IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS, *Plaintiff,* v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY *Defendant.*	)	Case No. 1:14-cv-529-ESH

***AMICUS CURIAE* BRIEF OF JUDICIAL WATCH, INC. IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Amicus Judicial Watch, Inc. ("Judicial Watch") believes that fidelity to the rule of law requires this Court to find that plaintiff Washington Alliance of Technology Workers ("WashTech") has standing to challenge the illegal regulations of the Department of Homeland Security ("DHS") at issue in this lawsuit. The regulations flatly contradict the relevant statute. DHS' issuance of these regulations amounts to *ultra vires* action, as well as abdication of its duty to enforce the immigration laws, and this in turn expands the relevant "zone of interest" test for prudential standing. WashTech therefore has standing in the present case in a way the plaintiffs in *Programmers Guild, Inc. v. Chertoff* did not. 338 Fed. Appx. 239, 243 (3rd Cir. 2003) (unpublished) ("[T]he plaintiffs never argue precisely why this injury arguably falls within the zone of interests…"). The Court should so find, and should otherwise grant plaintiff's Cross-Motion for Summary Judgment. ECF No. 25.

Interests of the *Amicus*

As articulated in the accompanying Motion for Leave, *amicus* Judicial Watch is concerned that DHS' unlawful action poses a special threat to the rule of law, and is concerned about the corrosive effect of that violation on American society. DHS's broad, unauthorized regulatory-rewrite of the Immigration and Nationalization Act ("INA") statute in question is especially harmful because it oversteps the agency's authority and usurps the powers reserved to Congress. In addition, DHS' violation of the INA turns a blind eye to a primary purpose of the INA – namely, to ensure that the right to participate in the market for U.S.-based jobs is fairly extended to American citizens and residents deemed lawful by Congress.

Introduction

Congress allows DHS to issue student visas so that foreign nationals may stay in the U.S. temporarily to pursue academic studies. 8 U.S.C. § 1101(a)(15)(F)(i). DHS has issued regulations which rewrite this statute to allow students to work in full time jobs after completing their education for over two years, so that they remain in the U.S. on their student visas without receiving work visas. 8 C.F.R. § 214.2(f)(10); 8 C.F.R. § 214.2(f)(10)(ii)(C); *see* ECF No. 17, Memorandum Opinion, pp. 1-3.

To avoid burdening this Court with repetitive arguments that have already been well made, *amicus* Judicial Watch files this brief only to highlight one narrow issue of prudential standing raised by this case. Specifically, this case illustrates the purpose of the doctrine of prudential standing based on illegal government acts of commission or omission – *ultra vires* actions and abdication of duty. The doctrines exist to allow the judicial branch to address naked illegality in the other branches. A consideration of this doctrine shows that standing has been effectively argued here, unlike in *Programmers Guild*, 338 Fed. Appx. at 243 (plaintiffs did not

"argue precisely why" zone of interest applied). *Amicus* urges the Court to acknowledge that plaintiff's claims in this case fall within the "zone of interests to be protected or regulated by the statute … in question." *Ass'n of Data Processing Serv. Org'ns v. Camp*, 397 U.S. 150, 153 (1970). *Amicus* Judicial Watch otherwise joins those arguments that support a grant of summary judgment in favor of WashTech. *See* ECF No. 25, Pltfs. Cross-Motion for Summary Judgment.

ARGUMENT: PARTIES TEND TO SATISFY PRUDENTIAL STANDING WHEN GOVERNMENT LAWBREAKING IS AT ISSUE

Amicus holds that illegal government actions (such as that exemplified in this case) expands the applicable "zone of interest" courts must consider in determining whether a plaintiff satisfies prudential standing considerations. This is not tantamount to arguing that a party's satisfaction of prudential standing depends on the merits of a case, but rather merely requires a consideration of plaintiff's merits claims during the standing inquiry. *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003). *Amicus* argues that the best reading of precedent shows a rule that the "zone of interest" prudential standing test is essentially broadened when illegal government actions are at issue. While a statute's zone of interest may ordinarily give rise to standing for only a specific class of potential litigants, cases of illegal government conduct expand the zone of interests due to the "inherently offensive" nature of government actions which exceed statutory limits. *Catholic Social Serv. v. Shalala*, 12 F.3d 1123, 1126 (DC Cir. 1994).

I. DHS' *Ultra Vires* Actions Give Rise to Standing

Ultra vires actions lower the bar for satisfying the zone of interest test, beyond its already undemanding standard. *See Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). In the analogous context of evaluating jurisdiction, courts have noted the presumptions that "Congress rarely intends to foreclose review of action exceeding agency authority" and that

"judicial review of allegedly *ultra vires* agency action is favored." *Amgen Inc. v. Smith*, 357 F.3d 103, 112, 113 (D.C. Cir. 2004). The same holds in evaluating standing.

The strongest formulation of this rule holds that plaintiffs need not even demonstrate that they fall within the zone of interest of a statute when *ultra vires* agency action is at issue:

> Appellants need not, however, show that their interests fall within the zones of interests of the constitutional and statutory powers invoked by the President in order to establish their standing to challenge the interdiction program as *ultra vires*. Otherwise, a meritorious litigant, injured by *ultra vires* action, would seldom have standing to sue since the litigants' interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest.

Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 812 n.14 (D.C. Cir. 1987). Here, the *Haitian Refugee* court was making the important point that Congress writes statutes which confer limited powers and grant narrow rights only partly for the benefit of those receiving the rights and powers. But when an agency acts illegally, the illegal action will impact persons beyond the intended class protected by the statute *precisely because* the agency is now acting outside of the statute, affecting persons and interests Congress never intended the statute to affect. In this regard, the "narrowness" of a statute's grant always serves the interest of all others *not* receiving the benefit of the statute. This is because a statute's limits ensures that the award of a benefit to one party does not harm another party more than intended. In the present case, while the primary parties within the "zone of interest" of 8 U.S.C. § 1101(a)(15)(F)(i) may be foreign students, when the government begins to ignore the text of that statute to grant even more benefits to foreign students than Congress intended, the "zone of interests" shifts towards those who are harmed by that unlawful expansion of the statute.

The *Haitian Refugee* court continues:

> It may be that a particular constitutional or **statutory provision was intended to**

> **protect persons like the litigant by limiting the authority conferred.** If so, the litigant's interest may be said to fall within the zone protected by the limitation.

Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 812 n.14 (D.C. Cir. 1987) (bold added). This statement of the rule is applicable to the present case. Congress intended to limit DHS' authority under Section 1101 to grants of visas for education. When DHS uses this statute to grant work visas, the "zone of interest" is in effect expanded to workers like those represented by plaintiff WashTech.

In another formulation, the "zone of interests" is broadened by *ultra vires* action because most plaintiffs have a cognizable interest in the rule of law when its absence injures them:

> Appellants argue that the principle of administrative law for which they contend necessarily assumes they fall within the zone of interests to be vindicated. If, as appellants argue, a rule that is retroactive in specific application is *ultra vires* and *void ab initio*, it can only be because administrative law, drawn from the APA and judicial decisions, views any such rule as **inherently offensive and that its offensiveness taints the entire existence of the rule and any application of it**."

Catholic Social Serv. v. Shalala, 12 F.3d 1123, 1126 (D.C. Cir. 1994). Under either formulation, plaintiff WashTech's members satisfy prudential standing. This explanation of how DHS' *ultra vires* action expands the zone of interests demonstrates "precisely why [WashTech's] injury… falls within the zone of interests," and therefore provides what was lacking in *Programmers Guild*, 338 Fed. Appx. at 243.

II. DHS' Abdication of Duty Gives Rise to Standing

"The power to regulate immigration is unquestionably... a federal power." *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1974 (2011). As such, the federal government has a high standard of responsibility and a fundamental obligation to ensure that the immigration laws are appropriately applied as Congress intended and enforced as required by statute. Failure to do so amounts to an abdication of duty. *See e.g. Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir.

1973) (finding a federal abdication of duty to enforce the civil rights laws). As in *ultra vires* actions, government abdication similarly broadens the relevant zone of interest, because nonenforcement of a statute necessarily affects a broader class of interests than Congress had in mind when it instructed enforcement.

The principle of abdication standing was illustrated by the recent decision in *Texas v. United States*, 2015 U.S. Dist. Lexis 18551, at *114 (S.D. TX 2015) ("Assuming that the concept of abdication standing will be recognized in this Circuit, this Court finds that this is a textbook example."). In that case, the court found that the federal government's total preemption in the area of immigration, combined with the failure of DHS to fulfill its responsibility to remove unlawfully present aliens, established a basis for abdication standing. *Texas*, 2015 U.S. Dist. Lexis at *98 ("[T]he [federal] Government claims total preemption in this area of the law. Thus, the first element of an abdication claim is established.").

The district court in *Texas* held that the plaintiffs had "abdication standing" because it was indisputable that DHS was abandoning its duty to enforce the law given its written pronouncements of non-enforcement:

> Because of this announced policy of nonenforcement, the Plaintiffs' claims are completely different from those based on mere ineffective enforcement. This is abdication by any meaningful measure.

Texas, 2015 U.S. Dist. Lexis at *100, fn 45. Accordingly, the plaintiffs easily satisfied "the second element necessary for abdication standing… [showing that] the Government has abandoned its duty to enforce the law." *Id.* at *101. *Amicus* avers the DHS regulations at issue in this case amount to an announced policy of non-enforcement of the terms of Section 1101 of the INA, and so are similarly tantamount to abdication.

Furthermore, the *Texas* holding is not limited to abdication standing for States as opposed to citizens' – in fact, quite the opposite. *Id.* at *136 ("The States **and their residents** are entitled to nothing less [than the enforcement of immigration laws]."), at *115, fn 48 ("[I]mmigration laws that are designed... to protect the States **and their citizens**."), at *132 ("The Court finds that the acts of Congress deeming these individuals removable were passed in part to protect the States **and their residents**.") (bold added). As further support for the concept of abdication standing for citizens, *Adams v. Richardson* is illustrative. 480 F.2d 1159 (D.C. Cir. 1973). In *Adams*, the plaintiffs asserting claims were "black students, citizens, and taxpayers." *Adams*, 480 F.2d at 1161. The plaintiffs in *Adams* alleged that the Department of Health, Education, and Welfare had adopted policies which essentially refused to enforce Title VI of Civil Rights Act of 1964. *Id.* The Court of Appeals rejected the government's argument that "the means of enforcement is a matter of absolute agency discretion...". *Id.* at 1162. The *Adams* court noted that the agency had "consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty," and therefore sided with the plaintiffs. *Id.* Accordingly, *Adams* illustrates that not only States which may satisfy the expanded "zone of interest" test *via* abdication standing, but also citizens who suffer direct injury as well – as in the present case. Accordingly, this case is distinguishable from the Third Circuit's decision in *Programmers Guild*, which never considered how abdication expands the relelvant zone of interests for standing. 338 Fed. Appx. 239.

Conclusion

WashTech's claims satisfy the requirements of prudential standing. *Amicus* respectfully requests that this Court so find and otherwise grant plaintiff's Cross-Motion for Summary Judgment.

Dated: April 6, 2015

Respectfully submitted,

s/ Chris Fedeli
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