No. 22-1071

In the Supreme Court of the United States

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,
Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGRATION SERVICES, IMMIGRATION AND CUSTOMS ENFORCEMENT, NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & INFORMATION TECHNOLOGY INDUSTRY COUNCIL,
Respondents.

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

PRIVATE RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL A. TILGHMAN II
NAM Legal Center
733 10th St. NW, Suite 700
Washington, DC 20001

Counsel for the National Association of Manufacturers

DARYL L. JOSEFFER
JORDAN L. VON BOKERN
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

PAUL W. HUGHES
Counsel of Record
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for the Private Respondents

JASON OXMAN
Information Technology Industry Council
700 K Street NW, Suite 600
Washington, DC 20001

Counsel for the Information Technology Industry Council

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Cases—continued

Cases—continued

Statutes, Rules, and Regulations

Statutes, Rules, and Regulations—continued

Other Authorities

STATEMENT

The optional practical training (OPT) program authorizes certain international students, who have entered the United States on F-1 student visas, to complete their education with term-limited employment opportunities directly related to their fields of study. Practical training programs like OPT have existed at least since 1947—that is, they predate the 1952 enactment of the Immigration and Nationality Act (INA)—and these programs and their authorizing regulations have been maintained through every upheaval in the immigration laws in the intervening decades. For three-quarters of a century, practical training has rested on sound legal footing.

Based on a thorough analysis of text, structure, history, and precedent, the court of appeals below therefore reached what should be a non-controversial conclusion: The INA does not foreclose an executive-branch program that has coexisted with the statute since the Truman administration. Nothing about that commonsense holding warrants this Court's review.

In attempting to suggest otherwise, petitioner Washington Alliance of Technology Workers (Washtech) invokes several aspects of the Court's recent administrative-law jurisprudence—potential changes to *Chevron* deference; the major questions doctrine; and the nondelegation doctrine—but properly understood, none of those issues are implicated here. Nor does the decision below conflict with the precedents of this or any other court. The court of appeals correctly rejected Washtech's attempt to upend the settled practice of authorizing temporary practical training opportunities for international students. The petition for certiorari should be denied.

A. Statutory background.

The INA establishes several classes of nonimmigrants, noncitizens who are permitted to enter the United States temporarily and for certain enumerated purposes. See 8 U.S.C. § 1101(a)(15). This case concerns international students who enter the United States on F-1 visas, which may be obtained by

> 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 * * * at an established * * * academic institution[.]

8 U.S.C. § 1101(a)(15)(F)(i).

The INA further provides that "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary of Homeland Security] may by regulations prescribe." 8 U.S.C. § 1184(a)(1).[1] Thus, the Department of Homeland Security (DHS) is explicitly empowered to issue regulations that "prescribe" the "time and * * * conditions" of nonimmigrants' admission to this country. See also *id.* § 1103(a)(3) (DHS's general rulemaking authority).

Finally, the 1986 Immigration Reform and Control Act (IRCA) identifies which noncitizens in the

---

[1] The statute refers to the Attorney General, rather than the Secretary of Homeland Security; with the transfer of immigration authority to the Department of Homeland Security in 2003, that statutory reference is now "deemed to refer to the Secretary." 6 U.S.C. § 557.

United States are authorized to work. Specifically, it is unlawful for an employer to hire an "unauthorized alien." 8 U.S.C. § 1324a(a)(1). And the statute defines an "unauthorized alien" as one who is neither "lawfully admitted for permanent residence" nor "authorized to be so employed by this chapter or by the [Secretary of Homeland Security]." *Id*. § 1324a(h)(3).

B. The OPT program.

"Since before Congress enacted the [INA in 1952], the Executive Branch under every President from Harry S. Truman onward has interpreted enduring provisions of the immigration laws to permit foreign visitors on student visas to complement their classroom studies with a limited period of post-coursework Optional Practical Training (OPT)." Pet. App. 1a.

That history dates back to at least 1947, before the enactment of the INA and the current statute authorizing the F-1 student visa. At that time, the Immigration and Naturalization Service (INS) promulgated a regulation permitting "employment for practical training" if recommended by a foreign student's school. 12 Fed. Reg. 5,355, 5,357 (Aug. 7, 1947). In practice, this regulation allowed practical training taking place after graduation, just like the current OPT program. See S. Rep. No. 81-1515, at 503 (1950) ("[S]ince the issuance of the revised regulations in August 1947 * * * practical training has been authorized for 6 months *after completion of the student's regular course of study*.") (emphasis added).

After the INA was enacted in 1952, requiring a new set of immigration regulations, the government issued a new practical training rule with nearly identical language. See 18 Fed. Reg. 3,526, 3,529 (June 19, 1953). Additional regulations followed, all based on

the conclusion that the INS may authorize practical training opportunities for international students. See, *e.g.*, *Special Requirements for Admission, Extension, and Maintenance of Status*, 38 Fed. Reg. 35,425, 35,426 (Dec. 28, 1973) ("If a student requests permission to accept or continue employment in order to obtain practical training, an authorized school official must certify that the employment is recommended for that purpose and will provide the student with practical training in his field of study[.]"); *Nonimmigrant Classes; Change of Nonimmigrant Classification; Revisions in Regulations Pertaining to Nonimmigrant Students and the Schools Approved for Their Attendance*, 48 Fed. Reg. 14,575, 14,586 (Apr. 5, 1983) (allowing "[t]emporary employment for practical training," including "[a]fter completion of the course of study"); see also Pet. App. 34a (collecting regulations).

This longstanding program was given its current title, "optional practical training," by regulation in 1992, during the George H.W. Bush administration. See *Pre-Completion Interval Training; F-1 Student Work Authorization*, 57 Fed. Reg. 31,954, 31,956 (July 20, 1992). Optional practical training "is a form of temporary employment available to F-1 students * * * that directly relates to a student's major area of study in the United States." Pet. App. 294a.

In 2008, during the George W. Bush administration, DHS promulgated a regulation that provided for an OPT extension of up to 17 months for students holding a STEM degree—that is, a degree in science, technology, engineering, or mathematics. See *Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1*

Students With Pending H-1B Petitions, 73 Fed. Reg. 18,944 (Apr. 8, 2008). Subsequently, during the Obama administration, DHS expanded the STEM OPT extension to a maximum period of 24 months. See Pet. App. 290a-676a (*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, 13,040 (Mar. 11, 2016) (2016 Rule)).

The OPT program is premised on the widespread understanding that "practical training is an accepted and important part of international post-secondary education," and "such work-based learning is a continuation of the student's program of study." Pet. App. 333a, 337a. In the 2016 Rule, DHS explained:

> [T]he OPT program enriches and augments a student's educational experience by providing the ability for students to apply in professional settings the theoretical principles they learned in academic settings. By promoting the ability of students to experience first-hand the connection between theory in a course of study and practical application, including by applying abstract concepts in attempts to solve real-world problems, the OPT program enhances their educational experiences.

Pet. App. 335a.

Current DHS regulations provide that an F-1 student "may apply to [United States Citizenship and Immigration Services (USCIS)] for authorization for temporary employment for optional practical training directly related to the student's major area of study." 8 C.F.R. § 214.2(f)(10)(ii)(A); see also *id.* § 274a.12(c)(3) (providing that "[i]f authorized" for

OPT, an F-1 student "may accept employment subject to any restrictions stated in the regulations"). Any student may be authorized for up to 12 months of OPT, either while the student is enrolled in school or "after completion of the course of study." 8 C.F.R. § 214.2(f)(10), (f)(10)(ii)(A)(3).

Additionally, as a result of the 2016 Rule, students with degrees in "a field determined by the Secretary * * * to qualify within a science, technology, engineering, or mathematics field" may be granted a 24-month extension to post-completion OPT. 8 C.F.R. § 214.2(f)(10)(ii)(C), (C)(2). This STEM OPT extension is subject to additional procedural requirements, including that "each STEM OPT student [must] prepare and execute with their prospective employer a formal training plan that identifies learning objectives and a plan for achieving those objectives," and that the employer must "attest that (1) it has sufficient resources and trained personnel available to provide appropriate training in connection with the specified opportunity; (2) the student on a STEM OPT extension will not replace a full- or part-time, temporary or permanent U.S. worker; and (3) the opportunity helps the student attain his or her training objectives." JA 43 (81 Fed. Reg. at 13,041); see also 8 C.F.R. § 214.2(f)(10)(ii)(C)(7), (10).

C. Procedural history.

Washtech brought suit to challenge the 2016 Rule. Pet. App. 15a-18a. The district court granted leave for the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Information Technology Industry Council to intervene in defense of the 2016 Rule. *Id*. at 17a. And the district court ultimately granted summary judgment for the government and

intervenors on the merits of Washtech's statutory-authority claim. See *id*. at 15a-18a (describing history); *id.* at 88a-139a (district court opinion).

On appeal, the D.C. Circuit affirmed. Pet. App. 1a-59a. Relying both on the current text and structure of the INA, as well as the unique history of the provisions at issue here—Congress was made aware that the Executive had interpreted prior law to permit practical training programs *before* it enacted the INA in 1952, and Congress reenacted those provisions as part of the INA without substantive change—the court upheld OPT as within the Executive's statutory authority.

Specifically, the court explained that "[t]he INA uses [individual nonimmigrant] visa classes" like the F-1 student classification "to identify who may enter temporarily and why, but leaves to DHS the authority to specify, consistent with the visa class definitions, the time and conditions of that admission," "which is exactly what section 1184(a)(1) grants DHS the authority to do." Pet. App. 25a. Of course, that time-and-conditions authority is not boundless: Under fundamental principles of administrative law, "DHS must ensure that the times and conditions it attaches to the admission of F-1 students are reasonably related to the purpose for which they were permitted to enter." *Id.* at 27a. And, as the court explained, OPT passes this test (*id.* at 27a-30a)—a premise that Washtech has never challenged in this litigation.

The court also rejected Washtech's alternative argument that the Executive lacks the power to authorize *any* noncitizens to be employed in this country, unless the INA specifically provides for that employment. Pet. App. 51a-55a. As the court explained, the

statute "defines non-nationals authorized to work as persons so authorized 'either' by the statute 'or by the Attorney General,'" and "thereby acknowledges the Executive's prerogative, where otherwise appropriate, to use" its general rulemaking powers to authorize employment. *Id.* at 51a (quoting 8 U.S.C. § 1324a(h)(3)).

Judge Henderson dissented. Pet. App. 60a-87a. Washtech then petitioned for en banc review, which was denied. Pet. App. 276a-277a. Judges Henderson and Rao dissented from the denial. *Id.* at 278a-286a.

REASONS FOR DENYING THE PETITION

Washtech's petition, which seeks to invalidate a feature of federal immigration law that has existed continuously since the aftermath of World War II, should be denied. The D.C. Circuit's decision properly interprets the INA not to preclude a program of which Congress was well aware when it reenacted the statutory authorization for that program as part of the 1952 INA itself, and that Congress has never repudiated in the seven intervening decades. And despite Washtech's protestations to the contrary, the court of appeals' ruling neither creates a circuit split nor implicates the Court's restraints on agency authority.

A. The D.C. Circuit's decision is unexceptional and correct.

1. The court of appeals was correct in its core statutory holding that the F-1 student-visa definition in 8 U.S.C. § 1101(a)(15)(F)(i) defines who can enter on an F-1 student visa, but leaves to DHS the authority under Section 1184(a)(1) to "prescribe" the "time and * * * conditions" of that stay. 8 U.S.C. § 1184(a)(1); see Pet. App. 25a. The court rightly rejected Washtech's

opposing interpretation of the statute, which would require that the language defining eligibility for entry on an F-1 student visa also sets all terms governing a nonimmigrant's stay on that visa—despite the absence of crucial terms from that statutory definition—and would render the plain language of Section 1184(a)(1) a functional nullity. Washtech's argument is inconsistent with the text, structure, and history of the statute.

The text and structure of the INA make clear that Congress understood the Executive to set the conditions governing visa-holders' stay. As the court of appeals explained, the INA's definitions of visa categories—including the specific F-1 definition for international students—must work hand-in-glove with Section 1184(a)(1)'s grant of authority to DHS to set reasonable restrictions on the "time" and "conditions" of a noncitizen's stay. The nonimmigrant visa definitions in general "are each very brief, specifying little more than a type of person to be admitted and the purpose for which they seek to enter," and "[n]o definition states exactly how long the person may stay, nor spells out precisely what the nonimmigrant may or may not do while here for the specified purpose." Pet. App. 24a; see generally 8 U.S.C. § 1101(a)(15)(A)-(V) (defining nonimmigrant visa classes). This strongly suggests that "[t]hose are parameters that Congress expected the Executive to establish 'by regulations,' which is exactly what section 1184(a)(1) grants DHS the authority to do." Pet. App. 24a-25a.

Not only does the overall statutory scheme indicate that "the time and conditions DHS sets are not cabined to the terms of the entry definition" (Pet. App. 50a), but "[t]he F-1 provision itself shows that the

student-visa entry criteria are not terms of stay" (*id.* at 41a). See also *id.* at 25a ("In fact, [the F-1 definition] cannot rationally be read as setting forth terms of stay.").

In particular, the F-1 definition contains several terms that can only credibly be read as aimed at the time of entry (rather than as continuing requirements), including that the noncitizen "*seeks to enter* * * * for the purpose of pursuing [a full] course of study." 8 U.S.C. § 1101(a)(15)(F)(i) (emphasis added). As the court of appeals explained, Washtech's contrary interpretation—that every term of the F-1 definition constitutes a continuing requirement—"nonsensically would require an admitted F-1 student to continue throughout her stay to seek to enter the country," among other anomalies. Pet. App. 41a. "These 'implausible' and 'counterintuitive' readings illustrate the error in Washtech's view of the F-1 provision and its role in the statutory scheme." *Ibid.*

In fact, Washtech admits that DHS can regulate terms of stay in ways that are flatly incompatible with Washtech's continuing-requirement interpretation of the F-1 statute. That is, Washtech agrees (Pet. App. 42a) that it is permissible for DHS to allow international students to remain in the country for 60 days following their graduation. See 8 C.F.R. § 214.2(f)(5)(iv). Likewise, international students may remain in the United States during breaks between terms—such as during summer break—and when they are between degree programs. See 8 C.F.R. § 214.2(f)(5)(ii)-(iii). Because "Washtech acknowledges the Department's authority to allow students to remain" in the United States during these periods, Washtech must "implicitly accept[] that F-1 works

together with [S]ection 1184(a)(1) to empower the Executive to design workable and meaningful educational programs for nonimmigrant foreign students." Pet. App. 42a.

Contrary to Washtech's assertions, this recognition of DHS's authority under Section 1184(a)(1) does not nullify the F-1 visa definition; rather, as the court of appeals properly recognized, that definition still guides and limits DHS's power to set terms and conditions for these nonimmigrants' stay. Thus, there is a clear limitation on the scope of DHS's authority: "The INA constrains the Department to set only such times and conditions for F-1 students' admission as are reasonably related to their visa class." Pet. App. 29a-30a. This is because, "[w]here Congress has delegated general authority to carry out an enabling statute, an agency's exercise of that authority ordinarily must be 'reasonably related' to the purposes of the legislation.'" *Id*. at 26a (quoting *Doe, 1* v. *Federal Election Comm'n*, 920 F.3d 866, 871 (D.C. Cir. 2019)).

Because the OPT rule challenged here *is* "reasonably related to the nature and purpose of the F-1 visa class," the court of appeals properly held that it is a lawful exercise of the Executive's statutorily defined power. Pet. App. 27a-30a. The court of appeals elaborated on record evidence demonstrating that "[m]any students, especially those in the fields of science, technology, engineering, and mathematics, can succeed at classroom training but need practical training in a workplace setting to operationalize their new knowledge." *Id.* at 27a. And the duration of the STEM extension "is based on the complexity and typical duration of research, development, testing, and other

projects commonly undertaken in STEM fields." *Id*. at 28a (quoting 81 Fed. Reg. at 13,088).

As a whole, "[t]he record shows that practical training not only enhances the educational worth of a degree program, but often is essential to students' ability to correctly use what they have learned when they return to their home countries." *Id*. at 4a; see also *id.* at 26a-28a (describing record evidence). And the OPT regulation requires that "[t]he practical training must be approved by both the school and DHS, * * * and the student's practical training must be overseen by both the employer and the school. *Id*. at 2a; see also *id*. at 13a-15a, 29a (describing relevant regulatory provisions). In all, the OPT rule "closely ties students' practical training to their course of study and their school," confirming that OPT "reasonably relate[s] to the distinct composition and purpose of the F-1 nonimmigrant visa class." *Id*. at 4a.

2. The unique history of the INA confirms that authorizing post-completion practical training is within the statutory power of the Executive. As the court of appeals described in detail, the precursor to the 1952 INA contained a materially identical student-visa definition and a provision similarly empowering the Executive with authority to set the time and conditions of a noncitizen's admission. Pet. App. 8a-11a; see also *id.* at 31a-33a. Applying these provisions, the Truman administration in 1947 issued a rule authorizing foreign students to engage in "employment for practical training" for six months, extendable up to 18 months. *Id.* at 31a-32a (quoting *Immigration and Naturalization Service,* 12 Fed. Reg. 5,355, 5,357 (Aug. 7, 1947)).

Three years later, the Senate Judiciary Committee report that became the "genesis" of the 1952 INA

(1 Charles Gordon et al., *Immigration Law & Procedure* § 2.03[1] (2019)) informed Congress that, under the 1947 regulations, "practical training has been authorized for 6 months *after completion of the student's regular course of study*." S. Rep. No. 81-1515, at 503 (1950) (emphasis added). That is, it is beyond cavil that the Congress that enacted the INA was fully informed that the Executive had interpreted the precursor statute to authorize post-completion practical training. Congress therefore "made a considered judgment to retain the relevant statutory text" in the 1952 enactment, ratifying the Executive's understanding that post-completion practical training is consistent with the statute. Pet. App. 32a (quoting *Texas Dep't of Hous. & Comty. Affs.* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 536 (2015)); see, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 n.66 (1982) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) ("The clearest application of the prior-construction canon" is that "[i]f a word or phrase has been authoritatively interpreted by * * * the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.").

Thus, "evidence reaching back several generations shows 'that Congress intended to ratify' the Executive's interpretation"—that post-completion practical training is not precluded by the relevant text—"'when it reiterated the same definition[s] in' the INA that it had used in the 1924 Act." Pet. App. 33a

(quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)). Together with the text and statutory structure, this history puts the court of appeals' conclusion on sound footing.

3. The court of appeals also correctly rejected Washtech's more general claim that the Executive is powerless to permit the employment of certain categories of noncitizens. See Pet. App. 51a-55a. DHS's rulemaking authority (8 U.S.C. § 1103(a)(3)), combined with its express mandate to "prescribe" the "conditions" of nonimmigrants' admission (*id.* § 1184(a)(1)), provide that power.

History confirms this point. When Congress enacted the F-1 statute, it was well established that the federal government had authorized international students to engage in certain forms of employment. See Pet. App. 52a. And, in 1961, Congress explicitly "exempted F-1 students from several forms of wage taxes—a measure that would be completely unnecessary if those students lacked authorization to work." *Id*. at 53a.

Any doubt on this point was laid to rest by the 1986 passage of IRCA. There, Congress provided that American employers may not hire a noncitizen who is neither "lawfully admitted for permanent residence," nor "authorized to be so employed by this chapter [i.e., the INA] *or by the Attorney General*. 8 U.S.C. § 1324a(h)(3) (emphasis added). This confirms that Congress has "deliberately granted the Executive power to authorize employment." Pet. App. 54a.

As the Reagan administration put it in rejecting precisely the argument Washtech presses here:

> The only logical way to interpret [Section 1324a] is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined "unauthorized alien" in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute.

Pet. App. 54a (quoting *Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987)).

Thus, as the court of appeals explained, "section 1324a(h)(3) expressly acknowledges that employment authorization need not be specifically conferred by statute; it can also be granted by regulation, as it has been in rules promulgated pursuant to DHS's statutory authority to set the 'conditions' of nonimmigrants' admission to the United States." Pet. App. 55a. That conclusion, too, is sound.

B. The Court's review is not warranted.

For all the foregoing reasons, the court of appeals correctly construed the governing statutes. No other court has addressed this question, much less disagreed. Further review is thus unwarranted.

Washtech nonetheless attempts to conjure up a circuit conflict—but none exists. And the 2016 Rule is an appropriate exercise of executive authority: The OPT program is well within the authority explicitly entrusted to the Executive by the INA, and it reflects a continuation of unbroken executive practice now stretching back at least 76 years. Quite unlike the

authorities Washtech invokes—wherein this Court has appropriately restrained executive-branch activism—*this* Rule lies in the heartland of appropriate executive authority expressly conferred by Congress.

1. There is no conflict in the case law.

a. To begin, Washtech mistakenly claims that the decision below "created an 11-1 circuit split with all the numbered circuits." Pet. 15; see also *id.* at 17-18 (collecting purported examples). None of the cases offered by Washtech actually addresses—much less resolves differently—the key issue taken up by the court of appeals below: the proper relationship between the nonimmigrant category definitions, on the one hand, and the Executive's authority to "by regulations prescribe" the "time and * * * conditions" of nonimmigrants' stay, on the other. 8 U.S.C. § 1184(a)(1).

The cases cited by Washtech fall into three groups. First, many of Washtech's cases hold merely that a student becomes deportable when he or she drops below a full course of study, drops out entirely, or accepts employment that is not authorized by the government—each of which is expressly prohibited by regulations promulgated by the Executive to implement the F-1 visa program; indeed, the cases explicitly rely on the regulations in reaching their holdings. See, *e.g.*, *Khano* v. *INS*, 999 F.2d 1203, 1207 (7th Cir. 1993) (noncitizen "violated his nonimmigrant status" by "ceas[ing] to be a full-time student" because he dropped out of school) (citing 8 C.F.R. § 214.2(f)(6)(I)(B)).[2] These cases are therefore entirely

[2] See also *Akbarin* v. *INS*, 669 F.2d 839, 840-841 (1st Cir. 1982) (noncitizen violated status by accepting employment in violation of the "conditions" set out in "8 C.F.R. § 214.2(f)(6)"); *United*

compatible with the court of appeals' explanation in this case that "[t]he INA uses visa classes to identify who may enter temporarily and why, but leaves to DHS the authority to specify, consistent with the visa class definitions, the time and conditions of that admission." Pet. App. 25a.

The second group of cases involves the distinct question of domicile, a requirement that holds a unique place in the INA with respect to the treatment of nonimmigrants, who by definition are residing in the United States temporarily. This issue is not implicated by the OPT program, which does not purport to permit students to develop immigrant intent.

As the Court observed in *Elkins* v. *Moreno*, 435 U.S. 647 (1978), because "Congress expressly conditioned admission for some [nonimmigrant] purposes on an intent not to abandon a foreign residence," "Congress must have meant aliens to be barred from these classes if their real purpose was to immigrate permanently." *Id.* at 665; see Pet. App. 43a. It follows, the Court stated, that "Congress intended that * * * nonimmigrants in restricted classes who sought to establish domicile would be deported." *Elkins*, 435 U.S.

States v. *Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (noncitizen failed to maintain F-1 status by remaining in the United States following graduation) (citing 8 C.F.R. § 214.2(f)(5)-(6)); *Touray* v. *U.S. Att'y Gen.*, 546 F. App'x 907, 913 (11th Cir. 2013) (noncitizen "was not 'pursuing a full course of study,' as required to maintain his status as a nonimmigrant student," because he "stopped attending" college) (quoting 8 C.F.R. § 214.2(f)(5)); *Xu Feng* v. *University of Del.*, 833 F. App'x 970, 971 (3d Cir. 2021) (similarly involving full-course-of-study requirement); *Olaniyan* v. *District Dir., INS*, 796 F.2d 373, 375 (10th Cir. 1986) (noncitizens "failed to comply with their conditions of admission" by "accept[ing] unauthorized employment") (citing 8 C.F.R. § 214.1(e)).

at 666; accord, *e.g.*, *Anwo* v. *INS*, 607 F.2d 435, 437 & n.8 (D.C. Cir. 1979) (citing *Elkins*, 435 U.S. at 666, for the proposition that, "if [a foreign student] did intend to make the United States his permanent home and domicile, then he violated the conditions of his student visa").

The OPT program, however, does not permit foreign students to establish domicile in the United States. Nor does it allow such students to renounce their ultimate intention to depart the country. Nothing about the OPT program thus conflicts with *Elkins* and its progeny cited by Washtech.[3]

Indeed, the INA's domicile requirements are textually distinct from the aspects of the student-visa definition invoked by Washtech here. Each time Congress imposed a domicile requirement in Section 1101(a)(15), it used the present participial phrase "having a residence in a foreign country which he has no intention of abandoning" (*e.g.*, 8 U.S.C. § 1101(a)(15)(F)(i)), suggesting an ongoing requirement. By contrast, the statutory course-of-study requirement invoked by Washtech applies when the noncitizen "seeks to enter the United States" (*ibid.*) supporting the court of appeals' reasoning that this provision "sets the criteria for entry and guides DHS in exercising its authority to set the time and conditions of F-1 students' stay," but "does not, itself,

---

[3] That is, *Anwo*, 607 F.2d 435; *Toll* v. *Moreno*, 458 U.S. 1, 14 n.20 (1982); *Moreno* v. *University of Md.*, 645 F.2d 217 (4th Cir. 1981); *Lok* v. *INS*, 681 F.2d 107, 109 & n.3 (2d Cir. 1982); *Morel* v. *INS*, 90 F.3d 833, 838 (3d Cir. 1996), vacated for lack of jurisdiction, 144 F.3d 248, 252 (3d Cir. 1998); *Graham* v. *INS*, 998 F.2d 194, 196 (3d Cir. 1993); and *Gaudin* v. *Remis*, 379 F.3d 631, 637 (9th Cir. 2004).

delineate the full terms of that stay." Pet. App. 25a. Were it otherwise, a foreign student would be unlawfully present when in the United States on breaks between terms and the moment after graduation—results that Washtech itself disclaims. See pages 10-11, *supra*.

What is more, *Elkins* has no relevance to the longstanding congressional ratification of an Executive Branch program that predates the underlying statute. See pages 12-14, *supra*. Regardless of whether Congress established that continued maintenance of a foreign domicile is an ongoing requirement, Congress necessarily ratified an interpretation of the statute holding that term-limited optional practical training is consistent with the scope of a student visa.

In all, whether the domicile requirement in the nonimmigrant visa definitions continues to govern past admission is a logically and legally separate question from whether the requirement that an F-1 student "seek[] to enter the United States * * * for the purpose of pursuing [a full] course of study" (8 U.S.C. § 1101(a)(15)(F)(i))—which is the basis for Washtech's objection to OPT—is an entry requirement, as its text explicitly states. *Elkins* and other domicile cases thus do not conflict with the outcome below.

Finally, the third group of cases cited by Washtech as purported evidence of a circuit split are of unclear relevance to the questions presented here. For example, *Jie Fang* v. *Director, USCIS*, 935 F.3d 172 (3d Cir. 2019), expressly acknowledges OPT as part of the framework governing foreign students; it is certainly

not authority that OPT is unlawful. See *id.* at 175-176.[4]

In sum, none of the cases proffered by Washtech actually bears on the issue addressed by the court of appeals here: the "interplay" between "Section 1184(a)(1)'s" grant of authority to "prescribe" "time and * * * conditions," on the one hand, and "the INA's definition of admissible nonimmigrants," on the other. Pet. App. 23a-24a. That is, none of Washtech's cases resolves the metes and bounds of the Executive's authority, under Section 1184(a)(1), to implement the INA's nonimmigrant visa definitions through time and conditions regulations, and they certainly do not suggest that that authority is lacking.

b. Separately, Washtech claims "tension" (Pet. 18)—while acknowledging that this tension "may not amount to a circuit split" (*id.* at 21)—between the D.C. Circuit's discussion of the Executive's statutory authority to grant work authorization (see Pet. App. 51a-55a) and the Fifth Circuit's decision in *United States* v. *Texas*, 809 F.3d 134 (5th Cir. 2015), aff'd by an equally divided Court, 579 U.S. 547 (2016). But there is no tension there, either.

As noted above, the court of appeals correctly explained that, by defining "unauthorized alien" to exclude "an alien * * * authorized to be so employed by this chapter or by the Attorney General," 8 U.S.C. § 1324a(h)(3) presupposes that the Executive must

---

[4] See also *Birdsong* v. *Holder*, 641 F.3d 957, 958 (8th Cir. 2011) (noncitizen admitted on K-1 fiancée visa "conceded removability" after marrying someone other than the U.S. citizen who had petitioned for her visa); *Gazeli* v. *Sessions*, 856 F.3d 1101, 1106 (6th Cir. 2017) (foreign-domicile requirement of B-2 visitor visa applies when noncitizen seeks to extend the visa).

have the power to authorize noncitizen employment in the first place, even in cases where the noncitizen is not expressly authorized for employment "by this chapter"—that is, by the INA. Pet. App. 51a-55a; see pages 14-15, *supra*.

Texas does not call that holding into doubt. In finding that it was beyond DHS's power to grant deferred action to 4.3 million undocumented individuals, the Fifth Circuit concluded that DHS's powers over employment could not be used to authorize unrestricted work for millions of undocumented immigrants, because to do so would "undermin[e] Congress's stated goal" of "preserving jobs for those lawfully in the country." *Texas*, 809 F.3d at 181 (emphasis added); see also *id.* at 184 (finding "untenable" an interpretation that "would allow [DHS] to grant lawful presence and work authorization to any illegal alien in the United States").

As the district court explained, "*Texas* said nothing about the question implicated by this case: whether DHS has authority to provide work authorization to individuals *already lawfully present in the United States*." Pet. App. 124a. OPT is limited to lawfully admitted F-1 visa-holders—and its time-limited work authorization is further limited to fields relevant to the noncitizen's course of study—meaning that it is not in tension with Congress's policy goal of preserving jobs for those lawfully present. Therefore, any purported conflict is illusory.

2. Questions regarding Chevron *deference are not presented by this case.*

a. Washtech's attempt to tie this petition to the ongoing discussion regarding *Chevron* deference also fails. See, *e.g.*, Pet. 14-15 (asserting that "the court of

appeals took *Chevron* deference into the realm of absurdity by excluding the governing statute from the analysis to manufacture ambiguity where none exists"); *id.* at 23-24 ("[T]he D.C. Circuit decision presents *Chevron* deference running amok from two directions."). There is a simple reason why: The court of appeals relied on *Chevron* deference only as an alternative, backup holding, after first interpreting the statute and determining that OPT is lawful without applying any deference at all. See generally Pet. App. 1a-55a.

That is, the court engaged in detailed, lengthy analysis of text, structure, history, and precedent to conclude that "the best" and "most straightforward reading of the INA is that it authorizes DHS to apply to admitted F-1 students the additional 'time' and 'conditions' that enable them to remain here while participating in OPT recommended and overseen by their respective academic institutions." Pet. App. 55a, 57a. Only *after* reaching this conclusion did the court of appeals add a brief coda to the opinion to the effect that "*any remaining* ambiguity counsels deference." Pet. App. 55a-58a (capitalization altered; emphasis added).

Thus, regardless of whether the Court overrules *Chevron*, the D.C. Circuit's primary reasoning—that, even without any deference, "the statutory authority to set the time and conditions of F-1 nonimmigrants' stay amply supports the Rule's OPT program" (Pet. App. 3a)—remains unaffected.

b. Washtech's suggestion to the contrary appears to rest on a misunderstanding of the D.C. Circuit's reasoning below. See, *e.g.*, Pet. 23 (asserting that the court of appeals "skipped to *Chevron* step two" in

determining that OPT is "reasonably related" to the purposes of the F-1 definition). But properly understood, that is not *Chevron* analysis at all.

That is, the court of appeals below did *not* give "deference" to "an agency's interpretation of the law," as a court would under current *Chevron* doctrine. *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1358 (2018); accord *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (where Congress has delegated rulemaking power, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). Rather, the court determined de novo—without deference, and based on indicia like text, structure, and canons of construction—that "Congress gave * * * control" over "the time and conditions of [F-1] students' stay once they have entered" to DHS, and that "[t]he F-1 definition tethers the Executive's exercise of that control, but by its plain terms does not exhaustively delimit it." Pet. App. 3a; cf., *e.g.*, *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018) ("Where, as here, the canons supply an answer, *Chevron* leaves the stage.") (quotation marks omitted).

The court then explained that the 2016 Rule satisfied the separate hurdle of being "reasonably related to the nature and purpose of the F-1 visa class" (Pet. App. 27a)—not as a matter of interpreting ambiguous text under *Chevron*, but as a substantive limit on the agency's authority. See Pet. App. 26a ("Where Congress has delegated general authority to carry out an enabling statute, an agency's exercise of that authority ordinarily must be 'reasonably related to the purposes of the legislation.'") (quoting *Doe, 1* v. *FEC*, 920

F.3d 866, 871 (D.C. Cir. 2019)); see *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973)).

In other words, Washtech did not lose below because the court "skipped to *Chevron* step two" (Pet. 23); it lost at *Chevron* step one, and then lost again with respect to an independent, non-*Chevron* check on agency authority. Neither of those decisions is exceptional or deserving of the Court's review.

c. In any event, the Executive's "longstanding" interpretation that practical training is permissible for F-1 students is deserving of "particular deference" under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), wholly separately from the *Chevron* framework. See *Alaska Dep't of Envt'l Conservation* v. *EPA*, 540 U.S. 461, 487 (2004). The Court has long explained that, "[i]n the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Edwards' Lessee* v. *Darby*, 25 U.S. 206, 210 (1827); see *Baldwin* v. *United States*, 140 S. Ct. 690, 690 (2020) (Thomas, J., dissenting from denial of cert.) (distinguishing this "traditional interpretive canon[]" from *Chevron* while calling for the overruling of the latter). The interpretation here, which is not only consistently held and contemporary with the 1952 INA, but in fact predates that law's enactment, surely qualifies. Again, the decision below is built on a firm foundation, quite independent of *Chevron* deference.

3. The major questions and non-delegation doctrines are not implicated here.

Finally, Washtech attempts to paint this as a major-questions or nondelegation case. See Pet. 26-28.

But Washtech never raised these issues to the panel below, which is why the decision below never addressed them. In any event, neither doctrine is implicated here.

As to the major questions doctrine, this is not an instance where an agency has "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2610 (2022) (quoting *Utility Air Reg. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014)). The Court has applied major-questions scrutiny where agencies invoke "unprecedented" claims of authority, which have "never before been" embraced by the relevant agency. *Id*. at 2608-2609. That is, this analysis applies where an agency "has never previously claimed powers of this magnitude under" the relevant statute. *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2372 (2023); see also *id.* at 2383 (Barrett, J., concurring) ("A longstanding 'want of assertion of power by those who presumably would be alert to exercise it' may provide some clue that the power was never conferred.") (quoting *FTC* v. *Bunte Bros., Inc*., 312 U.S. 349, 352 (1941)).

Quite to the contrary, as the court of appeals explained, "the Executive Branch under *every president from Harry S. Truman onward* has interpreted enduring provisions of the immigration laws to permit foreign visitors on student visas to complement their classroom studies with a limited period of post-coursework Optional Practical Training." Pet. App. 1a (emphasis added). Indeed, as the court described, the power to grant work authorization for practical training to noncitizens on student visas was first claimed *before* the 1952 INA was enacted; Congress was made

aware of this claim of authority; and Congress reenacted the relevant statutory provisions in the INA without material change. See Pet. App. 30a-33a. And the Executive has maintained that same position in an unbroken chain of regulations over the intervening seven decades. Pet. App. 33a-40a. This history belies the assertion that major-questions review is relevant here.

The nondelegation doctrine is inapplicable as well. Under the court of appeals' interpretation, Congress "has supplied an intelligible principle to guide [DHS's] use of discretion" (*Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion)) in exercising its time-and-conditions authority over nonimmigrants' stay: "DHS must ensure that the times and conditions it attaches to the admission of F-1 students are reasonably related to the purpose for which they were permitted to enter." Pet. App. 27a. Indeed, explaining that DHS's authority is constrained by that principle is one of the cornerstones of the D.C. Circuit's analysis.[5] For this reason, too, certiorari is unwarranted.

---

[5] The same result obtains under the principle of Justice Gorsuch's *Gundy* dissent: that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'" *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (quoting *Wayman* v. *Southard*, 23 U.S. 1, 43 (1825)). Here, "[t]he INA uses visa classes to identify who may enter temporarily and why"—that is, Congress has made the major policy decisions—"but leaves to DHS the authority" to fill up the details by "specify[ing], consistent with the visa class definitions, the time and conditions of that admission." Pet. App. 25a.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

MICHAEL A. TILGHMAN II
NAM Legal Center
733 10th St. NW,
Suite 700
Washington, DC 20001

Counsel for the National Association of Manufacturers

DARYL L. JOSEFFER
JORDAN L. VON BOKERN
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

PAUL W. HUGHES
Counsel of Record
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for the Private Respondents

JASON OXMAN
Information Technology Industry Council
700 K Street NW, Suite 600
Washington, DC 20001

Counsel for the Information Technology Industry Council