No. 22-1071

IN THE
Supreme Court of the United States

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

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BRIEF OF U.S. SENATORS TED CRUZ, MIKE LEE, TOM COTTON, MIKE BRAUN, AND KATIE BOYD BRITT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are United States Senators Ted Cruz, Mike Lee, Tom Cotton, Mike Braun, and Katie Boyd Britt.

Amici sit on Committees that oversee matters related to immigration and the economy. Senator Cruz is Ranking Member of the Senate Committee on Commerce, Science & Transportation, and is on the Senate Committees on the Judiciary and on Foreign Relations. Senator Lee is on the Senate Committees on the Judiciary and on the Budget, and the Senate Joint Economic Committee. Senator Cotton is on the Senate Committee on the Judiciary and the Senate Joint Economic Committee. Senator Braun is on the Senate Committees on Agriculture, Nutrition & Forestry and on Health, Education, Labor & Pensions. Senator Britt is on the Senate Committees on Appropriations and on Banking, Housing, and Urban Development.

Amici have a strong interest in courts interpreting the Immigration & Nationality Act in a way that gives meaning to the detailed requirements Congress imposed on receiving and maintaining nonimmigrant visas, and respects the judgments Congress made to protect American workers by limiting which aliens receive work authorization.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notification of the filing of this brief.

SUMMARY OF THE ARGUMENT

The defining characteristic of a "nonimmigrant visa" is that it allows an alien to stay in the United States only for a specific and time-limited purpose. For example, an F-1 student visa is available only to an alien who (1) "*is* a bona fide student qualified to pursue a full course of study" in the United States and (2) 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) (emphases added).

Congress has created nearly two dozen such categories of nonimmigrant visas with extremely specific eligibility requirements. *See, e.g.*, *id.* § 1101(a)(15)(E)(iii) (applying to certain Australians); *id.* § 1101(a)(15)(H)(ii)(a) (applying to aliens who press "apples for cider on a farm"); *id.* § 1101(a)(H)(i)(c) (applying to a "registered nurse").

Most notably, several categories—like H-1B and H-2B visas authorizing certain workers to come to the United States and work legally—have strict numerical and industry limitations to minimize the risk that corporate employers will use those visa recipients to displace American workers. *Id.* § 1101(a)(15)(H); *id.* § 1184(g); *see* Julia Preston, *Lawsuits Claim Disney Colluded to Replace U.S. Workers With Immigrants*, N.Y. Times (Jan. 25, 2016), https://www.nytimes.com/2016/01/26/us/lawsuit-claims-disney-colluded-to-replace-us-workers-with-immigrants.html; *see also* Ron Hira & Daniel Costa, *New Evidence of Widespread Wage Theft in the H-1B Visa Program*, Economic Policy Institute (Dec. 9,

2021), https://www.epi.org/publication/new-evidence-widespread-wage-theft-in-the-h-1b-program/.

For all nonimmigrant visa holders, Congress provided that "upon failure to maintain the status under which he was admitted, … such alien will depart from the United States." *Id.* § 1184(a)(1); *see also id.* § 1227(a)(1)(C)(i).

As Judge Rao explained below, these provisions represent a "carefully calibrated scheme," Pet.App.280a (Rao, J., dissenting from the denial of rehearing *en banc*), where Congress set the requirements for nonimmigrant visa eligibility based on carefully considered judgments about which categories of aliens can be allowed into the country, how long they can stay, what they must do while here, whether they can lawfully work in the United States, and what happens when they fail to maintain their visa requirements.

But the Department of Homeland Security was dissatisfied with Congress's nonimmigrant visa regime, in particular the numerical limits on H-1B visas. So, without regard for Congress or American workers, DHS devised a workaround where F-1 student visa holders wouldn't actually need to be students at all and would *also* be given authority to work legally in the United States for years after completing any purported studies.

The court below, over several persuasive dissents, blessed this implausible circumvention. The majority opinion held that the statutory requirements for obtaining any of the twenty-two categories of nonimmigrant visas are "entry conditions" only—i.e.,

they apply only at the moment of the alien's entry into the United States and are irrelevant thereafter. Accordingly, aliens could maintain their F-1 visas for years after they were no longer "students," and in fact they need not have been students for any amount of time beyond the initial moment of entry into this country.

But that still didn't provide F-1 visa holders with authority to work legally in the United States, so the court also had to bless DHS's assertion that 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"—impliedly includes the power to authorize employment for any and all nonimmigrant visa holders, even though § 1184(a) says nothing about employment, and even though Congress elsewhere did affirmatively provide work authorization for other types of nonimmigrant visas.

The D.C. Circuit's rulings are not just wrong but vitiate the nonimmigration visa system and render numerous other provisions of the INA illogical or superfluous. *See* Part I, *infra*. The decision is already having profound consequences on the nation's immigration system and on American workers, and those consequences will only multiply over time. *See* Part II, *infra*. Each year, there are over a million F-1 recipients alone, which is just one of the twenty-two statutory categories of nonimmigrant visas covered by the decision below. The D.C. Circuit held that DHS has authority to authorize legal employment for anyone with any nonimmigrant visa, and that they

can remain for years after abandoning any intent to comply with the statutory nonimmigrant visa requirements.

When an alien can obtain one of the unlimited F-1 student visas, despite the notable shortcoming of not being a student at all, and then lawfully work for years in the United States pursuant to a statute that says nothing about employment, there will be no need to bother with H-1B visas with their meddlesome numerical caps or H-2B visas with their strict requirement that American workers "cannot be found" to fill the jobs. 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

The decision below accordingly will result in hundreds of thousands of aliens remaining in the country and competing against American citizens for jobs, in direct defiance of Congress's detailed restrictions on nonimmigrant visas and work authorization.

Finally, the magnitude of the D.C. Circuit's decision would warrant review even if no other court had weighed in. But as Judge Rao explained in dissent, the majority decision below also created a circuit split, confirming the cert-worthiness of the question presented. *See* Part III, *infra*.

This Court should grant the Petition and reverse.

ARGUMENT

I. The Decision Below Eviscerated Congress's Carefully Crafted Nonimmigrant Visa Scheme.

To understand the dramatic consequences that will result from the D.C. Circuit's opinion, *see* Part II, *infra*, one must first understand the nature of its errors. As *amici* explain below, the D.C. Circuit's numerous implausible and illogical interpretations of the INA render unrecognizable the nonimmigrant visa system that Congress enacted to protect American workers, replacing it with an easily circumvented and illogical scheme to benefit corporate employers and foreign nationals that is operated almost entirely at DHS's discretion.

A. Section 1101(a)(15)'s Nonimmigrant Visa Requirements Are Not Exclusively Entry Conditions.

The twenty-two categories of nonimmigrant visas listed in § 1101(a)(15) represent a "carefully calibrated scheme" spread over 4,200 words describing just the specific requirements for who is eligible to come into the country temporarily and what they are allowed or required to do once here, including whether employment is authorized. Pet.App.280a (Rao, J., dissenting from the denial of rehearing *en banc*). Given the extraordinary detail in these provisions, it is clear they represent a balancing of difficult political judgments. Pet.App.282a (Rao, J., dissenting from the denial of rehearing *en banc*).

1. The majority opinion below rendered the distinctions between nonimmigrant visas almost meaningless by holding that they apply only at the moment of entry into the United States, after which they are irrelevant. Pet.App.41a. That conclusion was illogical and atextual.

Given that a defining characteristic of a nonimmigrant visa is that the alien is allowed to be in the country only for a specific purpose, it is a most "'unnatural reading'" to conclude that the alien need only possess that purpose at the precise moment of entry—and never again. Pet.App.71a (Henderson, J., concurring in part and dissenting in part). The majority never explained why Congress would have spent so much time and attention on the excruciatingly detailed § 1101(a)(15) nonimmigrant visa requirements if they applied only for a single moment in time and could be completely ignored thereafter, without the alien losing his visa status.

The text of § 1101(a)(15) demonstrates that many of the nonimmigrant visa requirements must continue applying after entry. For example, there are a dozen types of nonimmigrant visas that apply to an alien "having a residence in a foreign country which he has no intention of abandoning" or who "maintains actual residence and place of abode in the country of nationality." *E.g.*, 8 U.S.C. § 1101(a)(15)(B), (F)(i), (H), (J), (M), (Q). Under the D.C. Circuit's view, an alien can obtain one of those visas, enter the United States, and then immediately "abandon" his "actual residence" or "abode" in his home country—yet still maintain his visa.

The D.C. Circuit's conclusion that § 1101(a)(15) imposes only entry conditions is especially unpersuasive in the context of the F-1 student visas at issue here. Congress provided that an alien is eligible for an F-1 visa only if he "*is* a bona fide student" seeking "solely" to pursue a course of study in the United States. *Id.* § 1101(a)(15)(F)(i). These requirements contain "no temporal restriction[s]," Pet.App.72a (Henderson, J., concurring in part and dissenting in part), but instead convey present-sense requirements—i.e., *ongoing* requirements. The requirement that the alien "is" a student most obviously conveys this, but even phrases like "seeks to enter" and "coming" are used elsewhere in the INA to indicate ongoing requirements. Pet.App.78a (Henderson, J., concurring in part and dissenting in part). And the original student-visa statute, which even the majority acknowledged is "materially the same as its modern F-1 counterpart," Pet.App.8a, turned on "the termination of attendance of each immigrant student," Immigration Act of 1924, Pub. L. No. 68-139, § 4(e), 43 Stat. 153, 155.[2]

The text and statutory history thus confirm the commonsense conclusion that someone who "is" a "student" for visa purposes means someone presently

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[2] Further, as Judge Henderson noted, several September 11 hijackers entered the country on F-1 visas, and Congress responded by putting the "'onus on the universities to report students who were not complying or were not going to classes, because at that point they were out of status.'" Pet.App.72a (Henderson, J., concurring in part and dissenting in part) (quoting DHS's own attorney).

attending school, meaning the requirement carries forward even after the moment of entry.

But "[w]ords no longer have meaning"[3] if—as the majority opinion concluded—the statutory text "is a … student" can be construed, in effect, to mean "was or intended at one specific moment in time to be a … student." Under that view, F-1 visa holders can keep their visa for years after completing any studies and embarking on a full-time gainful career. Judge Henderson aptly described the majority's interpretation as "tortured" and "'verbicide.'" Pet.App.74a (Henderson, J., concurring in part and dissenting in part); *id.* at 75a ("I am at a loss to see ambiguity in 'student' that would capture post-graduation *employment*.").

And because the decision is not limited to F-1 visas, it is necessarily true that no other § 1101(a)(15) requirements apply after entry, either. For example, C-1 holders need not remain "in immediate and continuous transit through the United States" to maintain their visas, B holders need not remain only "temporarily for business" to maintain visas, A-1 holders need not remain "accredited by a foreign government," and so on—yet explicably they will all keep their visas even though the entire purpose for which they were allowed into the country had now lapsed. 8 U.S.C. § 1101(a)(15)(F)(i), (C)(i), (B), (A)(i).

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[3] *King v. Burwell*, 576 U.S. 473, 500 (2015) (Scalia, J., dissenting).

2. The majority's conclusion that § 1101(a) sets only entry conditions also rendered several other INA provisions superfluous or illogical.

For example, § 1258 authorizes most types of nonimmigrant visa holders to change their status to a *different* nonimmigrant visa at the Secretary's discretion. 8 U.S.C. § 1258. Under the D.C. Circuit opinion, however, someone changing status would never have to satisfy the statutory requirements for the new visa because those restrictions applied only at the moment of entry—and the alien would have *already* entered on the prior type of visa. For example, DHS could authorize someone who entered on a B visa for tourists or a P visa for entertainers to switch to almost any other nonimmigrant visa without making any showing at all. They could therefore be given an F-1 visa without ever having been a student. That nonsensical conclusion could be avoided simply by acknowledging the obvious point that many of § 1101(a)(15)'s requirements must be satisfied even after entry.

Further, the D.C. Circuit's decision trivializes § 1184(a)(1), which provides that "upon failure to maintain the status under which he was admitted, … such alien will depart from the United States." *Id.* § 1184(a)(1). That provides a simple rule: fail to maintain your nonimmigrant visa requirements, and you must leave. But under the D.C. Circuit's view, there *are no* ongoing statutory requirements "to maintain" in the first place. The decision suggests that § 1184(a)(1) must apply only to the requirements DHS itself imposes, *see* Pet.App.48a, but that means

DHS has nearly unfettered discretion to decide how long the alien remains in the country (a point discussed further below in Part I.B).

That turns the concept of a nonimmigrant visa on its head by presuming that the INA imposes no conditional limitations on how long an alien can remain. The only limit is where Congress provided an express chronological maximum. Otherwise, once a person receives a nonimmigrant visa, he can stay as long as DHS wishes—even permanently. The decision below tried to disclaim this result, *see* Pet.App.50a, but it is the inescapable logical conclusion of the decision's analysis.

As demonstrated next, the decision's statutory-construction errors were not limited to whether § 1101(a)(15) imposes only conditions of entry or whether DHS has authority to authorize continued presence. The panel also inexplicably concluded that DHS can also grant work authorization even when Congress itself did not do so. Pet.App.283a–284a (Rao, J., dissenting from the denial of rehearing *en banc*).

B. The D.C. Circuit's Interpretation of § 1184(a) Makes a Hash of the INA's Work Authorization Scheme.

Having held that § 1101(a)(15)'s requirements did not apply after the moment of entry, the D.C. Circuit had to figure out what regime *does* apply after entry. The answer, in the majority's view, was § 1184(a), which the court interpreted as empowering DHS to act as a junior varsity Congress with almost

unfettered discretion over most aspects of the nonimmigrant visa system, including the power to grant benefits like authorizing legal employment in the United States.

The majority held that § 1184(a) allows DHS to grant work authorization to F-1 visa holders even though the relevant nonimmigrant visa provisions say no such thing and even though other provisions expressly grant authority to work in the United States. This was another serious misreading of the INA that rendered numerous provisions irrelevant or illogical.

1. At the threshold, it is telling that DHS itself could not say with certainty which statutory provision supposedly allows it to authorize employment for all nonimmigrant visa holders the moment after they enter the United States. DHS claimed that some combination of 8 U.S.C. §§ 1103, 1184(a)(1), and 1324a(h)(3) provided this power. *See 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, 13,044–45 (Mar. 11, 2016); *see* Pet.App.83a (Henderson, J., concurring in part and dissenting in part). The necessity of resorting to a grab-bag of vague provisions is evidence enough that DHS was not given the tremendous power to authorize employment for millions of aliens.

2. For its part, the majority opinion settled on § 1184(a)(1) as the primary source of DHS's purported power to authorize employment. Pet.App.2a, 4a, 55a

(rejecting argument that § 1324a(h)(3) affirmatively provided authority). But § 1184(a)(1) says nothing about employment. It instead says only that the "admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as [DHS] may by regulations prescribe." 8 U.S.C. § 1184(a)(1). The panel majority concluded that this implicitly includes the ability to authorize employment.

But § 1184 provides only a limited power over "admission," which is defined as "the lawful entry of the alien into the United States." *Id.* § 1101(a)(13)(A). That means DHS can prescribe regulations to carry out Congress's requirements for *entry* on nonimmigrant visas, but there is no independent power for DHS to affirmatively authorize employment during the visa holder's time in the country, when Congress itself declined to do so. *See* Pet.App.283a (Rao, J., dissenting from the denial of rehearing *en banc*). That alone should have resolved the matter.

The decision was also internally inconsistent about the meaning of "entry." As discussed above, *see* Part 1.A, *supra*, when it comes to Congress's requirements for a visa under § 1101(a), the court said "enter" and "entry" refer only to the moment of physically entering the United States. But when it comes to DHS's power to set terms on "entry" under § 1184, suddenly that word allows for authorizations and requirements extending years after physical entry.

3. The D.C. Circuit's conclusion regarding DHS's authority to grant work authorization is also

impossible to square with numerous other provisions in the INA.

For example, Congress expressly authorized—with strict limitations—certain nonimmigrant visa holders to work lawfully in the United States. Most notable are H-1B and H-2B visas, which are numerically capped and apply only to certain industries. 8 U.S.C. § 1184(g).

The majority never bothered to explain why Congress would use such circuitous language in § 1184(a) to let DHS authorize employment, when Congress already did so expressly for H-1B and H-2B nonimmigrant visa holders. If anything, the absence of similar language for F-1 visa holders strongly indicates Congress did *not* authorize them to seek employment. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Tellingly, the decision below referenced H-1B visas only once in passing, and never mentioned the caps on those visas. Pet.App.5a. That is unsurprising, given that the tight restrictions on H-1B and H-2B visas demonstrate the illogic of the opinion's conclusion that DHS can freely grant employment to any nonimmigrant visa holder.

Further, as noted above, while in lawful status, most types of nonimmigrant visa holders can change their status to a *different* nonimmigrant visa. 8 U.S.C. § 1258. But under the D.C. Circuit's opinion, there is minimal-to-nonexistent benefit in changing from one nonimmigrant visa to another because DHS can grant work authorization to *any* nonimmigrant visa holder regardless of his type of visa. For example, those

"visiting the United States temporarily for business" can obtain a B visa, 8 U.S.C. § 1101(a)(15)(B), but DHS can directly authorize employment for those visa holders without the hassle of having to change their status to a visa type that expressly authorizes employment. There is little point in bothering to change visas, rendering § 1258 largely superfluous.

In short, the majority opinion never provided an explanation for why Congress would allow such easy "end run[s]" around numerous, exceedingly detailed statutory restrictions. Pet.App.282a (Rao, J., dissenting from the denial of rehearing *en banc*). The far more persuasive interpretation—and the one that gives effect to all provisions—is the one proffered by Judges Henderson and Rao in dissent, limiting DHS's authority to issuing regulations to carry out Congress's requirements for *entry* on nonimmigrant visas. That follows the text of the INA rather than relying on "unrestricted Executive Branch discretion." Pet.App.279a (Rao, J., dissenting from the denial of rehearing *en banc*).

As a final nail in the coffin, the major-questions doctrine confirms that Congress did not *implicitly* delegate to DHS the power to create, in essence, an entirely new nonimmigrant visa system where DHS can authorize employment for millions of aliens, despite the narrowly circumscribed H-1B and H-2B programs. Pet.App.283a (Rao, J., dissenting from the denial of rehearing *en banc*). Such a power would undoubtedly trigger the major-questions doctrine, yet the majority opinion below tellingly declined to address the doctrine at all, even though its opinion

issued after this Court decided *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), and even though Judge Henderson cited it in her panel dissent, *see* Pet.App.86a (Henderson, J., concurring in part and dissenting in part). There is no clear authority for DHS to have a free-roving power to authorize employment for all non-immigrant visa holders. The majority below thus had it exactly backwards when it claimed that "any remaining ambiguity counsels deference" to DHS's expansive view of its own powers. Pet.App.55a.

4. One final merits point of particular importance to *amici* warrants mention. Perhaps aware that its textual arguments were sorely lacking in persuasiveness, the majority decision below repeatedly looked beyond the provisions of the INA and contended that Congress had acquiesced in the court's unusual interpretations of the nonimmigrant visa system. Pet.App.30a–40a. The Court cited examples of Presidents relying on § 1184's predecessor to let students to stay in the country for "practical training" after their student visas had expired—and then claimed Congress had not "disapprove[d]" of that power when enacting the INA in 1952. Pet.App.8a.

This "acquiescence" argument is unpersuasive and illogical for several reasons. *First*, the majority never explained why Congress would have acquiesced in an interpretation of the INA that no court had ever previously adopted, until the decision below. The "consistent judicial interpretation" of these statutes is

directly counter to the decision below. *Pierce v. Underwood*, 487 U.S. 552, 567 (1988).

Second, the President has long disagreed with Congress about the INA's limits, as demonstrated by President Truman's veto of the INA because he viewed it as far too restrictive of immigration.[4] Congress overrode that veto to enact the INA into law. H.R. 5678, 82d Cong., Pub. L. No. 82-414, 66 Stat. 163 (overriding veto, *see* House Roll No. 165, 98 Cong. Rec. 8214–26 (June 26, 1952); Senate Roll No. 298, 98 Cong. Rec. 8253–68 (June 27, 1952)). The D.C. Circuit nonetheless saw fit to give more weight to the interpretation espoused by the branch that vetoed the INA than to the text written by the branch that passed it by supermajorities.

Third, acquiescence is irrelevant when the text is clear, as it is here. "Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

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At nearly every step, the majority opinion stretched logic and text to their breaking points, rejecting an orderly and commonsense approach to the nonimmigrant visa system in favor of one that

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[4] Harry S. Truman, *Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality* (June 25, 1952), *available at* https://www.trumanlibrary.gov/library/public-papers/182/veto-bill-revise-laws-relating-immigration-naturalization-and-nationality.

renders numerous statutory provisions illogical or irrelevant and ultimately grants DHS the novel power to authorize permanent nonimmigrant presence and employment in the United States, in defiance of the detailed nonimmigrant scheme Congress created for entering, remaining, working, and leaving the United States.

As explained next, these errors will cause—and are already causing—significant consequences for the nation's immigration system.

II. The D.C. Circuit's Ruling Will Have Dramatic Consequences for the Nation's Immigration System and the American Workers It Was Designed to Protect.

The sea change effected by the D.C. Circuit's decision has already resulted in "serious ramifications for the enforcement of immigration law," and those consequences will only increase over time. Pet.App.279a (Rao, J., dissenting from the denial of rehearing *en banc*).

The D.C. Circuit held that its interpretation of § 1101(a)(15) as setting only entry conditions applies to *all* 22 categories of nonimmigrant visas. Pet.App.49a–50a. There are over a million F-1 recipients alone every year, and over 100,000 of them remain in the country for DHS's "Optional Practical Training." Pet.App.2a.

Compare those figures to the caps for H-1B and H-2B visas, which are generally 65,000 and 66,000 per year, respectively. 8 U.S.C. § 1184(g)(1). DHS's OPT program has now "surpassed the H-1B visa program

as the greatest source of highly skilled guest workers." Pet.App.79a (Henderson, J., concurring in part and dissenting in part). Moreover, under DHS's regulations, F-1 holders can now stay in the country longer than most H-1B holders, who are limited to three years for an initial visa and six years total. 8 U.S.C. § 1184(g)(4); 8 C.F.R. § 214.2(h)(9)(iii)(A)(1); *see also* Part 1.B, *supra* (noting that under the D.C. Circuit's logic, DHS could authorize F-1 holders to remain permanently in the United States).

The D.C. Circuit's misinterpretation of § 1184(a) is especially damaging. DHS can now grant work authorization for any and all nonimmigrant visa holders, regardless of whether Congress expressly granted work authorization. The D.C. Circuit has blessed a dubious workaround that yields a visa program bigger, longer, and more expansive in benefits than the H-1B and H-2B programs—all in contravention of Congress's tightly circumscribed scheme. *See* Pet.App.279a (Rao, J., dissenting from the denial of rehearing *en banc*). And there is no reason DHS would limit its newfound powers to F-1 visas.

The D.C. Circuit claimed its ruling is limited because DHS's grant of work authorization must be "reasonably related" to the particular visa upon which the alien entered. Pet.App.26a. There is no textual basis in the INA for this "reasonably related" test. Rather, the proper limits are those Congress actually imposed, which the opinion repeatedly disregarded. In any event this "test" has no teeth, as demonstrated by this very case. The decision below concluded that being a full-time employee for years is "reasonably

related" to being a student. Under such a broad and meaningless test, DHS could presumably authorize full-time productive employment even for H-3 visa holders, who are required to be in "a training program that is *not* designed primarily to provide productive employment." 8 U.S.C. § 1101(a)(15)(H)(iii).

The consequences have already started playing out. The D.C. Circuit's decision obliterating the INA has now been applied to the context of visa holders' *spouses*. The U.S. District Court for the District of Columbia recently concluded that the D.C. Circuit's decision required upholding DHS's asserted power to grant work authorization for spouses of many H-1B visa recipients despite no statute expressly authorizing this power. *See Save Jobs USA v. DHS*, No. 15-cv-0615, 2023 WL 2663005, at *2 (D.D.C. Mar. 28, 2023).

Under that theory, DHS could authorize employment for any of the other fifteen types of visas that use similar language about accompanying or joining spouses, even though Congress expressly authorized employment for spouses of only *two* of those types of visa holders (E and L visas). *See* 8 U.S.C. § 1184(c)(2)(E); *id.* § 1184(e)(2). When Congress creates fifteen types of dependent visas but authorizes employment for only two of them, it is nonsensical to conclude that Congress implicitly gave DHS the power to authorize employment for the other thirteen types, too—but that is exactly what the D.C. Circuit's decision dictates.

Even if the decision below addressed only F-1 visas, this case would be worth the Court's review

because of the enormous size of the F-1 visa program. But the opinion is far more expansive. It reconfigures the entire nonimmigrant visa, from start (the moment of entry) to finish (the ability to work for years in the United States without losing visa status). Hundreds of thousands of aliens who are not authorized by Congress to remain in the country, let alone obtain work authorization, will now be competing for a wide range of jobs in defiance of the strict and comprehensive congressional limitations protecting American workers. The decision below thus cries out for review all the more.

III. The D.C. Circuit's Decision Created a Split and Is Also Contrary to This Court's Decisions.

Given the magnitude and consequences of the D.C. Circuit's decision, it would justify certiorari even if no other circuit had addressed these issues. But here a grant is especially warranted because, as Judge Rao explained, the decision below is contrary to other circuits' decisions holding that the requirements for nonimmigrant visas remain in place even after the alien has entered the country. Pet.App.285a (Rao, J., dissenting from the denial of rehearing *en banc*) (citing *Khano v. INS*, 999 F.2d 1203, 1207 & n.2 (7th Cir. 1993); *Graham v. INS*, 998 F.2d 194, 196 (3d Cir. 1993); *Castillo-Felix v. INS*, 601 F.2d 459, 464 (9th Cir. 1979)).

This Court has suggested the same rule, noting that, for example, "should a G-4 alien terminate his employment with an international treaty organization, both he and his family would lose their

G-4 status." *Elkins v. Moreno*, 435 U.S. 647, 666-67 (1978). The majority never responded to this point from *Elkins*.

Nor did the decision acknowledge this Court's recent *unanimous* pronouncements that "a foreign national who entered the country legally on a tourist visa, but stayed on for several months after the visa's expiration … founders in showing nonimmigrant status," as would "someone who legally entered the United States on a student visa, but stayed in the country long past graduation." *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 1813, 1815 (2021). That these examples elicited unanimous support from this Court demonstrates just how counterintuitive the D.C. Circuit's decision is.

The view espoused by *Elkins* and *Sanchez* represented the uniform interpretation of the INA by federal appellate courts—until the decision below.

This Court should grant review to remedy this important disagreement, especially given that the litigation in this case has been ongoing for fifteen years and warrants a lawful resolution.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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