In the
United States District Court
for the
District of Columbia

Washington Alliance of Technology Workers; 21520 30th Drive SE Suite 102 Bothell, WA 98021 *Plaintiff*, *v.* U.S. Dep't of Homeland Security; Office of General Counsel Washington, DC 20258 *Defendant.*	Civil Action No. 1:14-cv-529 (ESH)

Plaintiff's Response to Defendant's Motion Under Fed. R. Civ. P. 60(b)(6) for Limited Relief from the Court's Order

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STATEMENT OF THE CASE

In 1992, the former Immigration and Naturalization Service ("INS") promulgated regulations creating the *post completion Optional Practical Training program* ("OPT"). Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992) (codified at 8 C.F.R. § 214.2). This regulation allowed aliens on F-1 student visas to remain in the United States and work for up to one year after graduating college. *Id*. This was an interim final rule made without notice and comment. Today—over 23 years later—neither the INS or its successor, the U.S. Department of Homeland Security ("DHS") has published a final rule. *Id*.

The non-immigrant H-1B visa is the primary statutory path for admitting college-educated guestworkers into the American labor market. 8 U.S.C. § 1101(a)(15)(H)(i)(B). Employers routinely use the H-1B program to replace American technology workers already employed with cheaper foreign workers. *E.g.*, Michelle Malkin & John Miano, *Sold Out*, Simon & Schuster, 2015, pp. ix–xi, 77–91. Fortunately, Congress has enacted finite annual quotas on H-1B visas that limit the number of foreign competitors that can be admitted. 8 U.S.C. § 1184(g). Nonetheless, the demand for such foreign labor outstrips the number of available H-1B visas. *E.g.*, 73 Fed. Reg. 18,946–47, 18,953 (Apr. 8, 2008).

In 2007, Microsoft concocted a scheme to use regulation to circumvent the H-1B quotas and presented it to the DHS secretary at a dinner party. A.R. 120–22. Microsoft's idea was to allow aliens who were unable to get an H-1B visa to work for an extended period of time (29 months) on a student visa under DHS's Optional Practical Training ("OPT") program. *Id*. DHS responded by working in secret with industry and academic lobbyists to prepare a rule to implement Microsoft's scheme. A.R. 124–27, 130–34. The public received no notice that such regulations were being considered until DHS pro-

mulgated them in an interim rule as a *fait accompli*. Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944–56 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214 and 274a) ("2008 OPT Rule"). In the 2008 OPT Rule, DHS solicited after-the-fact comments but (over seven years later) has still not published a final rule. *Id*.

Shortly after publishing the 2008 OPT Rule, a number of organizations representing technology workers brought a challenge to it under the Administrative Procedure Act ("APA"), alleging it was in excess of DHS authority and that DHS did not have good cause to waive notice and comment. *Programmers Guild, Inc. v. Chertoff*, 338 Fed. Appx. 239, 241 (3d Cir. 2009). The Third Circuit dismissed *Programmers Guild* under Fed. R. Civ. P. 12(b)(1), holding the plaintiffs were not within the zone of interest of the statute in question. *Id*. at 245.

In 2014, the Washington Alliance of Technology Workers, Local 37083 of the Communication Workers of America, AFL-CIO ("Washtech"), filed this action—the second lawsuit challenging the OPT program—against DHS alleging the 2008 OPT Rule violated several provisions of the APA and the Immigration and Nationality Act ("INA"). Complaint, ECF 1 (March 28, 2014).

In November of 2014 the executive branch announced that it was going to reaffirm (and expand) the policy of extended work after graduation on OPT. The White House, *FACT SHEET: Immigration Accountability Executive Action*, Press Release, Nov. 20, 2014, *available at* https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action.

On March 6, 2015, both parties filed cross motions for summary judgment on the record. ECF 25 and 26. On Aug. 12, 2015, the Court issued its opinion on the summary judgment motions. Mem. Op., ECF 43. The Court held that

DHS had promulgated the 2008 OPT Rule unlawfully without notice and comment. ECF 43 at 34. The Court recognized that the failure to give notice and comment is a serious procedural defect that normally requires vacatur of the rule. *Id*. at 36. However, DHS pointed out to the Court that, if the 2008 OPT Rule be vacated, thousands of aliens working under its provisions would no longer have legal status to work and would have "to scramble to depart the United States." *Id*. The Court vacated the rule but stayed its order until February 12, 2016, so that "thousands of young workers [would not have] to leave their jobs in short order." *Id*.

Rather than use the extra time granted by the Court as a transition period to gracefully wind down the OPT extensions created by the 2008 OPT Rule, DHS opted to try to put a new and more complicated rule in place by the deadline. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 80 Fed. Reg. 63,375–404 (proposed Oct. 19, 2015) ("2015 NPRM"). This proposed rule expands the duration of work by non-student aliens after graduation to 36 months, *id*., as had been announced in advance. White House Press Release, *supra*.

December 14, 2015 was the deadline (7 years, 8 months, and 6 days after the 2008 OPT Rule was published as an interim measure) for DHS to have completed the rulemaking process in order for DHS to replace the vacated rule by the Court's February 12, 2016 deadline. Congressional Review Act, Pub. L. No. 104-121, § 801, 110 Stat. 847, 869 (1996) (Under the Congressional Review Act, the agency must publish a rule 60 days before going into effect.). With that deadline now passed, DHS filed the present motion under Fed. R. Civ. P. 60(b)(6), praying that the Court will grant relief from the Aug. 12, 2015 judgment by extending the stay of vacatur. Mot. Br., ECF 47 (Dec. 22, 2015).

LEGAL STANDARD

Fed. R. Civ. P. 60(b)(6) grants the Court discretion to "relieve a party … from a final judgment" for "any other reason that justifies relief." *Marino v. DEA*, 685 F.3d 1076, 1079 (D.C. Cir. 2012) (quoting *Pioneer Inv. Servs. v. Brunswick Assocs.,* 507 U.S. 380, 393 (1993)). The D.C. Circuit "has emphasized that Rule 60(b)(6) should be only sparingly used and may not be employed simply to rescue a litigant from strategic choices that later turn out to be improvident." *Salazar v. District of Columbia*, 633 F.3d 1110, 1120 (D.C. Cir. 2011) (internal quotation marks and citations omitted); *Richardson v. District of Columbia*, 2007 U.S. Dist. LEXIS 49686 (D.D.C. July 8, 2007). A Court "must balance the interest in justice with the interest in protecting the finality of judgments." *Summers v. Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004); *Douglas v. D.C. Hous. Auth.*, 306 F.R.D. 1, 4 (D.D.C. 2014). "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackermann v. United States,* 340 U.S. 193, 198 (1950).

Furthermore, "the D.C. Circuit has held that relief under Rule 60(b)(6) should be granted only in extraordinary circumstances." *Brookens v. Solis*, 635 F. Supp. 2d 1, 4 (D.D.C. 2009) (internal quotation marks and citations omitted). Extraordinary circumstances held to justify granting a Fed. R. Civ. P. 60(b)(6) motion include disclosure of "a previously undisclosed fact so central to the litigation that it shows the initial judgment to have been manifestly unjust," *Good Luck Nursing Home. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980), gross attorney negligence, *Marino*, 685 F.3d at 1079, and "when a litigant suffered from a disabling illness, where participation in litigation would cause greater disability, and where the illness had depleted the litigant's financial resources." *Salazar*, 633 F.3d at 1121.

ARGUMENT

I. The District Court may not grant the requested relief without the consent of the Court of Appeals.

This District Court cannot grant the requested relief unless it obtains jurisdiction through remand, because it involves a case subject to a pending appeal. Fed. R. Civ. P. 62.1. "It is 'generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects involved in the appeal.'" *United States v. Sparks*, 885 F. Supp. 2d 92, 102 (D.D.C. 2012) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)); *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 352 n.3 (D.C. Cir. 1997); *see also Forras v. Rauf*, 74 F. Supp. 3d 1, 3 (D.D.C. 2014) (holding the district court did lacked jurisdiction to hear a motion for reconsideration after the opposing party had filed a notice of appeal). In this case, remedy is a specific issue on appeal. Statement of the Issues, Doc. ID. 1574530, No. 15-5239 (D.C. Cir. Sept. 9, 2015).

Although the Government may seek an indicative ruling from this Court as to whether the motion raises a substantial issue, the movant must then notify and convince the United States Court of Appeals for the District of Columbia to remand the matter to the Court. Fed R. Civ. P. 62.1(b); *see Hoai v. Vo*, 935 F.2d 308, 312 (D.C. Cir. 1991) ("[W]hen both a Fed. R. Civ. P. 60(b) motion and an appeal are pending simultaneously, appellate review may continue uninterrupted. At the same time, the District Court may consider the 60(b) motion and, if the District Court indicates that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be granted.").

Nevertheless, parts II through V of this brief establish that the Government has not presented a substantial issue or identified extraordinary circumstances that might justify an indicative ruling by this Court in support of remand.

II. No extraordinary circumstances justify revision of the final judgment.

DHS states in its motion that it is unable to publish the 2015 NPRM as a final rule before the Court's vacatur of the 2008 OPT Rule goes into effect February 12, 2016. After the Count vacated the 2008 OPT Rule for failure to give public notice and comment, the Court granted DHS a six-month stay of that order, reasoning that if it were to have immediate effect, thousands of aliens would have to "leave their jobs in short order." Mem. Op., ECF 43 at 36. DHS opted to use that delay to create and publish a new and different final rule, further expanding the OPT program, rather than subjecting the 2008 OPT Rule to public comment or to provide an orderly transition from the vacated 2008 OPT Rule. 80 Fed. Reg. 63,375–404.

DHS claims two extraordinary circumstances supporting a Fed. R.Civ. P. 60(b)(6) motion. DHS Mot. Br., ECF 47 at 3–9. First, DHS asserts that its failure to publish a final rule is the result of extraordinary circumstances. *Id.* at 5–8. Second, DHS cites the hardship vacatur will cause F-1 visa holders and their employers. *Id.* at 8–10.

A. DHS's failure to put in place a final rule before vacatur of the 2008 OPT Rule goes into effect is not an extraordinary circumstance because this failure is entirely due to the agency's own strategic choices.

DHS gives two reasons it is unable to put in place a new rule expanding OPT before the Court's stay of vacatur for the 2008 OPT Rule ends. First, DHS asserts that the agency received an "unprecedented" number of comments. DHS Mot. Br., ECF 47 at 2–6. Second, DHS claims that it needs additional time

to develop guidance and provide training for new requirements in the 2015 NPRM. *Id*. at 7–8. Neither of these constitutes extraordinary circumstances required to justify a Fed. R. Civ. P. 60(b)(6) motion because DHS's inability to put in place a rule before the Court's vacatur deadline is *entirely* due to DHS's own strategic choices. *See Good Luck Nursing Home*, 636 F.2d at 577.

1. DHS's argument that the large volume of comments received for the 2015 NPRM creates an extraordinary circumstance requires the Court to accept the false premise that the time to act starts when a court imposes a deadline.

DHS alleges that, during the comment period for the 2015 NPRM, the agency received an unanticipated and "unprecedented" volume of comments. DHS Mot. Br., ECF 47 at 2–6. It asserts the number of comments received constitutes an extraordinary circumstance justifying the granting of a Fed. R. Civ. P. 60(b)(6) motion.[1] This argument, however, requires the Court to accept the false premise that that the time to act starts when a court imposes a deadline and runs until that deadline.

Specifically, the 2008 OPT Rule was promulgated as an interim rule without notice and comment on April 8, 2008. 73 Fed. Reg. 18,950. The Court stayed vacatur of the 2008 OPT Rule until February 12, 2016. Mem. Op., ECF 43 at 34–35. DHS made a critical mistake in 2008 by only giving industry and academic lobbyists access to the rulemaking process, while denying the gen-

1 DHS states that it received 43,000 unique comments, Decl. of Canty, ECF 47-1 ¶ 5, but gives no figure as to how many of these are "significant comments" that actually need responses, *id*. at ¶ 16. The large volume of comments on the rule clearly is the result of mass mailing campaigns (largely by supporters of the measure) that raise no issues warranting a response. *E.g.*, *Mass Mail Campaign 131, Comment Submitted by Deborah Pritchard*, Docket ID ICEB-2015-0002-43053 (Nov. 18, 2015); *Comment Submitted by Broc Sanchez*, Docket ID (Nov. 18, 2015) (reading in its entirety, "U.S.A. Would not be the great country it is if it had not been for it's immigrant population. Great minds are not limited by borders." (sic)). Even among the comments DHS considers unique, there is enormous duplication. Compare *Comment Submitted by Jordan Gerstler-Holton, National Foreign Trade Council*, Docket ID ICEB-2015-0002-38036 (Nov. 21, 2015) with *Comment Submitted by Abigail Slater, Internet Association*, Docket ID ICEB-2015-0002-41270 (Nov. 18, 2015).

eral public (especially those adversely affected, like Washtech) the opportunity to participate. However, that mistake was correctable and DHS had 7 years, 10 months, and 4 days to make a correction.

An agency can correct defect of failing to give notice and comment by holding a post-promulgation comment period in which it does so with an "open mind." *Intermountain Ins. Serv. of Vail v. Comm'r*, 650 F.3d 691, 709 (D.C. Cir. 2011). The agency then has the duty "to conduct notice and comment rulemaking *ab initio*" without giving preference to the conclusions of the original rulemaking. *Fertilizer Inst. v. U.S. Envtl. Prot. Agency*, 935 F.2d 1303, 1312 (D.C. Cir. 1991). DHS failed to such take corrective action, even though it had over seven years to do so.

DHS invited public comments for the 2008 OPT Rule but did not act on them. 73 Fed. Reg. 18,950. In 2008, several organizations representing technology workers challenged DHS's failure to give notice and comment for the 2008 OPT Rule. *Programmers Guild,* 338 Fed. Appx. at 241. The Third Circuit dismissed that case under Fed. R. Civ. P. 12(b)(1), holding the plaintiffs were not within the zone-of-interest of the statute in question. *Id*. at 245. However, the *Programmers Guild* lawsuit effectively put DHS on notice that American labor organizations considered the defects of the 2008 OPT Rule an important issue and that the problems with the 2008 OPT Rule were not going to simply go away. DHS made the strategic decision not to correct its failure to give notice and comment, gambling that no one would ever obtain standing to challenge its rule.

On March 29, 2014 Washtech filed the complaint in this case, again putting DHS on notice that its 2008 OPT rulemaking was defective. Complaint, ECF 1. Perhaps wagering that it could get this case dismissed on standing as well, DHS still did nothing to correct its mistake.

On August 12, 2015, the Court held that DHS had promulgated the 2008 OPT Rule without good cause to wave notice and comment and imposed on DHS a deadline of February 12, 2016 to take corrective action on the defective 2008 OPT Rule. From the time that DHS issued the 2008 interim rule to this Court's deadline, DHS had a total of 7 years, 10 months, and 4 days to put in place a final rule that followed the procedures required by the APA.

Finally, on October 19, 2015, DHS proposed a final rule and invited public comment. 2015 NPRM, 80 Fed. Reg. 63,375–404; *see also Comment of Sen. Charles, E. Grassley on U.S. Immigration and Customers Enforcement Proposed Rule: Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students (RIN 1653-AA72)*, Docket ICEB-2015-0002-42093 (Nov. 18, 2014) (asking the agency why the 2008 OPT Rule was never finalized).

The exceptional circumstances here are not the volume of comments that DHS received but rather that DHS (1) received the instructions of industry lobbyists on how to deprive American workers of their statutory protections from foreign labor, A.R. 120–23; (2) worked in secret with lobbyists to prepare a rule to implement those instructions, A.R. 124–27 and 130–34; (3) produced a one-sided record that only reflected the position of the lobbyists promoting the secret rule, Mem. Op., ECF 42 at 34 n.13; (4) promulgated the 2008 OPT Rule without giving the public any advanced notice, 73 Fed. Reg. 18,950 (Apr. 8. 2008); and (5) then waited more than seven years, until a court imposed a deadline, to initiate corrective action, 80 Fed. Reg. 63,776 (Oct. 19, 2015). This record of bureaucratic intransigence consists entirely of deliberate choices made by the agency. The volume of comments the agency received in response to the 2015 NPRM cannot explain why DHS was unable to correct the defects of the 2008 OPT Rule within the 7 years, 10 months, and 4 days available to the agency.

DHS actions (that is, inexcusable delay in correcting the defects of its 2008 rulemaking) speak louder than its words to the Court (claiming the agency has acted with urgency). *E.g.*, Decl. of Rachel Canty, ECF 47-1 ¶ 10 ("ICE has assigned this STEM OPT rulemaking the highest possible priority"); i*d*. ¶ 9 (stating the new rule "was the product of an 'all-hands-on-deck' approach"); Decl. of Daniel J. Kane, ECF 47-2 ¶ 7 ("USCIS has made this STEM OPT rulemaking a very high agency priority."). Under DHS's view of the APA, where notice and comment remains optional until a court sets a deadline and the failure to act within that deadline creates exceptional circumstances to extend the deadline, an agency would have no incentive to ever comply with the statutory notice and comment requirements. DHS sat on its hands until this Court forced it to act and nothing in its pending motion establishes otherwise. Indeed, DHS made the strategic decision to wait 7 years, 6 months, and 11 days to act on putting a final STEM OPT rule in place. 73 Fed. Reg. 18,944 (Apr. 8, 2008) and 80 Fed. Reg. 63,376 (Oct. 19, 2015). Adverse consequences resulting from such strategic choices explicitly are not grounds to grant a Fed. R. Civ. P. 60(b)(6) motion. *Good Luck Nursing Home*, 636 F.2d at 577.

2. Any need for time to create guidance and training for the 2015 NPRM is not an extraordinary circumstance because it is entirely due to strategic choices made by DHS.

DHS's political zealotry in expanding what should be called its American jobs giveaway program created the conditions for which it now seek extraordinary relief. As DHS noted, "The 2015 NPRM notified the regulated public that DHS proposed to significantly revise the 2008 STEM OPT Extension Rule by replacing it 'in its entirety' with a new STEM OPT extension final rule. 80 Fed. Reg. at 63,381." DHS Mot. Br., ECF 47 at 7. The foreseeable result of these comprehensive rule changes, made in the face of a Court-imposed deadline, was increased complexity in the OPT program.

Even groups representing employers that supported the expansion of OPT in the 2015 NPRM criticized the proposed rule's complexity. *E.g.*, *Comment Submitted by Christopher Corley, Compete America*, Docket ID ICEB-2015-0002-42700 (Nov. 18, 2015) ("The requirement to create an individualized Mentoring and Training Plan will create significant administrative burdens and costs."); *Comment Submitted by Jonathan Baselice, U.S. Chamber of Commerce*, Docket ID ICEB-2015-0002-41916 (Nov. 18, 2015) (stating the 2015 NPRM is "unnecessarily burdensome").

DHS concedes it caused this entirely foreseeable outcome: "*Because of this wholesale revision and replacement effort*, DHS should be able to avoid uncertainty and confusion felt by members of the regulated community by giving agency personnel time to train adjudicators on the new requirements of the final rule and educate the public through stakeholder engagements." DHS Mot. Br., ECF 47 at 7 (emphasis added); *see also*, *id*. at 4 ("DHS requires additional time to develop guidance and train officers in the new STEM OPT program requirements as well as provide training aids and material for foreign students, U.S. schools and U.S. employers."), Decl. of Canty, ECF 47-1 ¶ 22 and Decl. of Kane, ECF 47-2, ¶¶ 9–10 and 12.

A former Senior Counsel at DHS and the Department of Justice observed of DHS's instant motion:

> DOJ advised the court that plaintiffs would oppose the motion. Opposition is hardly surprising because the stated need for time to respond to the public comments (30 days) is overshadowed by the notion that the agency needs to retrain its staff (60 days). The motion argues that the volume of comments was "unprecedented" for the "agency"—it may be that "DHS" has not received such a volume, but its predecessor agencies most certainly did, and the argument suggests that the real problem is a knowledge vacuum.

Leland E. Beck, *Monday Morning Regulatory Review*, Federal Regulations

Advisor, Jan. 4, 2016, *available at* http://www.fedregsadvisor.com/2016/01/03/monday-morning-regulatory-review-1416-regulatory-priorities-in-an-administrations-final-year/. DHS's need for time to develop training for "new STEM OPT program requirements" flows from the DHS's own strategic choice to add complexity to the OPT program—not an unexpected volume of comments. DHS Mot. Br., ECF 47 at 4. The consequences of deliberate strategic choices made by a party explicitly do not provide grounds to grant a Fed. R. Civ. P. 60(b)(6) motion. *Ackermann,* 340 U.S. at 198 (stating "[t]here must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from").

B. Any disruption resulting from the vacatur of the 2008 OPT Rule is entirely the fault of DHS because the agency failed to provide guidance to those affected, even though the Court stayed the vacatur for six months.

DHS argues that the disruption from the vacatur of the 2008 Rule would create extraordinary circumstances justifying a modification to the Court's judgment under Fed. R. Civ. P. 60(b)(6). DHS Mot. Br., ECF 47 at 3 ("This Court stayed vacatur of the 2008 STEM OPT Extension rule with the express goal of preventing 'substantial hardship for foreign students and a major labor disruption for the technology sector.'"). As an initial consideration, Washtech can find no precedent from any federal court holding that a party may obtain extraordinary Fed. R. Civ. P. 60(b)(6) relief on the basis of hardship or injury to third parties, who are not themselves the movants. In staying its order of vacatur, the Court did not make any finding of hardship to the federal government, the Department of Homeland Security, or any of its officers or personnel should its vacatur order become effective. Mem. Op., ECF 43 at 34–37. Rather, the court sought to avoid what it considered to be a temporary disruption to the employment of a subclass of OPT beneficiaries, all of whom are non-immigrant foreigners present

in the United States only for the duration of their F-student visas. DHS argued that "a vacatur order would 'take off the books' the OPT-STEM extension rule providing thousands of foreign students with work authorization while presently in the United States. This emergency situation would cause these workers and their family members to scramble to depart the United States in an effort to avoid any possible immigration consequences." DHS Resp. Br., ECF 36 at 44. The Court responded to DHS's request stating, "Vacating the 2008 Rule could also impose a costly burden on the U.S. tech sector if thousands of young workers had to leave their jobs *in short order*." Mem. Op., ECF 43 at 36 (emphasis added). No OPT beneficiary or "tech sector" employer ever sought to appear as *amicus* in this proceeding. In its Fed. R. Civ. P. 60(b)(6) motion the Government is neither the agent of the OPT beneficiaries or their employers, nor is it acting *parens patriae* for any employer or beneficiary.

On the other hand, the Court previously granted DHS generous relief, in spite of the seriousness of DHS's rulemaking defects. Mem. Op., ECF 43 at 34–37. DHS could have prevented guestworkers on OPT extension from having to leave the country in *short order* by providing guidance to those workers and their employers well in advance about the significance of the February 12, 2016 deadline so that they could prepare for it. Five months have passed, yet all DHS can say is that it gave the *old college try* to get a new rule in place.

In spite of the serious immigration consequences aliens working under the 2008 OPT Rule would be exposed to if they continue to work after vacatur, DHS has provided no official guidance and conflicting unofficial guidance to those affected.[2] University web sites describing the impending deadline say they are waiting for information from DHS. *E.g.*, https://www.coloradocol-

2 To illustrate, many aliens working on OPT extensions are likely to be eligible for an alternate immigration status (*e.g.*, F-2 or H-4). Such aliens would likely want guidance from DHS as to how much time they have to adjust status.

lege.edu/dotAsset/a1406b1e-8efe-4283-ba89-163c1e0a5f55.pdf ("What will happen after February 12, 2016? At this point, we don't know. We are waiting for DHS response and are working with experts in the field."); https://www.smu.edu/international/isss/OptionalPracticalTraining/Announcement ("DHS has not provided any detailed response regarding the ruling"); http://web.mit.edu/iso/about/announcements.shtml ("As of today, DHS has not provided any detailed response regarding the ruling"); https://iss.washington.edu/STEMLegalChallenge ("We are waiting for updates from the Department of Homeland Security"); http://iss.okstate.edu/sites/iss.okstate.edu/files/u277/ISS%20Listserve%20letter%209-29-2015.pdf ("Please remember that the ISS [International Students & Scholars] is waiting just like you to receive a response from DHS so we are all waiting together."); http://ois.jhu.edu/News_and_Events/news ("OIS [Office of International Services] cannot provide answers to these questions until we receive guidance from DHS."); https://www.iss.purdue.edu/PracticalTraining/STEM.cfm ("At this time, we have not been provided with any guidance or advisory from DHS or USCIS."); http://ois.iu.edu/announcements/stem-opt.shtml ("We are waiting for DHS comment and will update you with new information as it becomes available."). The Court gave DHS a six month delay to mitigate the effect of the vacatur order and DHS still has not bothered to notify those affected that aliens will not be able to work on OPT extensions after February 12, 2016 or told them what their options will be. The United States Citizenship and Immigration Services's ("USCIS") own web site on OPT extensions does not even mention the pending vacatur of those work authorizations. http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/extension-post-completion-optional-practical-training-opt-and-f-1-status-eligible-students-under-h-1b-cap-gap-regulations (last visited Jan. 8, 2016).

When DHS requested the Court stay vacatur, it clearly stated that aliens would not be able to work on OPT extensions after a vacatur and that, without such a stay, such aliens would have to "scramble to depart the United States." DHS Resp. Br., ECF 36 at 44; DHS Mot. Br., ECF 47 at 9. Yet, DHS has distributed conflicting *unofficial* guidance on that point to the public. For example, one immigration law firm reported on December 9, 2015, that the USCIS Nebraska Service Center stated to the American Immigration Lawyers Association ("AILA") that DHS would ignore the Court's order and would allow aliens to continue to work on approved OPT extensions even after this Court's stay is lifted. Murthy Law Firm, *STEM OPT EAD Approvals Remain Valid After February 2016*, available at https://www.murthy.com/2015/12/09/stem-opt-ead-approvals-remain-valid-after-february-2016/. Then the same law firm updated that page on December 15, 2015 stating the USCIS subsequently clarified to AILA that no decision on whether employment authorizations made under the 2008 OPT Rule will remain valid after the rule is vacated. *Id.* Another web site publishing immigration news recently reported that it was confirmed that DHS will ignore the vacatur and allow aliens to continue to work on OPT extensions after the 2008 OPT Rule is vacated. Humera Subhani, *Immigration News Briefs*, January 2015, available at http://www.khabar.com/magazine/immigration/immigration-news-briefs_8. It is likely that DHS's conflicting information has led many people to believe that they can continue working under the 2008 OPT Rule even after it is vacated and that they are unaware of the dire consequences if they do so.

The agency's unexplained failure to provide official guidance right up to the deadline might give the impression that DHS is acting in a manner to maximize the vacatur order's disruptive effect. In any event, for DHS to come within days of vacatur of the 2008 OPT Rule and not provide any official

guidance to those affected represents misfeasance on the part of the agency. Any disruption experienced by third parties who are not before this court resulting from the termination of work authorization for certain OPT guestworkers after February 12, 2016 will be a foreseeable consequence of DHS's decision not to provide information to those guestworkers and their employers over the prior six months. Those adverse effects the agency complains of flow exclusively from astonishingly bad strategic choices by DHS and are not extraordinary circumstances that justify granting a motion under Fed. R. Civ. P. 60(b)(6). *Salazar*, 633 F.3d at 1120.

In support of its assertion that the hardship of vacatur creates an extraordinary circumstance, DHS cites *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7 (D.D.C. 2003). However, *Hawaii Longline* addresses a motion to reconsider under Fed. R. Civ. P. 59(e), where the parties had made their motions within the ten days allowed under the rule. Apropos to this case, this Court held that, after violating the procedural right of the plaintiffs, the agency could not rely on the conclusions of the vacated rule. *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 281 F. Supp. 2d 1, 37 (D.D.C. 2003). DHS did exactly that with the 2015 NPRM, using a go-through-the-motions notice and comment period to simply rationalize the same conclusion of its vacated rule (that is, the OPT work term should be expanded), 80 Fed. Reg. 63,375–404, and had even announced that conclusion in advance of the *pro forma* notice and comment period, White House Press Release, *supra*. *See* § V, *infra*.

III. DHS cannot show that the requested extraordinary relief would ensure timely publication of a new final rule.

"[A]s a precondition to relief under Rule 60(b), the movant must provide the district court with reason to believe that vacating the judgment will not be an empty exercise or a futile gesture." *Murray v. District of Columbia*, 52 F.3d

353, 355 (D.C. Cir. 1995). DHS seeks an extension of the stay of vacatur until May 10, 2016. DHS Mot. Br., ECF 47 at 9. DHS now claims that "barring unforeseen delay, we would expect completion of the STEM OPT rulemaking by March 11, 2016."

Under the Congressional Review Act, the agency must publish a rule 60 days before its effective date. Pub. L. No. 104-121, § 801, 110 Stat. 847, 869 (1996).[3] Sixty days from March 11, 2016 is May 10, 2016. Should another "unforeseen delay" (of even one day) occur, DHS will need yet another stay of vacatur to achieve its goal of uninterrupted STEM OPT extensions. *E.g.*, DHS Mot. Br., ECF 47 at 9. Even further, DHS's very equivocal statement to this court—that the agency "expects" it can meet the new deadline barring *yet another* "unforeseen delay"—when considered in light of its unforeseen volume of comments, its unforeseen need to provide training and guidance, and on top of its 7-year delay to act, does not instill confidence that will finish the task within its proposed deadline.

IV. Allowing facts that did not exist at the time of judgment to create extraordinary circumstances would undermine the finality of judgments.

DHS asserts that its Fed. R. Civ. P. 60(b)(6) motion is reasonable because it was filed within 30 days of discovering that it would be unable to put in place a new rule before the stay of vacatur of the defective, existing rule ends. DHS Mot. Br., ECF 47 at 3. Presenting a "previously undisclosed fact so central to the litigation" has been held to be an extraordinary circumstance. *Good Luck Nursing Home*, 636 F.2d at 577. However, DHS seeks to extend that principle to facts that did not exist at the time of judgment. Allowing subsequently created facts to create extraordinary circumstances for granting a Fed. R. Civ.

3 The Decl. of Canty, ECF 47-1 ¶ 6 shockingly states that DHS "considered proceeding without a delayed effective date" in spite of the statutory requirement to do so.

P. 60(b)(6) would make the litigation process open-ended and would undermine the balance required by the need for finality of judgments. *See Douglas*, 306 F.R.D. at 4 (stating a court must balance the interest of justice with the interest in protecting the finality of judgments). A change in the law after judgment rarely constitutes an extraordinary circumstance for the purpose of Fed. R. Civ. P. 60(b)(6). *Agostini v. Felton*, 521 U.S. 203, 239 (1997). Likewise, a change in conditions arising after judgment should not create an extraordinary circumstance.

In addition, for undisclosed information to constitute extraordinary circumstances under Fed. R. Civ. P. 60(b)(6), it must be "so central to the litigation that it shows the initial judgment to have been manifestly unjust." *Good Luck Nursing Home,* 636 F.2d at 577. Here, the time it would take DHS to promulgate a replacement regulation is not central to the litigation. In fact, even while DHS argued for a stay of vacatur, it did not request any specific duration from the Court. DHS Resp. ECF 36 at 43–45. The 2008 OPT Rule is to be vacated on February 12, 2016 because DHS did not provide notice and comment without having good cause. Mem. Op., ECF 42 at 30–34. In its *good cause* analysis, the Court did not consider how much time it would take DHS to promulgate a replacement regulation, *id.*, because that factor is irrelevant to the issue of *good cause*. DHS's time estimates for such a task, Decl. of Canty ECF 47-1 and Decl. of Kane, ECF 47-2, are simply not "central to the litigation." *See Good Luck Nursing Home*, 636 F.2d at 577. Furthermore, DHS makes no showing that the original stay of vacatur, giving the agency 7 years, 10 months, and 4 days to replace the 2008 OPT Rule with a final rule, was "manifestly unjust," especially when that is compared to the 8 year, 1 month, and 2 day time period it requests in this motion. Proposed Order, ECF 47-3.

V. DHS failed to give proper notice and comment for the 2015 Proposed Rule.

The Court delayed vacatur of the 2008 OPT Rule to allow the agency time to submit the rule "for proper notice and comment." Mem. Op., ECF 43 at 37. But yet again, the conduct of the agency has failed to provide the public, including the plaintiffs, with good faith consideration of alternatives to the agency's chosen preferences.

The purpose of notice and comment is to "ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *N.J., Dep't of Envtl. Prot. v. U.S. Envtl. Prot. Agency*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) (quoting from and adopting the reasoning of *U.S. Steel Corp. v. U.S. Envt'l Prot. Agency*, 595 F.2d 207, 214–15 (5th Cir. 1979)). President Obama reaffirmed this principle by directing agencies to give the public the opportunity to participate, specifically requiring agencies to seek the views of those affected, where feasible, *in advance* of publishing a proposed rule. Executive Order 13,563, 76 Fed. Reg. 3,821–22 (Jan. 18, 2011). Therefore, when Microsoft proposed to the DHS Secretary at a dinner party held to discuss immigration issues that it should reconsider the duration of work permitted on student visas (A.R. 120–23) and DHS decided to consider the idea, the agency should have given the public the opportunity to participate early in the process when the public would have influence and the agency would have been more likely to consider alternatives. *N.J., Dep't of Envtl. Prot.*, 626 F.2d at 1049.

Instead, the agency only met with industry groups in support of the proposal (*e.g.*, A.R. 126) and gave no notice to the public that such a rule was even being considered until it promulgated an interim rule without public notice and comment. 73 Fed. Reg. 18,950. As the Court noted, "[B]y failing to engage

in notice-and-comment rulemaking, the record is largely one-sided, with input only from technology companies that stand to benefit from additional F-1 student employees, who are exempted from various wage taxes." Mem. Op. at 34 n.13.

The 2008 OPT Rulemaking process is water over dam—but when does the public get the opportunity to participate *meaningfully* in the question of whether work on student visas after graduation should be expanded beyond one year?

One could easily imagine an opportunity for such public participation happening in some alternate, parallel universe; even one where DHS delayed action for years: *This lawsuit* could have raised an alarm within DHS that the 2008 OPT Rule was defective in early 2014. In November of 2014, DHS could have announced that it is going to reconsider the proper duration of work under the OPT program *ab initio* and invited public comment. The DHS secretary could have invited select labor representatives to dinner to discuss the issue (the same access granted to industry lobbyists previously). Over the next few months, DHS could have met with people with a wide variety of views on the subject, including labor groups. DHS could have researched the issues and gathered data reflecting all points of view. Taking all of the collected information into account, DHS could have decided the best course of action for OPT; prepared a new rule; submitted the rule for approval for publication; and, when the Court's decision was released on August 12, the agency immediately published a proposed rule that has already been vetted with the public and the Court's deadline could have been easily met—but that is in an imaginary *alternate universe.*

In *this* universe, DHS treated the Court's order as an invitation to validate the 2008 OPT Rule with a meaningless *pro forma* notice and comment period. In fact, the executive branch even announced *in advance* that it was going to

reaffirm (and expand) the policy of extended work after graduation on OPT. *See* White House Press Release, *supra*. Once again, the public was denied the opportunity to influence DHS on whether OPT should be expanded because the decision had already been made and announced before the public could get involved. After a briefing on DHS's OPT plans last summer, the Chairman of the Senate Judiciary Committee wrote the DHS secretary and stated, "Instead of … addressing the legitimate criticisms of the OPT-STEM program raised in the Washington Tech Alliance lawsuit, it appears the agency is intent on doubling down on the misguided policies that triggered the GAO report and lawsuit in the first place." Letter from Sen. Charles Grassley to DHS Secretary Jeh Johnson (June 8, 2015), *available at* http://www.grassley.senate.gov/sites/default/files/judiciary/upload/Immigration%2C%2006-08-15%2C%20OPT%20expansion%2C%20letter%20to%20Johnson.pdf.

DHS's submissions to the Court give no indication that the agency did anything differently the second time around. In 2008, the DHS secretary gave industry lobbyists personal access over dinner to advance ideas on immigration. Did the DHS secretary invite any labor representatives to dinner to give equal access this time? For that matter, did the DHS secretary meet with any labor representatives at all to discuss this issue? In 2008, DHS officials met with industry and academic lobbyists on expanding OPT while excluding the rest of the public. *E.g.*, A.R. 126. Did DHS meet with any representative of labor organizations to discuss the proposed rule in advance of publication, as it is required to do under Executive Order 13,563? Washtech is unaware of DHS extending such equal access and DHS makes no such representations to the Court that it has corrected that past mistake in this attempt at rulemaking.

Instead, the 2015 NPRM is simply *déjà vu* all over again. The Court observed of the 2008 OPT Rule that "the record is largely one-sided, with input

only from technology companies that stand to benefit from additional F-1 student employees." Mem. Op. ECF 42 at 34 n.13. For the 2015 NPRM, DHS did the same thing. Senator Grassley observed in his comments:

> On pages 28–30 of the proposed rule, the Department cites numerous publications in support of its assertion that foreign STEM students provide substantial benefits to the U.S. economy. However, the discussion cites only articles in support of the Department's position and doesn't cite a single article contrary to the Department's position.

Comment of Sen. Charles, E. Grassley, supra. DHS has learned nothing from the 2008 OPT Rule debacle. Rather than giving the public a first chance at having influence over any change in duration to OPT, DHS has used the delay of vacatur to simply go through the motions of providing a ritual comment period whose sole purpose is to rationalize the positions it took previously.

This is evident from DHS's submissions to the Court. DHS does not seek a delay so that it can correct the defects of the 2008 rulemaking by thoroughly considering the input of the public to determine whether the policy of expanding the duration of employment by non-students working on student visas created in the 2008 OPT Rule should be continued. Instead, DHS seeks the delay so that it can continue the policy implemented in the fatally flawed 2008 OPT Rule without interruption. DHS Mot. Br. ECF 47 at i, 2, 4, and 8–9; Decl. of Canty ECF 47-1, ¶ 8–9. The public was denied the opportunity to influence the agency on the key question of OPT duration in 2008. DHS has again denied the public the opportunity to have influence in 2015. The result is a fatally flawed proposed rule. 2015 NPRM, 80 Fed. Reg. 63,375–404.

As a result, even if the Court were to grant DHS's Fed. R. Civ. P. 60(b)(6) motion and DHS were able to promulgate a new rule within a new deadline, the parties would be back in court litigating over that rule because of DHS's defective go-through-the-motions notice and comment process where the agency

only afforded the public the opportunity to rubber stamp the 2008 decision, as the agency had announced months in advance. *See N.J., Dep't of Envtl. Prot.*, 626 F.2d 1038 at 1049. One might expect that, when (as DHS did with the 2008 OPT Rule) an agency runs roughshod over the APA to the point that it gives every appearance of government corruption, upon being given a chance to correct, the agency would go out of its way to counter the unseemly appearance given in the defective rulemaking—but that did not happen. In essence, DHS argues here that the policy it secretly put in place at the request of industry lobbyists in 2008 is now so sacrosanct that it cannot be subjected to public debate and should not be vacated by the Court because DHS has, through delay, ensured that changing its flawed policy will cause unnecessary hardship of the agency's own creation. Due to the agency's Chauvinistic devotion to the position it adopted (after being proposed by lobbyists privately over dinner), DHS is no closer now to correcting the defects of the 2008 OPT Rule than it was back in August when the Court issued its order. These procedural defects in the 2015 NPRM preclude any argument that denying DHS's motion simply postpones the inevitable.

CONCLUSION

The motion for a further delay of the Court's vacatur order should be denied. Even if the Court still possessed jurisdiction over this matter, all of the factors that DHS identifies as extraordinary circumstances required to justify a Fed. R. Civ. P. 60(b)(6) motion are, in fact, the entirely foreseeable consequences of DHS's own horribly bad strategic choices. Because of these bad choices, DHS has compounded its mistakes so that those affected have received no guidance from DHS on what happens to OPT extensions post-vacatur of the 2008 OPT Rule. The Court cannot and should not agree to revise its August 12, 2015 judgment. Instead, it should allow the appeal pending in the Court of Appeals to proceed without further meandering or delay.

Respectfully submitted,

Dated: January 11, 2016

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In the
United States District Court
for the
District of Columbia

Washington Alliance of Technology Workers; 21520 30th Drive SE Suite 102 Bothell, WA 98021 *Plaintiff*, *v.* U.S. Dep't of Homeland Security; Office of General Counsel Washington, DC 20258 *Defendant*.	Civil Action No. 1:14-cv-529 (ESH)

[Proposed] Order

Defendant's Motion Under Fed. R. Civ. P. 60(b)(6) for Limited Relief from the Court's Order is DENIED.

ELLEN SEGAL HUVELLE
United States District Judge

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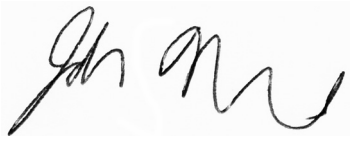
Washington Alliance of Technology Workers; 21520 30th Drive SE Suite 102 Bothell, WA 98021 *Plaintiff*, *v.* U.S. Dep't of Homeland Security; Office of General Counsel Washington, DC 20258. *Defendant.*	Civil Action No. 1:14-cv-529 (ESH)

Certificate of Service

I certify that on January 11, 2016, I filed the attached Plaintiff's Response to Defendant's Motion Under Fed. R. Civ. P. 60(b)(6) for Limited Relief from the Court's Order with the Clerk of the Court using the CM/ECF system that will provide notice and copies to the Defendant's attorneys of record.



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