only the prudential standing. *See* also *Schering v. FDA*, 51 F.3d 390 (3d Cir. 1995) (FDA did not challenge competition was an injury in fact, only zone-of-interest prudential standing was at issue).

A plaintiff has prudential standing if "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs.*, Inc., 397 U.S. at 154. "The 'zone of interest' test 'is not meant to be especially demanding,' and, '[i]n cases where the plaintiff is not itself the subject of the contested regulatory action,' the test is satisfied unless 'the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

Protecting the American labor market from an influx of labor is an interest recognized under the Immigration and Nationality Act. *Wang v. Immigration & Naturalization Service*, 602 F.2d 211, 213 (9th Cir. 1979) and *In-*

ternational Longshoremen's & Warehousemen's Union v. Meese, 891 F.2d 1374, 1379 (9th Cir. 1989). Plaintiffs are challenging a rule whose stated purpose is to increase the supply of foreign labor in the specific fields in which they work. 73 Fed. Reg. 18,953. This issue affects Plaintiffs' livelihood. So clearly, their interest exceeds the standard of "marginally related" and their interest is much greater than the U.S. population as a whole. What is more, Plaintiffs' interest, protection from competition from foreign labor, is one recognized by the applicable statute. *Wang*, 602 F.2d *at 213.* As such, Plaintiffs have prudential standing.

H. The Organizational Plaintiffs have pled the standing requirements to represent their members.

Three of the Plaintiffs are organizations representing workers in STEM fields. For an organization to have standing, "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333,343 (1977).

The Organizational Plaintiffs have pled the same economic injuries for their members that the individual Plaintiffs have pled for themselves.

They have pled that their membership consists of STEM workers. ¶¶ 3-5. They the have pled that the rule increases the economic competition for their members, and that protecting the economic interests of their members is an interest of the organizations. *Id.* What is more, each of the organization Plaintiffs has at least one member who is an individual plaintiff. The clearly demonstrates that the organizations' members would have standing to sue in their own right. As professional organizations for STEM workers, they have a vested interest in protecting the job market for their members.

The Plaintiff organizations have pled that their membership consists of workers in STEM fields. FAC ¶¶ 3-5. As the rule creates competition for workers in STEM fields, their members have standing to bring the case in their own right. They have also pled that the protecting the job market for their members is an organizational interest. The three claims of violation of the Administrative Procedures Act do not require individual proof of the organization Plaintiffs' members. The same is true of the declaratory and injunctive relief sought. Therefore, Plaintiffs organizations have standing to bring this action.

II. The facts of the case show Plaintiffs clearly have "no doubt" standing.

At this stage of the proceedings Plaintiffs need only to have pled their harm. *Danvers*, 432 F.3d at 291. However, in this case, Defendants have admitted on the record being challenged nearly the entire factual basis for standing. Defendants have admitted, "this rule will increase the availability of qualified workers in science, technology, engineering, and mathematical fields." 73 Fed. Reg. 18,953. They have admitted also that this increase "represents a significant expansion of the available pool of skilled workers."[6] *Id.* Furthermore, they have admitted that, "These changes will result an increase in the attractiveness of the [expanded OPT] program. (sic)" *Id.* Through the administrative record Defendants have eliminated any doubt that that the Rule creates *significant* additional economic competition for STEM workers such as Plaintiffs and that it will create increased competition in the future, as more foreign workers are attracted to the program.

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[6] In trying to minimize the impact of the Rule, Defendants have repeated their error of confusing the number of *first week* visa applications with visa approvals. DML p. 18. While the size of the injury is irrelevant for standing purposes (not to mention that the Plaintiffs are challenging an OPT Rule, not H-1B numbers), Plaintiffs point this issue out only because, in its opinion of Aug 5th, 2008, the court adopted this error nearly verbatim at p. 6.

As the Rule is intended to benefit employers by increasing the supply of STEM workers and Plaintiffs have pled they are STEM workers, the issue of fact in regard to standing in this case boils down to one simple question: Are Plaintiffs who they say they are? Justice Alito's statement that standing is not "Mount Everest" is highly apropos here. *Danvers*, 432 F.3d at 294. A Google or LEXIS search on, for example, "Programmers Guild" would complete the factual proof of standing. The pleadings here establish a case of "no doubt" standing.

A. *Defendants' challenge to standing ignores four decades of competitive injury precedent.*

In their brief, Defendants present purely academic arguments on how the standing rules *might be* applied to show how increased competition *should not be* an injury-in-fact. DML *passim*. Unfortunately, their analysis has no basis in how the law *is actually* applied. While Defendants may conclude through their reasoning that increased competition, "*cannot possibly constitute the kind of 'concrete and particularized' injury that standing analysis requires*."[7] DML p. 13. The Supreme Court says otherwise. *See* the *Camp* cases and *NCAU*, *supra*. So has every Circuit that has looked at the

[7] Unsurprisingly, Defendants cite no case supporting this conclusion of law.

question.[8] Defendants have spent considerable effort arguing why a settled point of law should not be the way it is. There is an extensive body of published cases (a small subset of which is cited here by Plaintiffs), addressing competition as an injury-in-fact and Defendants needed to carefully steer clear of all of it to reach their conclusion. DML *passim*.

This year, the 5th Circuit overturned on appeal one of the few cases where a trial court had denied standing where competition was pled as the injury-in-fact. *Texas Cable & Telcoms. Ass'n v. Hudson*, 265 Fed. Appx. 210, 214 (5th Cir. 2008). The defendants in that case made essentially the same argument Defendants make here, that the plaintiffs did not show specificity as to which members would suffer under the regulation changes or what precise harms those members would suffer. *Id* at 216-217. The Court held that the alleged injury of increased competition was "more than sufficient to establish…standing." *Id* at 217. For standing purposes, a Plaintiff must show "injury-in-fact" – not harm-in-fact. *Lujan* 504 U.S. at 560-61.

[8] This brief cites over 20 cases from the Supreme Court, the 1st, 2nd, 3rd, 5th, 7th, 9th, D.C. and Federal circuits where competition was an injury-in-fact. The Plaintiffs are unaware of any precedent where increased competition was not found to be an injury-in-fact.

B. Defendants' Recast of Plaintiffs' pleadings to challenge standing

To attack standing, Defendants attempt to recast this action as a challenge to Congressional policy. "Plaintiffs' discontent with Congressional policy cannot be a proxy for standing's causation requirement." DML p. 17. In actuality, Plaintiffs are challenging an action taken by un-elected bureaucrats that is in direct conflict with Congressional policy. Congress *rejected* a measure substantially similar to the Rule being challenged last year. Comprehensive Immigration Reform Act of 2007. S. 3848 (110th Congress) § 525 (extension of OPT to 24-months STEM fields). Lobbyists subsequently persuaded Defendants to implement as a rule what they had failed to get from Congress.[9] This is clear from Defendants' press release: "So as you can see from the Secretary's [Defendant Chertoff] comments immigration reform remains a top priority for the Bush Administration. *In the absence of legislation from Congress* we've been proactively tackling this issue head on with *as many* administrative actions as possible."[10] Plaintiffs are not chal-

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[9] Letter from R. Bruce Josten, Executive Vice President of Government Affairs for the Chamber of Commerce, to Michael Chertoff, Secretary of Homeland Security, Nov 16, 2007.

[10] Press Release, Remarks by Homeland Security Secretary Michael Chertoff and Department of Commerce Secretary Gutierrez at the State of Immigration Address, U.S Dept. of Homeland Security, June 9, 2008.

lenging a rule implementing Congressional policy but rather one intended to *circumvent* Congress. Also, any discontent Plaintiffs might have for any guest worker program is completely irrelevant to this case. What is relevant is that this rule marks a significant increase in the number of foreign workers in the United States and a complete change in purpose of the OPT program with no Congressional authority to do so.

The bottom line in this case is that Plaintiffs are STEM workers who are challenging a rule intended to significantly increase the number of foreign STEM workers available to employers. 73 Fed. Reg. 18,953. The connection here between Plaintiffs and the injury is so clear that there would be standing even if the injury-in-fact standard were not "generous". *See Bowman*, 672 F.2d at 1151. The purpose of the Article III standing requirement is to ensure that plaintiffs have a stake in the litigation. *Danvers* 432 F.3d at 291. It is not to ensure that no one can challenge a rule. *United States v. SCRAP*, 412 U.S. 669,688 (1973). Clearly, STEM workers, such as Plaintiffs, are those *most adversely affected* by the Rule. Standing in this case should be apparent on the face of the pleadings.

III. Plaintiffs have pled a legal basis for their causes of action.

Plaintiffs have pled three specific causes of action authorized under 5 U.S.C. § 706(2). FAC ¶¶ 40-51. The First Cause of Action challenges

whether the Rule complies with the statutory authorization of 8 U.S.C. § 1101(a)(15)(F)(i). The Second cause of action alleges that Defendants acted arbitrarily and capriciously in implementing the Rule. The Third cause of action is that Defendants improperly waived the notice and comment requirements of the Administrative Procedure Act.

In resolving a Rule 12(b)(6) motion to dismiss, the court "must accept as true all well-pleaded allegations of the complaint, and construe them in the light most favorable to the plaintiff; dismissal may [result] only if the plaintiff alleges no set of facts which, if proved, would entitle him…to relief." *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593, 595 (3d Cir. 1990). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level…on the assumption that all allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). A court "may not dismiss a complaint for failure to state a claim upon which relief can be granted unless [the court] find[s] that [] plaintiff[s] can prove no set of facts what would entitle [them] to relief." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006). "[T]he court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Unix Sys. Lab. V. Berkeley Software Design*, 832 F. Supp. 790, 803

(D.N.J. 1993) quoting *O'Boyle v. Jiffy Lube Int'l, Inc.* 866 F.2d 88, 93 (3d Cir. 1989). The proper inquiry is "whether relief could be granted…'under any set of facts that could be proved consistent with the allegations.'" *Lindsley v. Girard Sch. Dist.*, 213 F. Supp. 2d 523, 527 (E.D. Pa. 2002) quoting *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 71 (3d Cir. 1994). Plaintiffs have met this burden and their causes of actions should not be dismissed.

A. Defendants acted outside their authority under 8 U.S.C. § 1101(a)(15)(F)(i).

Defendants did not have the authority to promulgate this Rule. This Rule transforms what was once was a short period to work for the purpose of furthering educational goals (students) into an extended period of work for the purpose of supplying industry with labor (guest workers). This characterization is consistent with the justifications for the Rule given throughout the record being challenged. 73 Fed. Reg. 18,946-18,948,18,950,18,953.

The standard for review for this cause of action is "that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued." *NVE v. HHS*, 436 F.3d 182,191 (3d Cir. 2006). A basic question here is: In enacting 8 U.S.C. 1101(a)(15)(F)(i), did Congress contemplate regulations for identifying fields in which there are labor shortages and using F-1 visas to fill those perceived shortages? 73 Fed. Reg.

18,946-18,948,18,950,18,953. The plain text of the statute gives the answer: Clearly not.

Defendants' argument for failure to state a claim relies upon creative reinterpretation of the contents of the Amended Complaint. Defendants expand the scope of the complaint from a challenge to one specific rule to a challenge to the entire OPT program. Twice, Defendants incorrectly claim that Plaintiffs asserted, "that F-1 students may not lawfully work in the United States." Defendants' Memorandum of Law ("DML") p. 4, 5. Tellingly, Defendants provide no citation. The complaint actually states, "Prior to the promulgation of this rule, foreign students admitted on F-1 visas were allowed to work for up to 12 months on Optional Practical Training (OPT) in furtherance of their educational goals."[11] FAC ¶¶ 21. Plaintiffs' characterization of the purpose of OPT, that it previously was for the purpose of furtherance of educational goals, is consistent with that given in the Defendants' exhibits. See for example, Defendants Exhibits A at p. 4, B at p. 3 and E at p. 2.

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[11] The Plaintiffs made no such statement in previous filings either. Plaintiffs Preliminary Injunction Brief states at p. 3, "Generally, aliens admitted under F-1 visas may not lawfully work in the United States. 8 C.F.R. § 214.2(f)(9). However, a student on an F-1 visa can be authorized for employment under Optional Practical Training directly related to the student's major area of study."

Defendants' further expand the scope of the complaint by stating, "Enjoining the rule's implementation … would judicially dissolve decades of congressionally-sanctioned policy regarding foreign students' eligibility to work in the United States." DML p. 19.

This statement is complete nonsense. If the Rule is enjoined, students will still be able to work on OPT to further their education just as they were prior to April 8, 2008. Plaintiffs' challenge is to the specific Rule promulgated on April 8, 2008, not OPT as a whole. Expanding the complaint from a challenge to one rule that changes the nature of OPT into a challenge to the entire OPT program is an interesting academic exercise showing how the facts affect outcome. In any event, the court must decide this motion on Plaintiffs' actual pleadings, not the pleadings as reformulated by Defendants.

Defendants' also recast the nature of the complaint. They state, "The only substantive action being challenged in the Amended Complaint is the extension of time for the OPT student to remain in the United States." DML p. 4. In actuality, Plaintiffs challenge, among other things, the *purpose* for which the Rule allows people to remain on OPT. If the Rule merely allowed an extended period of time to be on OPT to meet some demonstrated educational purpose that required a longer duration, there would be no dispute here. The central issue is whether 8 U.S.C. § 1101(a)(15)(F)(i) authorizes

Defendants to identify labor shortages and use F-1 visas to correct those labor shortages with no educational purpose. Duration is just one of a number of changes in this Rule intended to transform OPT from a program of work to further education into work for the purpose of supplying employers with labor.

Defendants attempt to minimize the extent of the Rule's changes to make them conform to their authority. They state, "What cannot be overemphasized is that the Interim Final Rule merely extends by 17 months the time qualified nonimmigrant students can remain in-status in this country." DML p.16. Plaintiffs dispute this characterization and others do as well. Starting his analysis of the Rule, a prominent immigration lawyer wrote, "On April 8, 2008 the Department of Homeland Security (DHS) published an interim final rule that made *substantial changes* to the post competition optional practical training (OPT) system (emphasis added)."[12] For example, one of the new benefits in the Rule is the ability of OPT workers to be unemployed for up to four months. 73 Fed. Reg. 18,950. This change creates a pool of F-1 visa holders who are available for employers to hire, but who are neither studying in school nor working in furtherance of education. Furthermore, the

[12] Austin Fragomen, *The New OPT Rule: New Options, Lingering Uncertainties, for Foreign Students*, 85 Interpreter Releases 31, pp. 2173-2180, Aug. 11, 2008

regulation changes in the Federal Register consist of two pages of nine-point text in 2,252 words (12 pages when formatted to this court's rules). 73 Fed. Reg. 18,954-18,956. The sheer size of these changes shows the claim that this Rule is "merely" an increase in duration stretches credulity past the breaking point.

What is more, the extended time period does not extend to *all* foreign students holding F-1 visas. 73 Fed. Reg. 18,948. It only applies to those with degrees in fields where Defendants have determined there is a labor shortage; not where the longer period is needed for some educational purpose. *Id*. The justification here is to provide labor, not to further education. *See* 8 U.S.C. § 1101(a)(15)(F)(i) (Temporary admission solely for the purpose of study). In fact, the extension only applies to those with pending H-1B applications. 73 Fed. Reg. 18,947. In other words, this extension is not even available to a student who actually wants to take advantage of it solely for educational reasons and intends to return home at the completion of the longer OPT period. This student is instead required to apply to remain in the United States and work, even though the purpose behind OPT was to allow students to receive training they could not get in their home countries. *Id*. The assertion that this Rule is "merely" an extension of time period is in direct conflict with the administrative record being challenged.

Plaintiffs *have not* challenged the existence of OPT. Plaintiffs *have not* challenged the ability of Defendants to make Rules. Plaintiffs *have not* challenged the ability of Defendants to fill statutory gaps.

In this cause of action, Plaintiffs *have* challenged whether this one particular rule conforms to its statutory authorization of 8 U.S.C § 1101(a)(15)(F)(i). Plaintiffs have pled a recognized cause of action and there is a factual basis to support that cause of action. Changing OPT to supply industry with labor using student visa holders is not gap filling deserving deference, but rather a direct conflict with the statutory authorization of temporary admission solely for the purpose of study. 8 U.S.C. § 1101(a)(F)(i).

B. Defendants have not challenged pleadings that they acted arbitrarily and capriciously.

Plaintiffs Second Cause of Action is that Defendants acted arbitrarily and capriciously in implementing the Rule. FAC ¶¶ 45-47. The arbitrary and capricious standard focuses a court on the agency's process of reasoning. *NVE Inc.*, 436 F.3d at 190. The standard for "arbitrary and capricious" is that, "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before

the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court *should not attempt itself to make up for such deficiencies*; [the court] may not supply a reasoned basis for the agency's action that the agency itself has not given." *CBS v. FCC*, 2008 U.S. App. LEXIS 16692 (3d Cir. 2008)(emphasis added).

Defendants have made no challenge to this cause of action, so Plaintiffs only briefly point out the deficiencies in Defendants' reasoning when promulgating this Rule. Defendants never addressed or considered whether increasing the supply of STEM workers available to employers under the Rule would affect U.S. STEM workers, such as Plaintiffs. 73 Fed. Reg. 18,944-18,956. Defendants failed to provide any explanation how this rule furthered education. *Id*. Plaintiffs submit to the court that these are just some of the many obvious important aspects of the problem that Defendants failed to consider, but are to be briefed in the future. Additionally, Plaintiffs expect that discovery will play an important part in showing Defendants acted arbitrarily and capriciously in implementing the Rule.

C. Defendants' waived notice and comment under conditions that no court has found lawful.

Plaintiffs Third Cause of Action is that the Rule was improperly implemented without notice and comment. FAC ¶¶ 48-51. Defendants assert

that the explanation for good cause, "speaks for itself." DML p .24. However, "Good cause is clearly not established by the mere recital of good cause." *Woods Psychiatric Institute v. United States*, 20 Cl. Ct. 324, 333 (1990). The "good cause exception is to be narrowly construed and only reluctantly countenanced." *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (D.C. 2001). "The exception is not an escape clause; its use should be limited to emergency situations." *Id.* An emergency of Defendants' own making cannot constitute good cause. *NRDC v. Abraham,* 355 F.3d 179, 205 (2d Cir. 2004). A self-imposed deadline cannot qualify as good cause. *Id.* explaining *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983).

Additionally, an "urgent need for action" is not sufficient to constitute "good cause" within the meaning of the APA, where it would have been possible to comply with the APA. *Natural Resources Defense Council, Inc. v. U.S. EPA*, 683 F.2d 752, 765 (3d Cir. 1982). "Otherwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a…deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures. Because of the possibility for abuse, 'the mere existence of deadlines for agency action…[can] not in itself constitute good cause for a § 553(b)(B) exception." *Id* at 765, n.

25 citing *Council of Southern Mountains v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981).

Defendants had been aware of the situation they claim gives rise to good cause (exhaustion of the H-1B quota) since 2004. 73 Fed. Reg. 18,946. Suddenly, in April 2008, "delay created by the notice and comment requirements would result in serious damage to important interests." *Id*.

Defendants never even attempt to explain how years' of advance notice is not enough time to implement the Rule without notice and comment. Defendants have cited no case law that supports "good cause" under the facts of this case because none exists. DML *passim*. If the notice and comment requirements were as easy to circumvent as Defendants' claim they are here, the notice and comment protections under the APA would be rendered meaningless.

CONCLUSION

Plaintiffs clearly have standing to bring this action. As previously, Defendants' challenge to Plaintiffs' standing consists of a lengthy and clever mis-application of standing principles, which arrives at conclusions of law that are in direct conflict with decades of on-point precedent. Furthermore, Defendants' challenge to Plaintiffs' causes of action relies upon their crea-

tive recasting of the pleadings. As such, Defendants' Motion to Dismiss should be denied.

Submitted, Sept. 22, 2008

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Certificate of Service

I hereby certify that on Sept. 22, 2008 a true and correct copy of the foregoing Amended Complaint was served on the following parties by electronically filing with the Clerk of the United States District Court of New Jersey using its ECF System:

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