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

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND 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 enacts 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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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund[1] ("Eagle Forum ELDF") is a nonprofit corporation founded in 1981. For more than forty years, Eagle Forum ELDF has defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. In addition, Eagle Forum ELDF has

[1] All parties' counsel have been provided the timely notice required by Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party or counsel other than the amicus curiae, its counsel, and its supporters made a monetary contribution intended to fund preparation or submission of this brief.

consistently opposed unlawful behavior, including not only aliens' illegal entry into and residence in the United States, but also unlawful federal, state, and local government action that violates the immigration laws that Congress has enacted. For these reasons, Eagle Forum ELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Washington Alliance of Technology Workers ("Washtech") challenges a regulation promulgated by the Department of Homeland Security ("DHS") under the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA"). That regulation purports to extend the terms under which nonimmigrant aliens who enter the United States on student visas can not only remain in the United States but also work here after their graduation.

Specifically, DHS's Optional Practical Training Program ("OPT"), 8 C.F.R. § 214.2(f)(10)-(12), purports to allow students in a bachelor's, master's, or doctoral degree program to work in an "optional practical training directly related to the student's major area of study" for "a 14-month period following the completion of study." 8 C.F.R. § 214.2(f)(10)(ii)(A), 214.2(f)(10)(ii)(A)(3). In addition, for students with "a science, technology, engineering, or mathematics (STEM) degree," OPT purports to allow students to extend their practical work for an additional 24-month period. 8 C.F.R. § 214.2(f)(10)(ii)(C).

DHS promulgated OPT under the general INA authority to regulate the "time" and "conditions" of a nonimmigrants' stay in the United States. 8 U.S.C. § 1184(a)(1). But the definition of the student-visa

category of nonimmigrant aliens (*i.e.*, those who enter this Nation with the intent to return to their native country) provides limits on who can enter the United States as students and how they may remain under the student-visa category:

> The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> …
>
> (F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, 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*** consistent with section 1184(l) of this title ***at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program*** in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the ***termination of attendance*** of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the ***approval shall be withdrawn***[.]

8 U.S.C. § 1101(a)(15)(F)(i) (emphasis added). OPT attempts to address any inconsistency with the student-visa definition's temporal constraints by providing an administrative exception: "Continued enrollment, for the school's administrative purposes, after all requirements for the degree have been met does not preclude eligibility for optional practical training." 8 C.F.R. § 214.2(f)(10)(ii)(A)(3).

In the overall context of nonimmigrant visas for specialized workers, Congress not only regulates the category of "temporary employees" but also caps those in a "specialty occupation" with annual limits on the number of visas. *See* 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1184(g)(1)(A)(vii) (capping H-1B visas at 65,000 per fiscal year after 2003); 8 C.F.R. § 214.2(h). The OPT program for STEM workers thus provides a backdoor means to increase the number of specialty-occupation workers by an indefinite number. Indeed, the number of STEM workers added to the U.S. labor market by the OPT STEM extension exceeds the 65,000-worker cap set for H-1B visas. *See* Atlantic Legal Found. Br., at 21 (citing David J. Bier, Cato Inst., The Facts about Optional Practical Training (OPT) for Foreign Students (May 20, 2020)).

This case first sets up the conflict whether the general DHS authority to regulate the "time" and "conditions" of a nonimmigrants' stay is cabined by the limits in the definitions of the categories of aliens at issue (*e.g.*, students, temporary employees, and specialty occupations). If so, DHS's regulation is *ultra vires*. If not, this Court must ask itself whether DHS's action falls within the major-questions doctrine and, as such, requires a clearer congressional statement of

DHS's authority to regulate in this area.

SUMMARY OF ARGUMENT

This Court can reject DHS's regulatory expansion of INA's student-visa program as *ultra vires*. First, OPT is inconsistent with INA's plain language, especially the limiting language in § 1101(a)(15)(F)(i) and the related caps on specialty occupations in the H-1B visa program. *See* Section I.A. Second, DHS's attempt to tie § 1101(a)(15)(F)(i)'s limiting conditions to the time a student first enters the United States are inconsistent not only with INA's provisions that make those conditions apply on an ongoing basis but also the Dictionary Act's providing that the present tense in statutes includes the future tense. *See* Section I.B. Third, OPT's treatment of student work is inconsistent with the caselaw addressing the tax implications of medical internships. *See* Section I.C. Fourth, because OPT is inconsistent with INA, and DHS has not adequately justified OPT's deviation from INA, this Court should not defer to DHS's position. *See* Section I.D. Fifth, there is insufficient evidence of congressional ratification of OPT, given the amendments that Congress has made over time and the possibility that Congress is simply relying on the courts to trim OPT. *See* Section I.E.

Even if INA did not *affirmatively prohibit* OPT, this Court still should reject DHS's authority to expand the student-visa program because INA does not *affirmatively allow* OPT. Immigration generally and the visa worker context specifically fall into the "major-questions" doctrine, so that this Court should inquire independently into DHS's authority. *See* Section II. In particular, while INA assigns DHS

important duties on immigration, DHS's has no real expertise in regulating the technology sector, which calls into question whether Congress delegated that authority. *See* Section II.A. Similarly, even if DHS might claim deference when regulating visa issues within DHS's traditional authority, review under the major questions doctrine denies agencies deference in light of the improbability that Congress delegated the authority without a clear statement. *See* Section II.B.

With respect to Article III, Washtech has standing to assert its members' interests. INA protects workers who are citizens or lawful permanent residents ("LPRs"), but OPT not only opens those Washtech members to increased competition for jobs, but also depresses salaries in the market through more people willing to work for less. Washtech thus has "competitor standing" through its members *See* Section III.A.1. In addition, because F-1 visa holders get favorable tax treatment, Washtech members suffer an "unequal footing" or equal protection injury. *See* Section III.A.2.

ARGUMENT

I. OPT IS SIMPLY *ULTRA VIRES*.

The OPT program's justification rests on the word "student" bearing some ambiguity, which is simply not the case: "A school graduation marks, by definition, the end of a student's association with a school." *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 383 (6th Cir. 1999). Moreover, the F-1 program statutorily applies only to educational programs at educational institutions, which does not include blanket approval for employment by nonimmigrant STEM graduates specifically or all

nonimmigrant graduates generally.

A. OPT conflicts with INA's plain language.

INA's F-1 provisions are concerned with the individual student's ***bona fide*** educational course, applying only 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 established … academic institution***." 8 U.S.C. § 1101(a)(15)(F)(i) (emphasis added). Indeed, in 2005, Congress expressly amended INA to set aside up to 20,000 H-1B visas for the type of post-graduation holders of F-1 visas that benefit from OPT:

> The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 1101(a)(15)(H)(i)(b) of this title who—… has earned a master's or higher degree from a United States institution of higher education … 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); Consolidated Appropriations Act, PUB. L. NO. 108-447, § 425(a)(4), 118 Stat. 2809, 3356 (2005). By setting aside up to 20,000 visas for graduating F-1 visa holders, Congress indicated that the H-1B program and its caps apply to F-1 visa holders after they graduate. Such post-enactment legislation is "entitled to great weight in statutory construction" of the original law, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969), and compels this

Court to reject DHS's position.

B. DHS's entry-based argument conflicts with INA and the Dictionary Act.

The Court of Appeals accepted DHS's argument that the restrictions on student status should apply only to the time of the student's entry. App. 40a-48a; *but see id.* 73a-77a (Henderson, J., concurring in part and dissenting in part); *id.* 283a-285a (Rao, J., dissenting from the denial of rehearing *en banc*). Under this view, foreign students may enter the U.S. with no fixed plans of post-graduation employment, only to abandon that intent upon graduation. *Amicus* Eagle Forum ELDF respectfully submits that this temporal verb-tense-based argument is foreclosed not only by INA's specific, conflicting substantive provisions, but also by the general statutory-construction canons enacted in the Dictionary Act, 1 U.S.C. § 1.

Three INA provisions nullify DHS's temporal entry-requirement argument. First, the F-1 visa program itself applies only to academic programs and requires the educational institution to "report … the termination of attendance of each nonimmigrant student." 8 U.S.C. § 1101(a)(15)(F)(i). Second, INA requires that its implementing regulations "insure that … upon failure to maintain the status under which [an alien] was admitted, … such alien will depart from the United States." 8 U.S.C. § 1184(a)(1). Third, INA makes deportable "[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted." 8 U.S.C. § 1227(a)(1)(C)(i). DHS has not explained—and cannot explain—how INA's

expressly making entry requirements *continuing* requirements could support limiting those requirements to students' initial entry to the country.

Under the Dictionary Act, moreover, when "determining the meaning of any Act of Congress," "words used in the present tense include the future as well as the present" "unless the context indicates otherwise." 1 U.S.C. § 1. As explained above, the INA context here most decidedly supports the future and ongoing applicability of INA's entry requirements, so DHS's and the lower courts' exploration of grammatical possibility has no bearing on this Court's independent obligation to determine INA's meaning. *See Carr v. United States*, 560 U.S. 438, 447-48 (2010) ("[c]onsistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach"). Because the statutory context does not indicate otherwise, this Court should follow the Dictionary Act—as well as INA's continuing mandate to meet the tests for one's immigration status—to conclude that DHS has no INA authority to grant student-visa status to *non-students*.[2]

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[2] When faced with claims that agency clients acted *ultra vires*, the Department of Justice often argues that the particular transgression was merely a garden-variety mistake in using a delegated power, as opposed to a full-fledged *ultra vires* agency action. Rejecting that view, this Court clarified that there are no sliding scales of *ultra vires* conduct: "Both [agencies'] power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013).

C. OPT's across-the-board educational treatment of post-graduate work conflicts with the tax cases on the educational nature of medical internships.

Amicus Eagle Forum ELDF respectfully submits that the litigation history of Social Security taxation for medical interns should inform this Court's views on the scope of the student exemption. Under those cases, a medical resident may or may not qualify for a student-based exemption from taxation based on the educational nature of the internship or residency. *See, e.g.*, *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 30 (2d Cir. 2009) (the "student exemption relies, in part, on the identities of the employees and employers to define the scope of the exemption, … [and], [a]lthough all interns may be students, not all hospitals [or employers] are schools, colleges, or universities").[3] DHS's across-the-board determination of an educational benefit is, simply, untenable.

Whatever play at the margins that INA has for the word "student," the required and appropriate analysis consists of an individualized, case-by-case

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[3] *See also Univ. of Chicago Hosps. v. U.S.,* 545 F.3d 564, 570 (7th Cir. 2008) (Social Security's "student exception is not *per se* inapplicable to medical residents as a matter of law; rather, a case-by-case analysis is required to determine whether medical residents qualify for the statutory exemption from FICA taxation") (citations omitted); *United States v. Mount Sinai Med. Ctr. of Fla., Inc.,* 486 F.3d 1248, 1253 (11th Cir. 2007) ("a case-by-case analysis is necessary to determine whether a medical resident enrolled in a GMEP qualifies for a FICA tax exemption pursuant to the student exemption").

determination whether a particular job and employer are educational, consistent with INA's F-1 provisions (*e.g.*, academic supervision). Some STEM jobs—such as some post-doctoral positions—likely could qualify as educational, provided that they were either educational in their own right or conducted under academic supervision from the student's educational program. As with the medical-resident context relevant to the student-exemption cases under Social Security, however, not *all* STEM graduates are even remotely engaged in post-graduation work that qualifies as educational for an employer that qualifies as an educator. What INA's F-1 provisions do not allow is an across-the-board rule that any post-graduation employment by any STEM-educated worker qualifies as an extension of that graduate's student life.

D. DHS's views do not warrant deference.

The Court of Appeals deferred to DHS's views under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), based on a subset of the rationales that DHS made to claim that (or even higher) deference. Because this Court will decide the deference issue *de novo*, *amicus* Eagle Forum ELDF addresses DHS's claims as well as the lower-court holdings. In sum, DHS's views here do not warrant this Court's deference.

First, DHS claimed and the panel held that its INA longstanding interpretation warrants "particular deference" under *Barnhart v. Walton*, 535 U.S. 212, 220 (2002). App. 58a. Standing alone, divorced from the other relevant factors, longevity itself is no guarantee of deference: "Arbitrary agency action

becomes no less so by simple dint of repetition." *Judulang v. Holder*, 565 U.S. 42, 61 (2011). Moreover, the question of whether INA would countenance a 14-month OPT program *for all F-1 visa holders* is a different thing from whether STEM graduates (but not F-1 visa holders with other majors or degrees) get another 24 months, not for the educational purposes in 8 U.S.C. § 1101(a)(15)(F)(i), but to meet the needs of U.S. industry. *See, e.g.*, *Glebe v. Frost*, 574 U.S. 21, 24 (2014) (rejecting "an 'in for a penny, in for a pound' approach"). While *amicus* Eagle Forum ELDF concurs with Washtech that both the 14-month program and the 24-month STEM extension are unlawful, the hypothetical lawfulness of the 14-month program would not establish the lawfulness of the 24-month STEM extension.

Second, notwithstanding Eagle Forum ELDF's respect for the many important duties that Congress has put to DHS in service of the Nation, DHS cannot make itself the indispensable agency on issues of labor, technology, education, and the economy, in addition to its vital homeland-security duties. Courts often must "remind [an agency] that its mission is not a roving commission to achieve [certain statutory goals] or any other laudable goal." *Michigan v. U.S. EPA*, 213 F.3d 663, 696 (D.C. Cir. 2000); *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 669-70 (2022) (Gorsuch, J., concurring). This is an occasion for this Court to do so. This Court does not owe deference to DHS's efforts to optimize the U.S. technology sector or the economy.

Third, 6 U.S.C. § 522 argues against construing INA provisions "to limit judicial deference" to actions

by DHS or the Attorney General. Deference to administrative agencies is a judicially derived principle under the separation-of-powers doctrine. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps"); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 28 (1983). Congress can change the authority that it delegates to federal agencies, but it cannot dictate to courts the factors that determine whether a federal agency has violated the Constitution by making laws outside the scope of the agency's delegation. *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (the "power to interpret the Constitution … remains in the Judiciary"). For good reason, then, no court has based a decision on 6 U.S.C. § 522. This DHS argument is meritless.

1. DHS's views do not warrant *Chevron* deference.

DHS considers it relevant that Congress did not identify a level of specificity for regulating student employment, which purportedly warrants deference to the agency to pick the level of specificity. The point is that—because Congress failed to specify how long, exactly, after graduation students cease to be students—DHS may decide that. Given the clear meaning of the statutory terms, however, DHS's views fall outside the range of plausible interpretations: "Even under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 321 (2014) ("*UARG*")

(internal quotations omitted).

By contrast, "an agency interpretation that is inconsistent with the design and structure of the statute as a whole, does not merit deference." *Id.* (internal quotations and alterations omitted). Indeed, the OPT program that existed prior to 2008 treated all foreign F-1 visa holders equally, whereas the recent OPT program grants special treatment to STEM degrees. If DHS had not been so candid in providing the rationale for treating similarly situated F-1 visa holders differently, this Court likely would have rejected the OPT expansion as a "discrimination of an unusual character." *United States v. Windsor*, 570 U.S. 744, 770 (2013). But DHS expressly acknowledged that what defines STEM degrees' entitlement to employment for an additional 24 months has nothing to do with the § 1101(a)(15)(F)(i)'s educational focus, but rather with the perceived needs of the U.S. economy. This Court can easily reject that rationale as having literally nothing to do with § 1101(a)(15)(F)(i) or DHS's mission.

2. DHS's views do not warrant *Skidmore* deference.

For agency action without entitlement to *Chevron* deference, deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), potentially can apply, based on the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." Consistency of interpretation can increase deference, and inconsistency can decrease or nullify it. *Id.; Morton v. Ruiz*, 415

U.S. 199, 237 (1974). As *Judulang* explained, however, longevity alone would not require deference for an arbitrary interpretation, and the longstanding OPT programs involved across-the-board programs for education purposes, not a STEM-only program for industrial purposes. Here, DHS's reasoning appears to be that, because the STEM-based OPT expansion is good for U.S. industry, it must be legal. That argument has absolutely no statutory grounding. *Cf. McConnell v. FEC*, 540 U.S. 93, 262-63 (2003) (rejecting the "Charlie Wilson Phenomenon" under which "what's good for General Motors is good for the country") (Rehnquist, C.J., dissenting in part). Accordingly, the OPT program expansion does not warrant even *Skidmore* deference.

E. Congress did not acquiesce to or ratify OPT.

The panel found that the long history of similar administrative relief to foreign students demonstrates that Congress has acquiesced in DHS's interpretation of INA. App. 8a. *Amicus* Eagle Forum ELDF respectfully submits that Congress rejected DHS's position in 1981 and 2005 and that any alleged subsequent congressional acquiescence would "more appropriately be called Congress's failure to express any opinion." *Rapanos v. United States*, 547 U.S. 715, 750 (2006). For two reasons, this Court should reject DHS's claim to congressional acquiescence.

First, it is entirely possible that, instead of acquiescing to the OPT program—especially its post-2008 expansions—Congress believed that "the courts would eliminate any excesses," or that inaction "simply [reflects a congressional] unwillingness to

confront the [high-tech employers] lobby." *Id.; Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 187 (1994). DHS cannot cite evidence that "*Congress* considered and rejected the 'precise issue' presented before the Court," which is what an acquiescence theory requires to be forceful. *Rapanos*, 547 U.S. at 750 (emphasis added). As such, DHS's invocation of acquiescence has no force here.

Second, and quite to the contrary, in 1981 and 2005, Congress *rejected* DHS's position. In 1981, Congress "amend[ed] subparagraph (F) of [INA] section 101(a)(15) relating to nonimmigrant students, to specifically limit it to ***academic students***." S. REP. 96-859, at 7 (1980) (emphasis added); PUB. L. NO. 97-116, § 2(a)(1), 95 Stat. 1611 (1981). Specifically, for education other than language training and in pertinent part, the 1981 amendment struck "other recognized place[s] of study" potentially including on-the-job, practical training and replaced them with a "college, university, seminary, conservatory, academic high school, elementary school, or other academic institution" for student visas:

> Subsection (a)(15) of section 101 … is amended—
>
> (1) by striking out "institution of learning or other recognized place of study" in subparagraph (F) and inserting in lieu thereof "college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program[.]"

PUB. L. NO. 97-116, § 2(a)(1), 95 Stat. at 1611. Next,

in 2005, Congress clarified that the H-1B visa caps apply to F-1 visa holders who graduate. Regardless of how it rules on the OPT program's merits, this Court cannot find congressional acquiescence.

II. THIS ISSUE FALLS WITHIN THE "MAJOR-QUESTIONS" DOCTRINE.

While INA ***actually prohibits*** OPT as DHS has promulgated OPT, *see* Section I, *supra*, that is not the same question as whether INA ***allows*** OPT. To the contrary, holding that INA does not prohibit OPT would not mean that INA allows OPT. Instead, DHS must clear a final hurdle under the major-questions doctrine, even if INA is ambiguous.

Although the "major-questions" label is new, the issue flows from a long line of decisions,[4] with more recent additions sharpening—and naming—the doctrine.[5] The doctrine covers statutory interpretation generally under "a practical understanding of legislative intent," but has added force when agencies claim power through modest or vague statutory language, especially when the power is new but the statute is old. *West Virginia*, 142 S.Ct. at 2607-09. This special force derives from statutory interpretation generally and from the separation-of-powers

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[4] *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 642 (1980); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("*B&WTC*"); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *UARG*, 573 U.S. at 324; *King v. Burwell*, 576 U.S. 473, 486 (2015).

[5] *Alabama Ass'n of Realtors v. HHS*, 141 S.Ct. 2485 (2021) ("*Alabama Realtors*"); *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

doctrine, *id.*, which includes the federalism canon. *Id.* at 2620-2622 (Gorsuch, J., concurring); *Alabama Realtors*, 141 S.Ct. at 2489. While Congress clearly has authority to enact OPT, DHS nonetheless may lack delegated authority to promulgate OPT.

DHS's regulation of the technology employment market is economically significant, but the major-questions doctrine is not limited to economically significant rules. The doctrine applies equally to "major social … policy decisions" and ones with "political significance." *West Virginia*, 142 S.Ct. at 2613. Even if OPT lacked economic significance, it would readily satisfy the social-policy and political tests:

- Immigration has proved too thorny for Congress to address comprehensively, which highlights the political sensitivity of the issue.
- The actual amendments of relevant INA authority in 1981 and 2005 cut against DHS's suggestion that DHS's residual general authority determines the scope of the authority that DHS attempts to read into its time-and-conditions delegation.
- The economic importance of the technology sector and the political importance of favoring American workers are issues that cannot be passed to an agency without a clear and manifest congressional intent, no matter how much Congress may prefer to duck the issue.

Along these fronts, courts "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Realtors*, 141 S.Ct. at 2489 (interior quotations omitted). In our democracy, heightened judicial

scrutiny of congressional and *a fortiori* agency action extends beyond moneyed interests.

A. OPT is outside DHS's expertise, which makes it unlikely that INA delegated the authority DHS claims.

The major-questions doctrine views skeptically an agency's claimed congressional delegations when the agency lacks expertise in the relevant field: "deference ebbs when the subject matter of the dispute is distant from the agency's ordinary duties or falls within the scope of another agency's authority." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2417 (2019); *West Virginia*, 142 S.Ct. at 2612-13. Here, Congress did not displace the other relevant agencies with expertise in education, technology, and commerce, so there is little reason to think that Congress would delegate the regulation of the technology sector to DHS, especially given that the original Food, Drug and Cosmetic Act did not delegate regulation of cigarettes to the Food & Drug Administration. *B&WTC,* 529 U.S. at 133. In the fields at issue here, DHS lacks the expertise needed to claim the delegation that DHS finds implicit in INA.

B. The major-questions doctrine would deny DHS deference, even if deference were otherwise appropriate.

As indicated in Section I.D, *supra*, DHS's views do not warrant deference here. But even if DHS's views might warrant deference generally, this issue's falling in the major-questions doctrine would deny DHS that deference for the issues at stake here.

Clear-statement rules require considering alternate definitions, even if an ordinary meaning would support the agency's view. Thus, contrary to the

deference by the panel (App. 55a-58a), courts must "determine the correct reading" of statutes that raise "question[s] of deep economic and political significance," without administrative deference. *King*, 576 U.S. at 486 (interior quotations omitted); *UARG*, 573 U.S. at 324; *West Virginia*, 142 S.Ct. at 2612-13. The lower courts' deference was inappropriate under the major-questions doctrine. In major-questions contexts, agencies must show "clear congressional authorization" for claimed powers, not a "merely plausible textual basis for the agency action." *West Virginia*, 142 S.Ct. at 2609 (interior quotations omitted); *cf. Chevron*, 467 U.S. at 843 n.9 (*Chevron* "step one" relies on traditional tools of statutory construction, on which courts are "the final authority"). Deference cannot aid DHS because the issue of deference does not arise here.

C. The 2005 INA amendments make DHS's claimed delegation dubious.

When Congress amended INA in 2005 to count graduated F-1 visa holders toward the H-1B visa caps, Congress legislated specifically. *See* Section I.A, *supra*. That targeted, specific amendment reinforces that INA's general time-and-conditions authority does not use its "vague terms or ancillary provisions" to "hide elephants in mouse holes." *Whitman*, 531 U.S. at 468. This Court should reject DHS's latter-day claim to wide authority to regulate the technology sector.

III. WASHTECH HAS STANDING.

The standing inquiry consists not only of the minimum requirements for a case or controversy under Article III, but also several judicially imposed

prudential limits on the exercise of judicial power. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). In evaluating Washtech's standing, this Court must consider the question under ***Washtech's*** view of the merits: "one must assume the validity of a plaintiff's substantive claim at the standing inquiry." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *Warth v. Seldin*, 422 U.S. 490, 500 (1975). In other words, the question is not which party is correct but, assuming *arguendo* that Washtech is correct, whether the Court has a case or controversy appropriate for a federal court.

A. Washtech has constitutional standing.

Constitutional standing consists of a cognizable injury in fact caused by the defendant and redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Further, "an association may have standing solely as the representative of its members." *Warth*, 422 U.S. at 511; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Here, Washtech has standing if its members have standing.

Washtech members suffer several cognizable injury: (1) workers who are citizens or LPRs suffer competitive injury from exposure to foreign students working here illegally on F-1 visas after graduation; and (2) the tax advantage that F-1 visa holders enjoy creates an equal-protection violation *vis-à-vis* citizen and LPR workers.

1. Washtech has competitor standing.

Although modern competitor-standing doctrine began with this Court's administrative-law decisions,

Inv. Co. Inst. v. Camp, 401 U.S. 617, 620 (1970); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970), the Courts of Appeals have expanded on the issue. *See*, *e.g.*, *Mendoza v. Perez*, 754 F.3d 1002, 1011 (D.C. Cir. 2014); *Citizens for Resp. & Ethics in Washington v. Trump*, 953 F.3d 178, 214 (2d Cir. 2019); *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1324 (Fed. Cir. 2008). Indeed, this "Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy the Article III 'injury-in-fact' requirement." *Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (alterations and interior quotation marks omitted); *cf. Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984) ("[a] primary purpose in restricting immigration is to preserve jobs for American workers"). Washtech's members—who face increased job and salary competition from F-1 visa holders—clearly have competitor standing to challenge OPT's exposing them to competitors whom INA would regulate in the absence of OPT's purported work authorization.

2. <u>Washtech has standing to challenge the unlawfully favorable treatment that OPT participants have.</u>

Given that OPT workers have favorable tax treatment *vis-à-vis* workers who are American citizens or LPRs, *see* 26 U.S.C. §§ 3121(b)(19), 3306(c)(19); 42 U.S.C. § 410(a)(19), Washtech members also have "unequal footing" or equal protection standing. *See Clinton*, 524 U.S. at 433 & n.22; *id.* at 456-57 (Scalia, J., dissenting); c*f. CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 287 (2011) ("tax schemes

with exemptions may be discriminatory"). Washtech members have standing both to enforce INA's protections for citizen and LPR workers and to oppose the favorable tax treatment for F-1 visa holders.

B. Washtech has prudential standing under the zone-of-interests test.

In addition to meeting the constitutional minima of Article III standing, Washtech also must satisfy the judicially developed "prudential" limits on standing, *Elk Grove*, 542 U.S. at 11-12. This "prudential standing" doctrine includes limits on asserting the rights of absent third parties and requiring suits to be brought by those "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *Ass'n of Data Processing Serv. Org'ns*, 397 U.S. at 153. Because Washtech argues—and the standing inquiry thus assumes *arguendo*, *Waukesha*, 320 F.3d at 235; *Warth*, 422 U.S. at 500—that DHS's actions are *ultra vires*, this action easily meets the zone-of-interests test.[6]

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[6] Several Courts of Appeals have found the zone-of-interests test inapplicable to *ultra vires* regulations. *See*, *e.g.*, *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 812 n.14 (D.C. Cir. 1987); *Catholic Social Service v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994); *Chiles v. Thornburgh*, 865 F.2d 1197, 1210-11 (11th Cir. 1989). Indeed, by operating outside its delegation, DHS purports to make law without the constitutional process for making law, violating "the separation-of-powers principle, the aim of which is to protect… the whole people from improvident laws." *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 271 (1991) (internal quotations omitted).

As indicated, "[a] primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan*, 467 U.S. at 893. Washtech members are the intended beneficiaries of the U.S.-worker protections enacted into the H-1B program and therefore satisfy the zone-of-interests test.[7] The injuries to Washtech members thus fall in the center of INA's protected zone of interests.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

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Respectfully submitted,

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[7] Significantly, the relevant zone is not the interests protected by DHS's views of the F-1 visa program, but rather the citizen and LPR interests protected by the H-1B program under *Washtech's* merits views. *Waukesha*, 320 F.3d at 235; *Warth*, 422 U.S. at 500.