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 *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation (Landmark) is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities. Landmark is particularly concerned with encroachments by the executive branch upon the legislative powers of Congress and the ever-increasing powers of the administrative state. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioner, Washington Alliance of Technology Workers (Washtech).

INTRODUCTION AND SUMMARY OF ARGUMENT

Conceived over cocktails and crafted by a colossal international corporation's legal department, the regulation at issue presents a worst-case scenario in regulatory abuse. The Department of Homeland Security's (DHS) post-completion Optional Practical Training Program (OPT Program) functions as an end run

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus Curiae* informed Petitioner and Respondents of its intent to file this brief on May 19, 2023. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

around the carefully crafted conditions Congress places on nonresident aliens who enter and remain in the country under student visas. It creates a new class of aliens who are eligible for employment within the United States by allowing nonresidents who enter the country under the F-1 student visa program to remain long after they are no longer students. The DHS turns the statutory requirements for continuing eligibility under the F-1 program on their head and, in so doing, establishes a program affecting hundreds of thousands of workers throughout the country.

Recent decisions by the Court have restored the balance of powers contemplated by our founders. *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022). Administrative agencies are constrained by clearly established statutory limitations. They do not have carte blanche to usurp power from Congress by establishing and operating programs well beyond their authority. Granting certiorari here will reaffirm separation of powers. Here, the DHS circumvents the limitations placed on nonresident aliens who enter and remain in the country to work by expanding the Immigration and Nationality Act's (INA) F-1 student visa program to include workers who seek employment post-graduation. The DHS contorts the INA in order to implement a program contrary to the intent of Congress and, in so doing, violates congressional authority "to prescribe rules for the admission and exclusion of aliens." *Miller v. Christopher*, 96 F.3d 1467, 1470 (D.C. Cir. 1996). The INA sets clear conditions differentiating those nonresident aliens who enter the country seeking to work

from those who enter the country seeking to study. The OPT Program muddles those distinctions rendering clear terms meaningless. This kind of regulatory distortion should not be permitted.

In upholding the OPT Program, the lower court created an untenable split in how courts interpret the DHS's authority to establish conditions for nonresident aliens to remain and work in the United States. Granting certiorari will also reconcile this split and enable the Court to correct the D.C. Circuit's unprecedented decision that allows DHS to redefine the conditions under which nonresident aliens can remain in the country. Finally, certiorari will provide the Court the opportunity to reassert the long-standing primacy of Congress (not administrative agencies) to dictate national policies affecting hundreds of thousands of workers over the admission of aliens and the conditions under which they are allowed to remain in the country.

ARGUMENT

A. The text and structure of the INA does not support the lower court's interpretation of DHS's authority to operate the OPT Program

Under the INA, DHS may issue an F-1 visa to aliens (1) "having a residence in a foreign country which he has no intention of abandoning," (2) "who is a bona fide student qualified to pursue a full course of study"

and (3) "who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study." 8 U.S.C. § 1101(a)(15)(F)(i). Nonimmigrants who participate in the OPT Program do not meet these criteria as they are no longer "bona fide" students pursuing a "full course of study." Nor are they "solely" pursuing a course of study, as they no longer have any affiliation with an institution of higher learning.

DHS, however, allows aliens who have completed their studies at colleges and universities to still participate in the OPT Program as "bona fide students" who are "solely pursuing a course of study." This means they can remain in the country well after they have graduated and no longer have any affiliation with a college or university. Under the OPT Program, individuals who have graduated from college or university with any type of degree can work for up to one year after graduation. 8 C.F.R. § 214.2(f)(10). Those aliens with degrees designated as STEM (science, technology, engineering, or math) may remain in the United States for up to another 24 months. 8 C.F.R. § 214.2(f)(10)(ii)(C). Aliens can also remain in the country while seeking employment or when waiting for their application for an H1-B visa to process. 8 C.F.R. §§ 214.2(f)(10)(ii)(E), 214.2(f)(5)(vi). All told, some of these individuals can remain in the United States for up to three years post-graduation.

The lower court upheld the OPT Program as a valid exercise of DHS authority – relying on an overly broad and incorrect interpretation of the INA. Pet.

App. 1a. It concluded that the provisions authorizing DHS to regulate the "time" and "conditions" of admission are broadly applicable and give the agency authority to set parameters throughout the nonimmigrant's stay. According to the lower court, DHS has broad discretion in two crucial areas relevant here: (1) authority to regulate procedures for admission; and (2) authority to regulate time and conditions to remain. Pet. App. 23a. This authority purportedly derives from section 1184(a) which states that "[t]he admissions 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." 8 U.S.C. § 1184(a)(1).[2]

Reliance on 1184(a) to justify the OPT Program is misplaced. Section 1184(a) exists within the constraints established by Congress. The DHS may add to but not subtract from or directly contradict the statute. This limited provision gives DHS authority to promulgate regulations for entry into the country – it does not authorize the expansion of post arrival stays and work authorization. Pet. App. 283a (Rao, J., dissenting from denial of reh'g en banc). A strict reading of section 1184 supports the conclusion that the time and conditions clause only conveys to the DHS the authority to regulate within congressionally predetermined bounds.

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[2] Congress enacted the INA prior to the establishment of the DHS, the statute identifies the Attorney General as having authority. Authority under the INA is currently vested with the DHS and references to the Attorney General are interpreted as references to the Secretary of Homeland Security.

This clause, contrary to what the DHS claims, cannot convey the ability to contradict the express will of Congress by willfully redefining the terms of a statute. The DHS' "time and conditions" authority exists only "to insure" that departure of the visa holder will occur if the visa holder fails to maintain the congressionally mandated "status." Id. In other words, section 1184 deputizes the DHS to enforce congressional visa requirements and mandate any additional time and conditions pursuant to this end. It does not convey vague plenary authority to set any time and conditions the executive may choose, even those standing in direct opposition to Congress.

Conditions necessary to obtain and maintain an F-1 visa also limit DHS authority. As noted before, the nonimmigrant must be a "bona fide" student and seek to enter the United States "temporarily and solely for the purpose of pursuing [a full course of study]." 8 U.S.C. § 1101(a)(15)(F)(i). Upon completion of a course of study (such as graduation from college or university) an individual ceases to be a "bona fide" student. Nor is the person "solely pursuing" a course of study. The use of "is" supports the interpretation that these conditions apply throughout the nonimmigrant's stay. Once the individual is no longer a student, he or she no longer meets this requirement. *See* Pet. App. 72a (Henderson J., dissenting). "Bona fide student" means a nonresident who not only enters the country as a student but continues to remain a student throughout the duration of their stay.

Provisions of the INA support this interpretation. The INA specifies that a "course of study" must be "at an established college, university . . . or other academic institution . . . , which institution or place of study shall have agreed to report to the [Secretary of Homeland Security] *the termination of attendance* of each nonimmigrant student." 8 U.S.C. § 1101(a)(15)(F)(i). *See* Pet. App. 72a (Henderson, J., dissenting) (emphasis added). This means that the term "course of study" is a continuing requirement – to remain eligible for the F-1 program, the nonimmigrant must continue to attend their respective educational institution and notify DHS upon "termination." Upon termination of attendance, the nonimmigrant can no longer remain in the country under an F-1 visa.

There is no plausible textual support for the OPT Program. Section 1184(a) does not, on its face, convey broad authority to regulate nonimmigrants post-admission. Admission does not mean "continuing admission" and the lower court erred when it added the term "continuing." Nonimmigrants who have completed their studies and have graduated from college or university are no longer "bona fide" students. Upon graduation, they are no longer "solely pursuing" a course of study. The lower court erred when it stretched these terms beyond their plain meaning. Its "unnatural reading" of the F-1 statute should not be upheld. *See Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001) and *Sackett v EPA*, 2023 U.S. LEXIS 2202, at *34 (2023) (stressing the importance of statutory context when discerning the meaning of terms).

B. The lower court created an untenable split in how courts interpret administrative authority to regulate individuals who seek to temporarily stay in the United States under nonimmigrant visas.

Judge Rao noted that "nonimmigrant visa holders must satisfy the statutory [admissions] criteria both at entry and during their presence in the United States." Pet. App. 285a (Rao, J., Dissenting from reh'g en banc). And at least one court has held that the first of the F-1's visas requirements apply throughout the nonresident's stay – not simply at the time of entry. *See Anwo v. Immigr. & Naturalization Serv.*, 607 F.2d 435 (D.C. Cir. 1979) (holding that a nonimmigrant admitted under an F-1 visa must not intend to abandon his residence in a foreign country throughout his stay.). While no court has concluded specifically that the other two conditions apply throughout a nonresident alien's stay, other courts have found that the INA's requirements to obtain and maintain a visa apply throughout the nonimmigrant's stay.

The Court has recognized that under "many of these nonimmigrant categories, Congress has precluded the covered alien from" violating an original condition of their visa. *Toll v. Moreno*, 458 U.S. 1, 14 (1982) (noting that Congress has precluded many nonimmigrant classes from establishing domiciles as a condition to remain in the United States). The Court has also noted that "a nonimmigrant alien who does not maintain the conditions attached to his status can be deported." *Elkins v. Moreno*, 435 U.S. 647, 666

(1978). Recognizing the INA's visa regime as a "comprehensive and complete code covering all aspects of admission of aliens to this country," the Court has consistently enforced these "deliberate" policy choices Id. at 664-66.

Circuit courts of appeals have followed. Respecting the F-1 student visas, lower courts demand fidelity to Congress' statutory nonimmigration visa requirements. These cases recognize the DHS's "authority to order the deportation of those nonimmigrants who fail to maintain the conditions attached to their nonimmigrant status while in the United States." *Khano v. Immigr. & Naturalization Serv*., 999 F.2d 1203, 1207 (7th Cir. 1993). But these cases also rely on statutory requirements – not agency discretion – to determine when a nonimmigrant visa holder failed to meet those conditions.

For example, in a case involving a nonimmigrant who had graduated from college but remained in the United States without adjusting his visa status, the Fifth Circuit concluded that "after failing to maintain the student status required by his visa, [a nonimmigrant] was without authorization to remain in this country." *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985). And in *Anwo v. Immigr. & Naturalization Serv.*, the D.C. Circuit found that a nonimmigrant who "violated the conditions of his student visa . . . was not here 'lawfully'." 607 F.2d 435, 437 (D.C. Cir. 1979).

The INA's primacy in delineating the maintenance of visas was also summarized well in *Shoja v. Immigr.*

& Naturalization Serv., 679 F.2d 447 (5th Cir. 1982). In *Shoja*, the Fifth Circuit specifically addresses whether F-1 visas impose continued admission requirements on a nonimmigrant student. It noted that meeting the requirements of the F-1 visa at *entry* is not enough. The nonimmigrant must also continue attending school to maintain status as a student. A student must not only attend school but must attend the specific school approved by the federal government on admittance to the country. It stated, "we find no merit to petitioner's argument that he was only required to have an intention to attend the school designated on his I-94 form at the time he was admitted, and that he was not required to actually attend such school." Id. at 450 (citing 8 U.S.C. §§ 1101(a)(15)(F)(i) and 1251(a)(9)). The court concluded that "[t]hese two statutes make it clear that one of the qualifications for being classified as a nonimmigrant alien student is *attending* an institution approved by the Attorney General, and that failure to comply with such condition of status will result in deportation." *Shoja*, 679 F.2d, at 450 (emphasis added).

The broader principle of statutory interpretation involved in these F-1 visa cases has also been recognized in other nonimmigrant visa disputes. Simply put, the federal courts recognize that administrative agencies, in setting their own enforcement discretion, must continue to apply and adhere to the statutory regime implemented by Congress. *See Khano v. Immigr. & Naturalization Serv.*, 999 F.2d 1203, 1207 (7th Cir. 1993); *Anwo v. Immigr. & Naturalization Serv.*, 607 F.2d 435, 437 (D.C. Cir. 1979); and *Elkins v. Moreno*,

435 U.S. 647, 666 (1978). *See also Akbarin v. Immigr. & Naturalization Serv*., 669 F.2d 839, 840 (1st Cir. 1982) ("petitioners deportable . . . for failing to maintain nonimmigrant status under 8 U.S.C. § 1101(a)(15)(F)."); *Lok v. Immigr. & Naturalization Serv*., 681 F.2d 107, 109 & n. 3 (2d Cir. 1982) (upholding deportation for failure to meet statutory conditions of admission); *Graham v. Immigr. & Naturalization Serv.* 998 F.2d 194, 196 (3d Cir. 1993) (holding that a nonimmigrant who "violated the conditions of his visa" acted unlawfully); *Mortazavi v. Immigr. & Naturalization Serv.*, 719 F.2d 86 (4th Cir. 1983) (finding F-1 student visa requirements do not cease at entry); *Gazeli v. Session*, 856 F.3d 1101, 1106 (6th Cir. 2017) (holding that B-2 visa holders "must satisfy the eligibility requirements that Congress imposed"); *Birdsong v. Holder*, 641 F.3d 957, 958 (8th Cir. 2011) (upholding nonimmigrant's deportation for "fail[ure] to comply with the terms of her K-1 visa"); *Braz. Quality Stones, Inc. v. Chertoff*, 531 F.3d 1063, 1066 (9th Cir. 2008) (upholding deportation of an L-1A visa holder who failed to maintain a position in some "managerial or executive capacity," therefore violating the statutorily-defined requirements for receiving his nonimmigrant visa); *Olaniyan v. Dist. Dir., Immigr. & Naturalization Serv.*, 796 F.2d 373, 374 (10th Cir. 1986) (upholding deportation "for failing to comply with the condition of their admission into the United States as nonimmigrants."); and *Touray v. United States AG*, 546 F. App'x 907, 912 (11th Cir. 2013) ("An alien who was admitted as a nonimmigrant is removable if he fails 'to maintain the nonimmigrant status in which the alien

was admitted . . . or to comply with the conditions of any such status. . . .'" (citations omitted)).

Finally, the lower court's conclusion that Congress only sets entry requirements, is both implausible on its face and stems from misplaced reliance on existing precedent by the lower court. The lower court relies on a misinterpretation of *Rogers v. Larson* and asserts that "F-1 identifies entry conditions but 'is silent as to any controls to which these aliens will be subject after they arrive in this country' *Rogers v. Larson*, 563 F.2d 617, 622-23 (3d Cir. 1977)." As Judge Rao notes in her dissent, *Rogers* does not assert that F-1 visas have entry only requirements, nor is this quote from *Rogers* even discussing F-1 visas. This quote from *Rogers* is discussing H visas for nonimmigrant workers which are "silent as to any controls to which aliens will be subject after they arrive in this country." Id. at 622-23. The lower court errs in interpreting this in two ways. First, as Rao notes, "[t]he opinion nowhere stated the nonimmigrant requirements apply only at entry." Pet. App. 285(a) (Rao, J., dissenting from denial of reh'g en banc). Second, even if H visas for nonimmigrant workers are only subject to entry requirements, it would be erroneous to assume that this necessarily means that all nonimmigrant visas possess only entry requirements. It might very well be that Congress's intention was to impose entry-only requirements for H visas and ongoing requirements for F-1 visas.

The claim that the Congressional statute applies only to entry requirements also conflicts with the INS's own historical interpretation of F-1 visa requirements.

In *Mashi v. Immigr. & Naturalization Serv.*, the INS ordered deportation of a student for failing to maintain student status and a "full course of study" pursuant to 8 U.S.C. § 1101(a)(15)(F)(i). The DHS now asserts that this same statute no longer imposes continuing enrollment requirements. In *Mashi*, the court affirmed that F-1 visa requirements do not cease at the moment of entry and provided several examples of failure to maintain student status which may be grounds for deportation or were at least a violation of the Congressional intent of 8 U.S.C. § 1101(a)(15)(F)(i). *Mashi v. Immigr. & Naturalization Serv.*, 585 F.2d 1309, 1313 (5th Cir. 1978).

C. The OPT Program circumvents the limits Congress has placed on the number of non-resident alien workers.

DHS's OPT Program works as an end run around clear limits Congress has set on the number of technology workers admissible through the H1-B visa program. 8 U.S.C. § 1184(g). It creates a new class of aliens who are eligible for employment within the United States. Congress has "plenary authority to prescribe rules for the admission and exclusion of aliens" and specifically sets the number of H1-B visa holders. *Miller v. Christopher*, 96 F.3d 1467, 1470 (D.C. Cir. 1996). In other words, Congress has spoken on the issue of numbers of these types of guestworkers allowed in the United States and Congress decides who enters and remains in the country. And when determining whether an administrative agency has the authority to

establish and operate the OPT Program, a court must determine whether "Congress in fact meant to confer the power the agency has asserted." *West Virginia v. EPA*, 142 S.Ct. 2587, 2608 (2022) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

No language in the INA provides "clear authorization from Congress" to justify the OPT Program. *West Virginia v. EPA*, 142 S. Ct. at 2609 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Both the lower court and DHS must twist the plain text of the INA to justify the OPT Program. The size and scope of the OPT Program requires "clear authorization" and neither DHS nor the lower court can point to a clear statutory delegation providing such authority.

As noted by Judge Rao, the INA "precisely" delineates the categories of nonimmigrants who "may be eligible for visas to come to the country temporarily." Pet. App. 280a (Rao, J., dissenting from denial of reh'g en banc.). Many of these categories are "further divided into specific subcategories." Id. These details reflect "Congress's judgments as to which aliens may be admitted into the country and for what reason." Id. The various categories thus "reflect political judgments balancing the competing interests of employers and American workers." Id. at 282a. Judge Rao continues, "Such detailed legislation is incompatible with assuming a broad delegation to DHS to confer additional work visas through regulation." Id. Congress has made the policy decision on who to admit and there is no grant of authority to DHS to create a new class of

individuals who remain in the country after the conditions of their F-1 visas have expired.

DHS, an administrative agency with no political accountability, however, has managed to circumvent these limits through creative and improper interpretation of terminology from the section of the INA involving the F-1 visa program. DHS's interpretation allows hundreds of thousands of aliens to remain in the country with no connection to a university or institute of higher learning. These aliens are no longer "bona fide students" nor are they "solely pursuing a course of study." Yet they remain present because DHS has substituted its own policy preference for that of Congress.

Unilaterally expanding the number of individuals permitted to remain in the United States post-graduation and in contravention to the clear language of the statute, conflicts with congressional intent. Congress has expressly set the number of guestworkers permitted in the United States. And DHS's OPT Program expands the number not by dozens or hundreds but by hundreds of thousands. David J. Bier, *The Facts about Optional Practical Training (OPT) for Foreign Students*, Cato Inst., May 20, 2020, available at https://www.cato.org/blog/facts-about-optional-practical-training-opt-foreign-students (May 16, 2023). The number of nonimmigrants admitted via the F-1 program continues to grow. In 2007, for example, DHS approved 81,976 participants for the OPT Program. Id. By 2018, that number had risen to 208,065. Id. Awarding authorization to several hundred thousand nonimmigrant workers annually thus amounts to a major policy decision

that circumvents the limits Congress has placed on nonimmigrant workers. *See* 8 U.S.C. § 1184(g)(1)(A)(vii) (limiting the number of H1-B visas to 65,000 annually).

And there are significant practical consequences to the lower court's holding. If left in place, DHS could structure the regulations such that a nonimmigrant student could obtain an F-1 visa by qualifying for a program of study at an established college and then immediately drop out on the second day of the semester and the U.S. government would have no grounds for revoking the visa or arranging deportation. Almost this exact scenario was cited by the majority in *Mashi v. INS* as a violation of the F-1 visa and the Congressional intent behind the specific language "full course of study." *Mashi v. Immigr. & Naturalization Serv.*, 585 F.2d 1309, 1313 (5th Cir. 1978).

Congress has specifically designated the classes of aliens who may enter and work in the United States. Congress has also provided clear language as to who is to be permitted to remain in the country under the F-1 visa program. If Congress would like to create another statutory program to permit nonimmigrant tech workers, this is within their legislative power. But the DHS has no authority to functionally repurpose the F-1, or any other visa, through unilateral regulation contrary to the intent of the Congressional statute.

CONCLUSION

This Court need look no further than Judge Henderson's panel dissent or to Judge Rao's dissent from the denial of Washtech's petition for rehearing in banc. Landmark Legal Foundation presents these complementary arguments with additional analysis in support of granting the Petition for Writ of Certiorari to highlight this case's critical importance.

Respectfully submitted,

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