NO. _____

In the
Supreme Court of the United States

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN M. MIANO
COUNSEL OF RECORD
CHRISTOPHER J. HAJEC
Immigration Reform Law Institute
25 Massachusetts Ave. NW
Suite 335
Washington, DC 20001
202-232-5590
jmiano@verizon.net

Counsel for Petitioner

May 2023

QUESTIONS PRESENTED

1. Are the statutory terms defining nonimmigrant visas in 8 U.S.C. § 1101(a)(15) mere threshold entry requirements that cease to apply once an alien is admitted or do they persist and dictate the terms of a nonimmigrant's stay in the United States?

2. When Congress has enacted a statutory scheme governing a class of aliens in the Immigration and Nationality Act, is the Department of Homeland Security's power to extend employment authorization to that class of aliens through regulation limited to implementing the terms of that statutory scheme?

PARTIES TO THE PROCEEDING

Petitioner is the Washington Alliance of Technology Workers, Local 37083 of the Communications Workers of America, AFL-CIO (Washtech). Petitioner was Appellant in the court of appeals.

Respondents are the U.S. Department of Homeland Security, Secretary of Homeland Security, U.S. Immigration and Customs Enforcement; Director of U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services; Director of U.S. Citizenship and Immigration Services.

Intervenor Respondents are the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner, Washington Alliance of Technology Workers, is a not-for-profit labor union with no shareholders.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

- *Wash. All. of Tech. Workers* v. *United States Dep't of Homeland Sec.*, No. 21-5028, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered October 4, 2022.
- *Wash. All. of Tech. Workers* v. *United States Dep't of Homeland Sec.*, No. 16-CV-1170, U.S. District Court for the District of Columbia. Judgments entered January 28, 2021 and April 19, 2017.
- *Wash. All. of Tech. Workers* v. *United States Dep't of Homeland Sec.,* No. 17-5110, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered June 8, 2018.
- *Wash. All. of Tech. Workers* v. *United States Dep't of Homeland Sec.*, No. 15-5239, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered May 13, 2016.
- *Wash. All. of Tech. Workers* v. *United States Dep't of Homeland Sec.*, No. 14-CV-529, U.S District Court for the District of Columbia. Judgment entered November 21, 2015.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Regulations:

Other Authorities:

Petitioner, Washington Alliance of Technology Workers, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 50 F.4th 164. The order denying rehearing en banc (Pet. App. 276a) is published at 58 F.4th 506. The district court's memorandum opinion denying Petitioner's motion for summary judgment (Pet. App. 88a) is published at 518 F. Supp. 3d 448. The opinion of the court of appeals reversing in part the district court's order dismissing the case for failure to state a claim upon which relief can be granted (Pet. App. 140a) is published at 892 F.3d 332. The district court's memorandum opinion dismissing the case for failure to state a claim upon which relief can be granted (Pet. App. 166a) is published at 249 F. Supp. 3d 524. The opinion of the court of appeals dismissing the appeal as moot and vacating the judgment of the district court (Pet. App. 226a) is published at 650 Fed. Appx. 13. The memorandum opinion granting in part and denying in part Petitioner's motion for summary judgment (Pet. App. 228a) is published at 156 F. Supp. 3d 123.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2022. Pet. App. 1a. A timely petition for rehearing was denied on February 1, 2023. Pet. App. 276a. Jurisdiction was invoked in the district court under 28 U.S.C. §§ 1331, 1346, and 1361. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The statutes and regulations at issue are reproduced in the appendix (Pet. App. 287a).

STATEMENT OF THE CASE

This case addresses the post-completion Optional Practical Training Program (OPT), created by the Department of Homeland Security (DHS) under the guise of student visas. 8 C.F.R. § 214.2(f)(10)(A)(ii)(3). The F-1 student visa authorizes the admission of aliens who seek to enter the United States "solely" to pursue a course of study at an accredited academic institution. 8 U.S.C. § 1101(a)(15)(F)(i). Yet OPT allows aliens to remain in the U.S. in student visa status for up to three and a half years after graduation to work or be unemployed. While entirely the creation of regulation, OPT is now the largest alien guestworker program in the immigration system. Petitioner brought this case under the Administrative Procedure Act, challenging DHS's authority to create such a massive foreign labor program without any directive from Congress. Petitioner argued in the courts below that (1) DHS lacks the authority to allow aliens to remain in student visa status after graduation because this extension directly conflicts with the statutory terms of the student visa; and (2) DHS lacks the authority to permit such nonstudents to work in student visa status. This litigation's Dickensian, 15-year procedural history stands in stark contrast to its complete lack of factual issues and the seemingly straightforward questions of law it presents.

1. Since the enactment of the Immigration and Nationality Act in 1952, the executive has published regulations permitting alien employment that were not authorized by statute. For example, *Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese* addressed

standing in a challenge to regulations that allowed alien bricklayers to work on B visitor visas. 761 F.2d 798 (D.C. Cir. 1985). Those regulations were later held to be in excess of agency authority. *Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985). Starting in 2015, DHS began publishing regulations authorizing alien employment under the claim that the definition of the term *unauthorized alien* in section 1324a(h)(3) confers on DHS the power to allow any class of aliens to work through regulation unless Congress explicitly prohibits them from working. Pet. App. 83a; Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015). Since then, the number of alien employment programs created through regulations has surged.

OPT is one example of an alien work program created through regulation that has no statutory basis. The OPT program was created in 1992 without notice and comment. Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992) (1992 OPT Rule) (Pet. App. 734a). OPT originally authorized all aliens in student visa status to remain in the United States and work for a year after graduation. Pet. App. 745a.

2. The use of foreign labor has become one of the most contentious issues in the computer industry as employers have used cheap, foreign workers on H-1B visas as a supply of college-educated workers to replace Americans. See *e.g.*, Julia Preston, *Toys 'R' Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas*, NY Times, Sept. 29, 2015. To protect American workers, the H-1B program (section

1101(a)(15)(H)(i)(b)) imposes annual quotas that limit the number of visas. 8 U.S.C. § 1184(g). So great is industry demand for such foreign labor that the quotas are usually reached each year. *E.g.*, 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, 18,946 (Apr. 8, 2008) (2008 OPT Rule) (Pet. App. 677a). In 2007, Microsoft Corporation concocted a scheme to circumvent the H-1B quotas protecting American workers using regulation. Pet. App. 748a–752a. Microsoft's plan was for DHS to increase the duration of OPT by 17 months (from a year to 29 months) so that OPT could serve as a substitute for H-1B visas. Pet. App. 749a–750a. Microsoft presented its plan to the DHS secretary at a dinner party, Pet. App. 748a, and requested that it be implemented as an interim rule. Pet. App. 750a. Thereafter, DHS worked in secret with industry lobbyists to craft regulations implementing Microsoft's scheme. 2008 OPT Rule, Administrative Record at 124–27, 130–34.

Just as Microsoft requested, DHS published the resulting 2008 OPT Rule as an interim rule without notice and comment. Pet. App. 677a & 702a. The publication of the rule was the first notice the public received that DHS was even considering such regulations. The 2008 OPT Rule contained two extensions to the original one-year OPT term. The first applied to all graduates and extended OPT from the time an H-1B petition was filed on behalf of the alien until a decision was made on that petition. Pet. App. 692a.

The second extension only applied to aliens with degrees in fields DHS listed as being STEM (science/technology/engineering/mathematics). This extension was for 17 months. Pet. App. 686a. There is no explanation in the record why this odd duration was chosen other than it was what Microsoft requested. Pet. App. 749a. Combined, the two extensions allowed nonimmigrants to work on student visas for up to 35 months after graduation. As a further means to increase the foreign labor supply, DHS also allowed unemployed alien graduates to remain in the U.S. under the OPT program so they could look for work. Pet. App. 701a.

DHS gave no educational rationale whatsoever for extending the duration of OPT employment. Instead, disagreeing with the policy judgment of Congress, DHS justified the 2008 OPT Rule on the ground that the quotas on H-1B visas, which Congress enacted to protect American workers, harmed businesses. Pet. App. 684a–689a. The only purpose of the 2008 OPT Rule was to frustrate the protections for American workers by trumping the quotas in the H-1B statutes through regulation. *Ibid.* Since the 2008 OPT Rule expanded the work period to a length similar to that of a guestworker visa, the OPT program has grown to surpass H-1B as the largest guestworker program in the entire immigration system. Neil Ruiz & Abby Budiman, *Number of Foreign College Students Staying and Working in the U.S. After Graduation Surges, Pew Research Center*, May 18, 2018, p. 7.

3. Petitioner, Washington Alliance of Technology Workers (Washtech), filed suit in the U.S. District Court for the District of Columbia on March 28, 2014.

Petitioner argued that the 2008 OPT Rule was made unlawfully without notice and comment; that the OPT program was unlawful because DHS had no authority to allow aliens to remain in the United States in student visa status after they had completed their course of study (graduated) and were no longer students; and that DHS had no authority to allow such non-students to work in student visa status. In deciding DHS's motion to dismiss, the district court held that Petitioner had standing to challenge the 2008 OPT Rule. *Wash. All. Tech. Workers.* v. *U.S. Dep't of Homeland Sec.,* 74 F. Supp. 3d 247 (D.D.C. 2014) (*Washtech I*). On summary judgment, the district court held that the 2008 OPT Rule was made unlawfully without notice and comment. The district court also held, however, that the rule was within DHS's authority. *Wash. All. Tech. Workers.* v. *U.S. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 140 (D.D.C. 2015) (*Washtech II*) (Pet. App. 228a). The district court brushed aside the direct conflict between the student visa statute's limitation to those solely pursuing a course of study[1] at a school and OPT's authorization of work outside of a course of study in industry by adopting the never-before-seen interpretation that the terms of the student visa statute merely provided entry requirements that DHS was free to disregard once an alien enters the United States. Pet. App. 254a. The district court could cite no judicial opinions in support of this new

[1] DHS regulations define a *course of study* as education taking place at a school. 8 C.F.R. § 214.2(f)(6). This definition has never been in dispute in this case because OPT is explicitly not part of a course of study. 8 C.F.R. §§ 214.2(f)(5)(i), (10)(ii)(A)(3)

interpretation because, since the enactment of the Immigration and Nationality Act in 1952, every opinion of this Court, the courts of appeals, and other district courts addressing the scope of the student visa statute had consistently interpreted the visa terms as applying to an alien's entire duration of stay. *E.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 665–66 (1978). This reinterpretation of the statute allowed the district court to erase its conflict with OPT, and so to find that the OPT program was within DHS's authority. Pet. App. 266a. The district court vacated the 2008 OPT Rule for failure to provide notice and comment but stayed vacatur so that this ruling would have no effect, and directed DHS to republish the rule with after-the-fact notice and comment. Pet. App. 275a.

4. Petitioner appealed the *Washtech II* decision to the U.S. Court of Appeals for the District of Columbia Circuit. While the appeal was pending, DHS promulgated its replacement to the 2008 OPT Rule, Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students 81 Fed. Reg. 13,040 (Mar. 11, 2016) (2016 OPT Rule) (Pet. App. 290a). The 2016 OPT rule reenacted or replaced all of the OPT provisions of the previous OPT Rules. Pet. App. 625a–647a. The 2016 OPT Rule removed all of its predecessor's claims that the purpose of expanding OPT was to provide labor to industry and replaced them with a pretextual educational justification. Pet. App. 296a. It also replaced the Microsoft-dictated STEM extension duration of 17 months with a round 24 months. Pet. App. 290a. The 2016 OPT Rule (unlike the 2008 OPT Rule) was promulgated under DHS's

claim that section 1324a(h)(3) established the agency's dual authority with Congress to permit alien employment, a claim that DHS had begun to make the previous year in regulations authorizing alien employment. Pet. App. 314a, 368a. The D.C. Circuit held that *Washtech II* was moot because of the new rule and vacated the decision. *Wash. All. of Tech Workers* v. *U.S. Dep't of Homeland Sec.*, 650 F. App'x 13 (D.C. Cir., 2018) (*Washtech II Appeal*) (Pet. App. 226a).

5. Petitioner promptly filed another complaint in the D.C. District Court that alleged that the 2016 OPT rule was in excess of DHS's authority for the very same reasons the 2008 OPT Rule was. This time, the district court dismissed the case under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *Wash. All. of Tech Workers* v. *U.S. Dep't of Homeland Sec.*, 249 F. Supp. 3d 524 (D.D.C. 2017) (*Washtech III*) (Pet. App. 166a). Petitioner again appealed and the D.C. Circuit reversed. *Wash. All. of Tech Workers* v. *U.S. Dep't of Homeland Sec.*, 892 F.3d 332 (D.C. Cir. 2018) (*Washtech III Appeal*) (Pet. App. 140a).

On January 28, 2021, the district court issued an opinion on summary judgment. *Wash. All. of Tech. Workers* v. *United States Dep't of Homeland Sec.*, 518 F. Supp. 3d 448 (D.D.C. 2021) (*Washtech IV*) (Pet. App. 88a). The *Washtech IV* opinion follows the reasoning of the vacated *Washtech II* opinion, with much of the text quoting from the previous opinion. The district court circumvented the direct conflict between OPT and the student visa statute by readopting the interpretation that the statutory definition of the F-1 student visa merely set forth the conditions for entry into the United States and holding that DHS was free

to ignore those statutory terms once an alien entered the country. Pet. App. 119a–120a. Again, the district court did not mention any of the conflicting precedent or other judicial authority that had universally interpreted the terms of the student visa statute as applying for the alien's entire stay. *E.g.*, *Akbarin* v. *Immigr. & Naturalization Serv.*, 669 F.2d 839, 840 (1st Cir. 1982)

The *Washtech IV* opinion did not address DHS's claim in the 2016 OPT Rule of having dual authority with Congress to authorize alien employment through regulation. The 2008 OPT Rule was published before DHS started issuing work authorization regulations under that claim in 2015. Consequently, the *Washtech II* opinion never addressed this issue. By tracking the reasoning and wording of *Washtech II*, the *Washtech IV* opinion skipped this issue as well. See Pet. App. 61a n. 1 (Henderson, J. dissenting).

6. a. Petitioner appealed again. *Wash. All. of Tech. Workers* v. *United States Dep't of Homeland Sec.*, 50 F.4th 164 (D.C. Cir. 2022) (*Washtech IV Appeal*) (Pet. App. 1a). A divided panel of the D.C. Circuit affirmed while expanding the scope of the district court decision. The majority held that the nonimmigrant visa statutes in general (section 1101(a)(15)) only specified "threshold entry criteria" that DHS can disregard once an alien enters the United States. Pet. App. 57a; Pet. App. 287a (Rao, J., dissenting from denial of reh'g en banc). The majority reinterpreted the Immigration and Nationality Act as creating a two-step process for governing nonimmigrants. Pet. App. 7a. First, the nonimmigrant statutes define entry criteria that cease to have effect once the alien enters.

Ibid. Second, section 1184(a) confers on DHS broad authority to govern nonimmigrants post-admission through regulation. *Ibid*.; Pet. App. 283a (Rao, J., dissenting from denial of reh'g en banc).

The majority performed an analysis under the two-step process announced in *Chevron, U.S.A.* v. *Nat. Res. Def. Council, Inc.* to evaluate whether OPT was within DHS's authority. 467 U.S. 837 (1984). Pet. App. 56a–57a. Petitioner had argued that Congress had directly addressed the issue of whether work after graduation was permitted by restricting student visas to those "solely" pursuing a course of study at an academic institution, and therefore OPT should fail at *Chevron* step one. Pet. App. 66a–67a. The majority avoided addressing the facial conflict between the statute and the 2016 OPT Rule by applying its holding that the nonimmigrant visa statutes provide mere "threshold entry criteria" that do not apply after an alien enters the United States. Pet. App. 56a–57a. That interpretation left no statute governing student visa terms after admission, so the analysis automatically skipped to *Chevron* step two where the majority held OPT was reasonably related to the student visa. Pet. App. 58a. Like the district court, the majority did not address any of the authority conflicting with its entry-criteria-only interpretation. See Pet. App. 71a (Henderson, J., concurring in part and dissenting in part); Pet. App. 284a (Rao, J., dissenting from denial of reh'g). The majority also gave no explanation why DHS should receive deference in determining educational and labor needs when such expertise lies in other agencies. See *West Virginia* v. *Env't Prot. Agency*, 142 S. Ct. 2587, 2612–13 (2022).

The majority made two additional holdings related to alien employment that conferred vast authority on DHS. First, an "employment authorization need not be specifically conferred by statute; it can also be granted by regulation." Pet. App. 55a. Second, DHS is free to extend employment to any class of nonimmigrants as long as the employment is "reasonably related" to the visa. Pet. App. 4a.

The majority also held that hearsay and unsworn statements are admissible if they are admitted through an amicus brief. Pet. App. 59a. The majority then cited such otherwise inadmissible evidence as authority for its own decision in support of its *Chevron* step two analysis that found DHS did not act arbitrarily and capriciously in the 2016 OPT Rule. Pet. App. 57a.

b. Judge Henderson concurred with the majority that Petitioner had standing but dissented on the merits. Pet. App. 60. (Henderson, J. concurring in part and dissenting in part). Judge Henderson's dissent made a detailed statutory analysis of the student visa statute. Pet. App. at 69a–81a. The majority's entry-criteria-only interpretation of the student visa statute was a "tortured interpretation" amounting to "verbicide." Pet. App. 73a–74a. Furthermore, the entry-criteria-only interpretation was contrary to precedent. Pet. App. 72a. Applying the student visa statute at *Chevron* step one, the statute was unambiguous in that *student* did not encompass "post-Graduation *employment*." Pet. App. 75a. Judge Henderson concluded the student visa statute "cannot reasonably be read to include post-completion OPT." Pet. App. 74a.

7. Petitioner filed a timely petition for rehearing *en banc* that was denied. Pet. App. 276a. Judge Henderson dissented from that petition denial and incorporated her *Washtech IV* dissent by reference. Pet. App. 279a. Judge Rao wrote a separate dissent with which Judge Henderson joined. Pet. App. 280a (Rao, J., dissenting from denial of reh'g en banc).

Judge Rao observed that this case presents "a question of exceptional importance" and "has tremendous practical consequences for who may stay and work in the United States." *Ibid.* "[T]here is not even a plausible textual basis for DHS to allow student visa holders to remain in the country and work long after their student status has lapsed." Pet. App. 283a. "By replacing Congress's careful distinctions with unrestricted Executive Branch discretion, the panel muddles our immigration law and opens up a split with our sister circuits." Pet. App. 280a.

Judge Rao addressed the question of whether the statutory visa terms are mere entry requirements by noting that "the Supreme Court and other circuits have consistently held nonimmigrant visa holders must satisfy the statutory criteria both at entry and during their presence in the United States." Pet. App. 285a. The majority opinion "rests on a fundamental misreading of the statute." Pet. App. 283a. "In holding that the nonimmigrant visa requirements are merely conditions of entry, the court grants the Department of Homeland Security [] virtually unchecked authority to extend the terms of an alien's stay in the United States." Pet. App. 280a.

Judge Rao found the majority's holding that the Immigration and Nationality Act contained a "broad

delegation to DHS to confer additional work visas through regulation" was incompatible with the political judgments made in the Act. Pet. App. 282a. Such "'extraordinary grants of regulatory authority' require not 'a merely plausible textual basis for the agency action' but 'clear congressional authorization.'" Pet. App. 282a–283a (quoting *West Virginia* v. *Env't Prot. Agency*, 142 S. Ct. 2587, 2609 (2022)). She also noted that "Congress has enumerated specific pathways for aliens to work." Pet. App. 282a. Yet the majority's creation of a "'reasonably related' to the particular visa category" standard allows DHS to make a regulatory "end run" around the protections for American workers. Pet. App. 281a–282a.

REASONS FOR GRANTING THE PETITION

1. This case presents "a question of exceptional importance" that unmistakably warrants this Court's review.[2] Pet. App. 279a (Rao, J., dissenting from denial of reh'g en banc). By restricting the statutory nonimmigrant visa terms to entry only and allowing DHS to permit employment on any visa, the court of appeals decision fundamentally restructures the entire system of nonimmigrant visas, Pet. App. 280a, and undermines the system of protections for American workers Congress put in place. Pet. App. 282a. Using that interpretation, the court of appeals took *Chevron* deference into the realm of absurdity by excluding the

[2] Counsel for Petitioner has been invited to testify before the Senate Judiciary Committee *twice* on this case, further illustrating its importance.

governing statute from the analysis to manufacture ambiguity where none exists. *Ibid.* The ultimate effect of the court of appeals decision is that its application of *Chevron* transforms the system of nonimmigrant visas from being a creation of Congress through statute into a system of regulation defined by the bureaucracy. The court of appeals decision affects not only this case but also the function of nonimmigrant visas for the entire nation.

2. To reach its outcome, the D.C. Circuit decision created a circuit split. Before the decisions in the courts below, the federal courts had been unanimous in interpreting the statutory requirements for nonimmigrant visas as applying to an alien's entire authorized stay in the United States. By holding that nonimmigrant visa requirements only apply at entry and that DHS is free to ignore those requirements once a nonimmigrant enters the country, the court of appeals created an 11–1 circuit split with all the numbered circuits. Pet. App. 280a (Rao, J., dissenting from denial of reh'g en banc).

3. The court of appeals decision also conflicts with precedent of this Court. Just last year, this Court, reversing a D.C. Circuit decision, reaffirmed in *West Virginia* v. *Env't Prot. Agency* that it "'expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.'" 142 S. Ct. 2587, 2605 (2022) (quoting *Utility Air Regulatory Group* v. *Env't Prot. Agency*, 573 U.S. 302, 324 (2014)). Yet just twelve weeks after this Court issued its opinion, the same court of appeals held, once again, that Congress had implicitly conferred vast authority on an agency to create a major program. Pet. App. 4a.

The court of appeals decision also conflicts with additional precedent of this Court that consistently interprets the statutory terms of nonimmigrant visas as applying to an alien's entire stay. *E.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 666 (1978).

For these reasons, the decision of the court of appeals decision manifestly warrants this Court's review.

I. The D.C. Circuit decision created a circuit split on the scope of statutory nonimmigrant visa terms.

1. The previous universal judicial understanding[3] of the nonimmigrant visa system was that (1) Congress defined visa statuses and their requirements in terms of entry in section 1101(a)(15); (2) DHS implemented regulations setting the conditions of lawful entry (admission) for the visa categories pursuant to section 1184(a); and (3) maintaining lawful status in a visa category required conforming to the terms of lawful entry—both statutory and regulatory, 8 U.S.C. §§ 1184(a)(1), 1227(a)(1). *E.g.*, *Touray* v. *United States AG*, 546 F. App'x 907, 912 (11th Cir. 2013); Pet. App. 285a (Rao, J, dissenting from denial of reh'g). The decision below "turns [] that scheme on its head" by restricting the statutory visa terms to entry only. Pet. App. 280a. Under the court of appeals decision, (1) Congress defines entry criteria for visas; (2) after entry, the statutory requirements no longer apply and

[3] Ignoring for simplicity the special cases of unlawful entry and entry without admission. See *Sanchez* v. *Mayorkas*, 141 S. Ct. 1809, 1814–15 (2021)

regulation alone dictates the conditions of an alien's stay. Pet. App. 56a–57a; Pet. App. 283a (Rao, J., dissenting from denial of reh'g en banc).

The D.C. Circuit decision thus creates a circuit split on the scope of statutory nonimmigrant visa terms. Pet. App. 279g (Rao, J., dissenting from denial of reh'g en banc). From the enactment of the Immigration and Nationality Act in 1952 until now there had been total unanimity among this Court, the courts of appeals, and the district courts that the student visa statute requirements apply for an alien's entire stay.[4] Pet. App. 285a (Rao, J., dissenting from denial of reh'g en banc); *e.g., Toll* v. *Moreno*, 458 U.S. 1, 14 n. 20 (1982); *Elkins* v. *Moreno*, 435 U.S. 647, 665–66 (1978); *Akbarin* v. *Immigr. & Naturalization Serv.*, 669 F.2d 839, 840 (1st Cir. 1982); *Lok* v. *Immigr. & Naturalization Serv.*, 681 F.2d 107, 109 & n. 3 (2d Cir. 1982); *Morel* v. *Immigr. & Naturalization Serv.*, 90 F.3d 833, 838 (3d Cir. 1996); *United States* v. *Igbatayo*, 764 F.2d 1039 (5th Cir. 1985); *Khano* v. *Immigr. & Naturalization Serv.*, 999 F.2d 1203, 1207 & n. 2 (7th Cir. 1993); *Olaniyan* v. *Dist. Dir., Immigr. & Naturalization Serv.*, 796 F.2d 373, 374 (10th Cir. 1986); *Touray* v. *United States AG*, 546 F. App'x 907, 912 (11th Cir.

[4] With the D.C. Circuit's expansion of the entry-criteria-only interpretation from student visas to nonimmigrant visas in general, the 7–1 split becomes an 11–1 split with all the numbered circuits. *E.g.*, *Moreno* v. *Univ. of Md.*, 645 F.2d 217 (4th Cir. 1981), aff'd, 458 U.S. 1; *Gazeli* v. *Session*, 856 F.3d 1101, 1106 (6th Cir. 2017); *Birdsong* v. *Holder*, 641 F.3d 957, 958 (8th Cir. 2011); *Von Kennel Gaudin* v. *Remis*, 379 F.3d 631, 637 (9th Cir. 2004)

2013). In fact, the interpretation that the statutory terms of nonimmigrant visas apply to an alien's entire stay had never before been a matter of dispute.

The only judicial interpretation the court of appeals cited for this radical reinvention of the immigration system is *Rogers* v. *Larson*, 563 F.2d 617, 622–23 (3d Cir. 1977). Pet. App. 6a. In *Rogers*, the Third Circuit observed that the one restriction in the specific H-2 visa provision (repealed in the Immigration Act of 1990) did not apply after the alien entered the country, so it deferred to regulation after entry. *Rogers* at 563 F.2d at 622–23. *Rogers* did not hold that nonimmigrant visas in general only specified entry requirements. Pet. App. 285a n. 2 (Rao, J., dissenting from denial of reh'g en banc). Furthermore, not even the Third Circuit interprets nonimmigrant visa definitions as mere entry criteria. Instead, it applies the statutory terms to an alien's entire stay. *E.g.*, *Graham* v. *Immigr. & Naturalization Serv.*, 998 F.2d 194, 196 (3d Cir. 1993), *Jie Fang* v. *Dir. United States Immigr.& Customs Enf't*, 935 F.3d 172, 175 & n. 7 (3d Cir. 2019); *Xu Feng* v. *Univ. of Del.*, 833 F. App'x 970, 971 (3d Cir. 2021). The circuit split on this question presented puts the immigration system in an incoherent state, Pet. App. 280a–281a. (Rao, J., dissenting from denial of reh'g en banc), and thus should be resolved by this Court.

2. The decision below also creates tension with another circuit on the question of whether DHS possesses a general power over alien employment that need not operate through the implementation or interpretation of specific statutes. In 2015, DHS began publishing a series of regulations authorizing alien

employment under the claim that the clause "or by the Attorney General" in section 1324a(h)(3) (Pet. App. 289a) confers or recognizes the agency's dual authority with Congress to permit alien employment through regulation. *E.g.*, Pet. App. 83a, 314a. The Fifth Circuit rejected the claim that section 1324a recognized vast agency power to authorize alien employment. *Texas* v. *United States*, 809 F.3d 134, 182–83 & n. 185 & n. 186 (5th Cir. 2015), aff'd by an equally divided court, 579 U.S. 547 (2016).

While litigation on DHS's claim of dual authority over alien employment continues to grow, neither its source nor its scope has been firmly established. See Pet. App. 84a, 87a (Henderson, J. dissenting). In *Texas* v. *United States*, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238), the government argued before the Fifth Circuit that section 1324a(h)(3) was the source of its authority to grant employment to any class of aliens it chooses. Br. for Appellants, ECF No. 00512986669 at 8–9; Reply Br. for Appellants, ECF No. 00513047024 at 13 & 22–23. When the case moved to this Court, the government had a brand-new story: "[R]espondents focus on the wrong provision. Section 1324a(h)(3) did not create the Secretary's authority to authorize work; that authority already existed in Section 1103(a). . . ." Br. for the Pet'rs at 63, *United States* v. *Texas*, 579 U.S. 547 (2016) (No. 15-674).

The confusion over the source of authority repeats in the D.C. Circuit decision but winds up at a different provision. The 2016 OPT Rule itself asserts that section 1324a(h)(3) is the source of its authority to authorize alien employment. Pet. App. 314a. Following DHS's cue, Petitioner showed the court of appeals that

section 1324a(h)(3) could not confer such vast authority on DHS because that provision, a term definition limited to its own section, had no intelligible principle of how such employment power should be used. Pet. App. 54a–55a. The court of appeals answered that argument by holding that "Washtech is right that section 1324a(h)(3) is not the source of the relevant regulatory authority." Pet. App. 55a. Rather, section 1324a(h)(3) only "acknowledges" or "recognizes" that DHS has dual authority with Congress to permit alien employment. Pet. App. 51a, 54a–55a. The court of appeals decision identified a different provision—8 U.S.C. § 1184(a)—as the source of authority for DHS to permit employment. Pet. App. 51a; contra *West Virginia* v. *Env't Prot. Agency* 142 S. Ct. 2587, 2610 (2022). Like section 1103(a), section 1184(a) does not mention employment.

3. The breadth of DHS's employment authority remains unclear also. See Pet. App. 87a (Henderson, J. dissenting). This case addresses employment on a nonimmigrant visa. Pet. App. 4a. The decision below, however, holds that "section 1324a(h)(3) expressly acknowledges that employment authorization need not be specifically conferred by statute; it can also be granted by regulation," without limiting that power to nonimmigrant visas. Pet. App. 55a; see also Pet. App. 83a. Indeed, DHS's post-2015 regulations include work authorizations for aliens other than nonimmigrants. For example, the International Entrepreneur Rule created yet another alien employment program under the claim that section 1324a(h)(3) recognizes DHS has the authority to allow any class of alien to work through regulation. 82 Fed. Reg. 5,238, 5,239

(Jan. 17, 2017). That rule allows aliens to enter the United States without admission on parole (that is, without a visa) and work. *Ibid*. While the difference in the D.C. Circuit's and the Fifth Circuit's approaches may not amount to a circuit split, those approaches augur different results in cases challenging programs in which DHS authorizes aliens to work pursuant to a claimed general power to do so, rather than through regulations implementing or interpreting a specific statute.

II. The questions presented are exceptionally important.

1. By limiting the statutory restrictions on nonimmigrant visas to entry, the court below has removed any barrier to stop DHS from continuing to dismantle the protections for American workers in the immigration system. Since the enactment of the Immigration and Nationality Act in 1952, the administering agencies have permitted alien employment through regulations not authorized by Congress. American workers have relied on the courts to restrain such administrative overreaches. *E.g.*, *Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985). Prior to 2015, the claims of statutory authority for such regulations were made and argued under the terms of the statute for the visa at issue. *E.g.*, *Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese*, 616 F. Supp. 1387, 1398–99 (N.D. Cal. 1985); *Int'l Longshoremen's & Warehousemen's Union* v. *Meese*, 891 F.2d 1374, 1380–84 (9th Cir. 1989). Under the court of appeals decision, the statutory restrictions

that the courts had previously recognized as protecting American workers, no longer apply. Pet. App. 57a.

2. The D.C. Circuit's fundamental restructuring of the immigration system makes the questions presented ones "of exceptional importance." Pet. App. 279a (Rao, J., dissenting from denial of reh'g en banc). The decision claims to restrict the statutory terms of nonimmigrant visas to "threshold entry criteria," but the decision actually nullifies the student and other visa statutes. See Pet. App. 57a. Consider the simple case of an alien admitted to the United States on a nonimmigrant visa other than a student visa (such as a B visitor visa). While in lawful status, that alien can change status to a student visa. 8 U.S.C. §1258. Under the court of appeals decision's brand-new, threshold-entry-criteria-only interpretation, the student visa statute never applies to the student visa in that situation because the alien *entered* on a different visa. The decision below erases the distinctions among visas the moment an alien enters the United States. Pet. App. 281a–282a (Rao, J. dissenting from denial of reh'g en banc).

In the more general case, the entry-criteria-only interpretation of the student visa statute creates an unmistakable conflict. On one hand, if the student visa statute's terms actually functioned at entry, DHS would deny entry (admission) to anyone seeking to participate in OPT because of the student visa statute's limitation to those solely pursuing a course of study at an academic institution precludes work or unemployment after graduation. 8 U.S.C. § 1101(a)(15)(F)(i). On the other hand, the courts below held it is within DHS's authority to offer OPT even

though DHS is prohibited from admitting aliens who seek to participate in OPT. Pet. App. 4a–5a. Clearly, DHS does not even attempt to exclude aliens who seek to participate in OPT because the agency uses OPT to attract foreign students so they can supply labor to industry. Pet. App. 305a, 308a, 325a, 327a, 330a, 337a, 340a–341a, 356a, 392a, 406a, 460a, 495a, 561a, 590a, 594a, 596a, 616a, 703a, 707a, 716a. Under the holdings of the courts below, the requirements of the student visa statute are *never* applied. Calling the statutory visa terms mere "threshold entry criteria" is a façade for totally nullifying the statute. Pet. App. 57a.

The court of appeals decision's application of *Chevron* illustrates how its statutory interpretation has the effect of transferring all governing power over student and other nonimmigrant visas from Congress to DHS. Pet. App. 56a–57a. OPT should not survive a *Chevron* step one analysis because "someone who legally entered the United States on a student visa, but stayed in the country long past graduation" would not be in "lawful status." *Sanchez* v. *Mayorkas*, 141 S. Ct. 1809, 1813 (2021); 8 U.S.C. § 1101(a)(15)(F)(i); Pet. App. 283g (Rao, J., dissenting from denial of reh'g en banc). The court of appeals did not even attempt to reconcile the conflict between OPT and the student visa statute. Pet. App. 57a. Instead, the majority applied its entry-criteria-only interpretation, leaving no statute governing student visa terms, and so the court skipped to *Chevron* step two. *Ibid*. The decision below demonstrates that, under its entry-criteria-only interpretation, any challenge to DHS's authority over student and other nonimmigrant visas *starts* at *Chevron* step two. Thus, the D.C. Circuit decision presents *Chevron*

deference running amok from two directions. On one side, the decision treats Congress's restrictions on the agency at their minimum—to the point of complete nullification. On the other side, the decision "grants [DHS] virtually unchecked authority" from a provision that does not even mention the power the agency claims. Pet. App. 279a (Rao, J., dissenting from denial of reh'g en banc). This form of *Chevron* application produces the absurdly overbroad interpretation that unemployed aliens who have not attended school in years are called *students*. Cf. Pet. App. 73a (Henderson, J., dissenting).

Comparing precedent, one can see the path the court below followed to take *Chevron* off the rails. *N.Y. Stock Exch. LLC* v. *SEC* explains (using the authority the decision cited, Pet. App. 26a) how the D.C. Circuit applies a "reasonably related" standard to an agency's empowering provision at *Chevron* step two *after* an agency action has been found to be within its delegated authority at step one. 962 F.3d 541, 556 (D.C. Cir. 2020). Here, the court below nullified the restrictions in the statute delegating the authority to DHS to admit foreign students using its entry-criteria-only holding. Pet. App. 56a–57a. Then it used the empowering provisions (sections 1103(a) and 1184(a)) to determine both the scope of DHS's delegated authority and the reasonableness of its exercise of that delegated authority. Pet. App. 26a–27a.

3. The court of appeals decision has far-reaching consequences for working Americans. The Immigration and Nationality Act created a comprehensive scheme for protecting American workers. H.R. Rep. No. 82-1365 at 50–51 (1952); S. Rep. No. 82-1137 at 11

(1952). Indeed, protecting American workers is a primary purpose of the immigration system. *Immigr. & Naturalization Serv.*, v. *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 194 (1991). The court of appeals decision discards this system by allowing DHS to negate any protections Congress puts in place for American workers by permitting employment on any nonimmigrant visa through regulation—as DHS purposefully did with OPT. Pet. App. 682a–685a; Pet. App. 282g (Rao, J., dissenting from denial of reh'g en banc). There is no distinction between a work visa and a non-work visa when DHS can permit work on any visa through regulation. Further demonstrating the threat to American workers, the amorphous "reasonably related" standard immediately became *anything goes* in practice. The H-4 visa permits dependents of H guestworkers to "accompany[]" or "follow[] to join" the principal alien. 8 U.S.C. § 1101(a)(15)(H). In *Save Jobs USA* v. *Dep't of Homeland Sec.*, a regulation authorizing unrestricted employment on H-4 visas satisfied the "reasonably related" standard of *Washtech IV Appeal* simply because DHS "explain[ed] why it had decided to authorize employment for H-4 spouses." No. 15-CV-615, slip op. at 13 (D.D.C. Mar. 28, 2023).

4. Weighty constitutional issues flow from the decisions of the courts below. Is America a democracy where major programs are created by a Congress that has to answer to the people—or is America an aristocracy where lobbyists and bureaucrats create major programs in secret over dinner parties? Pet. App. 747a–753a. While the courts below have facilitated the latter form of government, this Court endorses the former. "[T]he Constitution is neither silent nor

equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States. . . .'" *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587–88 (1952). Furthermore, "[t]he lawmaking function . . . may not be conveyed to another branch or entity." *Loving* v. *United States*, 517 U.S. 748, 758 (1996). The precedent of this Court stands in stark contrast to the court of appeals decision that recognizes a system where both Congress and DHS can legislate to cross purposes in the same area so that DHS can trump statutes through regulation. Cf. Pet. App. 282a (Rao, J., dissenting from denial of reh'g en banc).

The court of appeals opinion disregards the longstanding prohibition against finding elephants in mouseholes under the major questions doctrine. *Whitman* v. *American Trucking Association*, 531 U.S. 457, 468 (2001); *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022); *Ala. Ass'n of Realtors* v. *HHS*, 141 S. Ct. 2485, 2489 (2021); *Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Just last year, this court reaffirmed in *West Virginia* v. *Env't Prot. Agency* that Congress does not confer vast power on agencies implicitly through ancillary provisions. 142 S. Ct. 2587, 2610 (2022). In such cases, the agency "must point to 'clear congressional authorization' for the power it claims." *Id.* at 2609 (quoting *Util. Air Regulatory Grp.* v. *Env't Prot. Agency*, 573 U.S. 302, 324 (2014)). At issue here is the largest alien employment program in the country, yet the court of appeals invoked a provision (section 1184(a)), that does not even mention employment,

as the source of authority for this program. Pet. App. 55a. It is notable that the majority did not address *West Virginia* while the dissent did. Pet. App. 86a.

The authority problems for OPT can also be viewed from the perspective of the nondelegation doctrine. That doctrine prohibits the delegation of power unless "*Congress* 'shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.'" *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989) (emphasis added) (quoting *J. W. Hampton, Jr., & Co.* v. *United State*s, 276 U.S. 394, 406 (1928)). The court of appeals decision holds that "[a]s Congress itself has *recognized*, the Secretary's statutory authority to set the 'conditions' of nonimmigrants' stay in the United States includes the power to authorize employment *reasonably related to the nonimmigrant visa class*." Pet. App. 4a (emphasis added). This holding has two key interpretive flaws. First, the court of appeals decision invokes section 1184(a) as the source of DHS's independent authority to permit alien employment. Pet. App. 51a. That provision's only apparent intelligible principle is that DHS ought to "insure" that a nonimmigrant "maintain[s] the status under which he was admitted, or [] maintain[s] any status subsequently acquired." 8 U.S.C. § 1184(a)(1). Yet the court of appeals decision holds that those statuses are mere "threshold entry criteria" that do not apply after entry. Pet. App. 57a. That leaves no statute to provide an intelligible principle to guide *any* regulations (let alone employment regulations) governing nonimmigrants pursuant to section 1184(a)(1) after aliens

enter the United States. Second, the only guiding principle on alien employment through regulation the court of appeals decision recognizes is that it must be "reasonably related to the nonimmigrant visa class." Pet. App. 4. That limitation, however, does not appear anywhere in the Immigration and Nationality Act but is entirely a judicially-created standard.

The court of appeals decision's delegation to DHS of authority to allow any reasonably-related employment on a nonimmigrant visa in turn raises yet another constitutional issue. Previously, "an agency literally has no power to act . . . unless and until *Congress* confers power upon it." *City of Arlington* v. *Fed. Commc'n Comm'n*, 569 U.S. 290, 317 (2013) (quoting *La. Pub. Serv. Comm'n* v. *Fed. Commc'n Comm'n*, 476 U.S. 355, 374 (1986) (emphasis added). Nonetheless, here it was the judiciary branch—not Congress—that conferred on DHS the power to permit alien employment through regulation with the restriction that such employment must be "reasonably related" to the visa class. Pet. App. 4a.

The questions presented here "are weighty and have important consequences." Pet. App. 286a (Rao, J., dissenting from denial of reh'g en banc). Members of this Court have raised concerns over whether *Chevron* deference violates the separation of powers. See, *e.g.*, *City of Arlington* v. *Fed. Commc'n Comm'n*, 569 U.S. 290, 312–28 (2013) (Roberts, C.J., dissenting); *Cuozzo Speed Techs., LLC* v. *Lee*, 579 U.S. 261, 286 (2016) (Thomas, J., concurring); *Buffington* v. *McDonough*, 143 S. Ct. 14 (2022) (Gorsuch, J., dissenting from denial of certiorari). The indiscriminate application of *Chevron* here, where the courts below nullified the

governing statute to manufacture ambiguity where none exists, and the complete disregard of this Court's recent guidance in *West Virginia,* should elevate those *concerns* to *alarms*. The court of appeals decision's creation of *shared legislative power* between Congress and DHS, where both can define classes of aliens eligible for employment to cross purposes, can only be viewed as a momentous violation of the constitutional separation of powers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN M. MIANO
Counsel of Record
CHRISTOPHER J. HAJEC
Immigration Reform
Law Institute
25 Massachusetts Ave. NW
Suite 335
Washington, DC 20001
202-232-5590
jmiano@verizon.net

Counsel for Petitioner

May 2023