No. 22-1071

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

BRIEF OF KANSAS AND 10 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The States of Kansas, Alabama, Idaho, Indiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Tennessee, and Virginia respectfully submit this brief as *amici curiae* in support of Petitioner.[1]

The federal government's power over immigration "does not diminish the importance of immigration policy to the States." *Arizona v. United States*, 567 U.S. 387, 397 (2012). But States generally must rely on Congress to represent their interests in that area. And so they have a stake in ensuring that the Executive Branch's immigration policy complies with the statutes Congress enacts.

The D.C. Circuit upheld a Department of Homeland Security (DHS) regulation that is fundamentally at odds with the governing statutory scheme. That regulation, the Optional Practical Training (OPT) Rule, allows F-1 student visa holders to remain in the country and work for up to thirty-six months after the completion of their studies, despite the fact that F-1 visas are restricted to aliens entering the United States "solely for the purpose of pursuing [a full] course of study" at an academic institution. 8 U.S.C. § 1101(a)(15)(F)(i). The OPT Rule harms the citizens of *amici* States, who must now compete with F-1 visa holders for jobs.

Amici States are also concerned with the broader ramifications of the D.C. Circuit's decision. By interpreting § 1101(a)(15) as merely imposing entry re-

[1] *Amici* timely notified counsel of record of their intent to file this brief. *See* Supreme Court Rule 37.2

quirements, which DHS is free to disregard after aliens enter the country, the decision opens the door to a massive regulatory expansion of the precise nonimmigrant visa categories prescribed by Congress.

SUMMARY OF THE ARGUMENT

The OPT Rule conflicts with the text and structure of the Immigration and Nationality Act (INA). The INA provides that an F-1 nonimmigrant visa is available to an alien "who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and *solely* for the purpose of pursuing such a course of study" at an academic institution or accredited language training program. § 1101(a)(15)(F)(i) (emphasis added). Under the plain text of this provision, F-1 visas do not allow aliens to remain and work in the United States after the completion of their studies. Other provisions of the INA make clear that the nonimmigrant status specified by § 1101(a)(15) must be maintained for the visa to remain valid. *See* 8 U.S.C. § 1227(a)(1)(C)(ii).

Allowing F-1 visa holders to work in the United States after graduation circumvents the quotas that Congress has placed on H-1B visas for skilled workers. As DHS admitted in adopting an earlier version of the OPT Rule, the rule was motivated by DHS's view that the quotas imposed by Congress are too restrictive and harm American employers. But the question of whether and how many foreign aliens should be allowed to work in the United States is a question of major economic and political significance that our constitutional system reserves for *Congress*, not bureaucrats. DHS has not identified the sort of clear congressional authorization that the major questions doctrine requires to justify the OPT Rule.

The D.C. Circuit's holding that § 1101(a)(15) imposes only entry requirements that no longer apply once aliens have entered the country has consequences beyond F-1 visas. The INA establishes numerous categories of nonimmigrant visas, each with detailed criteria. The D.C. Circuit's decision authorizes DHS to extend all of these precisely defined statutory categories by regulation to anything "reasonably related" to the statute. This Court should not allow such a massive expansion of administrative authority.

ARGUMENT

I. The OPT Rule is inconsistent with the text and structure of the Immigration and Nationality Act.

The INA specifies "classes of nonimmigrant aliens" who are eligible for admission into the United States. § 1101(a)(15). An F-1 student visa is available for an alien "who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study" at an academic institution or accredited language training program. § 1101(a)(15)(F)(i).

The plain text of this provision does not authorize F-1 visa holders who have completed their course of study to remain and work in the United States under that visa. A person who has already graduated is no longer a "bona fide student," nor is employment a "full course of study . . . at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program." § 1101(a)(15)(F)(i).

The D.C. Circuit incorrectly held that § 1101(a)(15) only prescribes entry requirements and that once aliens are admitted, DHS regulations may allow them to remain in the United States even if they no longer satisfy the statutory visa criteria. Pet. App. 40a-51a. This interpretation is inconsistent with the text of § 1101(a)(15), which plainly limits the visa to "bona fide students."

It is also inconsistent with other provisions of the INA. Elsewhere, the INA specifies that "[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted . . . or to comply with the conditions of any such status, is deportable." 8 U.S.C. § 1227(a)(1)(C)(ii); *see also* 8 U.S.C. § 1184(a)(1) (authorizing DHS to require nonimmigrant visa holders to give a bond sufficient "to insure that . . . upon failure to maintain the status under which he was admitted . . . such alien shall depart from the United States"). In other words, the "nonimmigrant status" specified by § 1101(a)(15) must be "maintain[ed]" for a nonimmigrant visa to remain valid. Thus, an F-1 visa holder who is no longer pursuing a full course of study at an academic institution is not eligible to stay in the United States.

The D.C. Circuit's interpretation of § 1101(a)(15)(F)(i) would lead to an absurd result. If that statute specifies entry requirements only, then an alien who at the time of entry intends to complete post-graduation OPT would not be admissible, since the alien is not seeking "to enter the United States . . . *solely* for the purpose of pursuing [a full] course of study." § 1101(a)(15)(F)(i) (emphasis added). But an alien who seeks to enter solely for the purpose of full-

time study and only later develops an intent to remain for post-graduation employment would be entitled to remain on an F-1 visa. It is implausible that Congress would have made such a peculiar distinction based on when the alien formed an intent to work in the United States after graduation.

The D.C. Circuit also failed to consider the statutory context of 8 U.S.C. § 1101(a)(15)(F)(iii). While F-1 visas are only available to students pursuing a "full course of study," § 1101(a)(15)(F)(iii) authorizes nonimmigrant visas for certain part-time students, namely:

> an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico.

The reference back to F-1 visas under clause (i) is instructive. Clause (iii) creates a carve-out from clause (i)—a limited exception for part-time study. But the phrase "who *commutes* to the United States institution or place of study" (emphasis added) indicates an ongoing restriction, not a mere entry requirement. There would be no need for a carve-out discussing ongoing activity if the standards for the ordinary student visa were mere entry requirements that could be abandoned once the visa was obtained. Likewise, the reference to the alien's "actual course of study" indicates that visas under § 1101(a)(15)(F) only authorize aliens to remain in the United States while they are

actually pursuing a course of study, not for a period of post-graduation employment.

II. The OPT Rule circumvents the quotas that Congress has placed on H-1B visas for skilled workers.

The OPT Rule also upsets the balance between the need for foreign labor and the protection of American workers that Congress has attempted to achieve in statutes governing H-1B nonimmigrant visas for skilled workers. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Many F-1 visa holders who remain and work in the United States after graduation under the OPT Rule could seek to obtain an H-1B visa. Pet. App. 685a (noting that "[m]any employers who hire F-1 students under the OPT program eventually file a petition on the students' behalf for classification as an H-1B worker in a specialty occupation"). But Congress has placed an annual quota on the number of H-1B visas that may be issued. 8 U.S.C. § 1184(g)(1). Congress has also created an exemption from this general quota for nonimmigrant aliens who have "earned a master's or higher degree from a United States institution of higher education" (presumably often under an F-1 visa), although only "until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000." 8 U.S.C. § 1184(g)(5)(C). By authorizing F-1 visa holders to work in the United States after graduation, the OPT Rule circumvents these clear statutory limitations.

Indeed, DHS admitted that this was one of the purposes of an earlier version of the OPT Rule.[2] That rule, adopted in 2008, noted that the "H-1B category is greatly oversubscribed" and that "[t]he inability of U.S. employers, in particular in the fields of science, technology, engineering and mathematics, to obtain H-1B status for highly skilled foreign students and foreign nonimmigrant workers has adversely affected the ability of U.S. employers to recruit and retain skilled workers . . . ." Pet. App. 684a-685a. DHS recognized that this situation was directly caused by the quotas on H-1B visas prescribed by Congress. Pet. App. 684a. But rather than attempt to convince Congress to modify the quotas to address these concerns, DHS instead resorted to regulatory fiat and authorized an extended period of OPT for science, technology, engineering, and math graduates. Pet. App. 689a.

DHS's action harms citizens of *amici* States, who must now compete with F-1 visa holders for jobs. As the D.C. Circuit noted, "there is little dispute that the 2016 OPT Rule has increased the labor supply in the STEM field." Pet. App. 22a. In fact, the court found that an increased competition for jobs provided Petitioner with standing to challenge the rule. Pet. App. 20a-23a.

Even if DHS could conjure up a "plausible textual basis" for the OPT Rule—which it cannot—it certainly has not demonstrated "clear congressional authorization" as required by the major questions doctrine. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022)

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[2] The 2008 OPT Rule was set aside for failure to follow notice and comment procedures. Pet. App. 12a. While DHS omitted this discussion of H-1B visas from its current rule, the current rule continues to circumvent the statutory quotas on H-1B visas.

(quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). The extent to which foreign aliens should be allowed to enter the United States and compete with American workers for jobs is a question of "economic and political significance." *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). And the breadth of DHS's assertion of administrative power—the regulatory creation of a guest worker program that at times "surpasse[s] the H-1B visa program as the greatest source of highly skilled guest workers," *see* Pet. App. 79a (Henderson, J., concurring)—"provide[s] a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159). DHS's disagreement with the visa categories and quotas Congress has prescribed does not give it authority to alter that scheme by regulation.

This case presents yet another example of an "agenc[y] asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* at 2609. When Congress has created other nonimmigrant visa categories for the purpose of employment—and placed caps on those numbers of visas—it is implausible that Congress would have authorized DHS to allow nonimmigrants admitted on F-1 visas solely for the purpose of full-time study to remain and work in the United States under their F-1 visas after graduation. Rather, "common sense as to the manner in which Congress [would have been] likely to delegate' such power to the agency at issue, ma[kes] it very unlikely that Congress ha[s] actually done so." *Id.* at 2609 (internal citation omitted).

The D.C. Circuit allowed DHS to rely on what was at most "oblique or elliptical language to empower [DHS] to make a 'radical or fundamental change' to a statutory scheme." *Id.* (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994)). The D.C. Circuit held that the OPT Rule was authorized by 8 U.S.C. § 1184(a), which provides that the "admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe." But as Judge Rao explained in her dissent from the denial of rehearing en banc, this authority applies only to "admission," which is defined as "the lawful *entry* of the alien into the United States." Pet. App. 283a (citing 8 U.S.C. § 1101(a)(13)(A)). This authority allows DHS to fill in certain details relating to nonimmigrant visa holders' admission to the country. *Id.* But it does not allow DHS to expand the nonimmigrant visa categories defined by Congress and create a brand new guest worker program. This Court "presume[s] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *West Virginia*, 142 S. Ct. at 2609 (quoting *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

III. The D.C. Circuit's interpretation would have wide-ranging consequences beyond F-1 visas.

Amici States' concern is not limited to F-1 student visas. The INA delineates numerous categories of nonimmigrant visas and establishes detailed criteria on their availability. *See* § 1101(a)(15). The D.C. Circuit's holding that § 1101(a)(15) addresses only entry

requirements applies to all of these categories, as that court recognized. Pet. App. 49a-50a ("[T]he time and conditions DHS sets are not cabined to the terms of the entry definition . . . .").

The only limit to the D.C. Circuit's holding is that DHS's action must be "reasonably related" to the purposes of the visa class. Pet. App. 26a-27a. As Judge Rao observed, "[t]his capacious standard could distort other nonimmigrant categories, allowing, for instance, an agricultural worker admitted under an H-2A visa to remain in the country even if he abandons his agricultural work and opts instead to pursue a degree in agricultural sciences."

To give another example, 8 U.S.C. § 1101(a)(15)(I) allows the admission of "an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation." Under the D.C. Circuit's theory, DHS could authorize an alien to remain in the United States under a foreign journalist visa even when the alien no longer works for a foreign news organization as long as the alien pursues other plans "reasonably related" to journalism.

Or consider the example of Mexican and Canadian part-time commuter students discussed above. If § 1101(a)(15) only imposes entry requirements, DHS could admit Mexican or Canadian aliens who intend to commute for part-time study but then allow those aliens to stop commuting and maintain a full-time residence in the United States. Or the agency could allow F-1 visa holders, once admitted to the country for purposes of full-time study, to remain for part-time study. After all, part-time study is surely more "reasonably

related" to full-time study than post-graduation employment is. Yet Congress has strictly limited nonimmigrant visas for part-time study to Mexican and Canadian nationals who commute to the United States. *See* § 1101(a)(15)(F)(iii).

The D.C. Circuit's decision sanctions a dramatic and unprecedented regulatory expansion of the specific nonimmigrant visa categories prescribed by Congress. That decision cannot stand.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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