NO. 22-1071

In the
Supreme Court of the United States

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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September 2023

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REPLY BRIEF

The Department of Homeland Security (DHS) has created the largest alien employment program in the immigration system entirely through regulations that directly conflict with their enabling statute. The post-completion Optional Practical Training program (OPT) allows aliens to remain in the United States in student visa status for years after graduation to work or be unemployed. OPT disregards the statutory terms that define student visas as applying to aliens solely pursuing a course of study at an academic institution.

To sustain the OPT program, a divided D.C. Circuit panel upended the previously universal understanding of nonimmigrant visas. The court below held that the statutory terms of nonimmigrant visas merely specify entry criteria that cease to apply once an alien enters the United States. After entry, the terms of an alien's stay are entirely defined by regulations. Paradoxically, the decision below permits such regulations to conflict with the statutory visa terms as long as the regulations meet the judicially created standard of being reasonably related to the visa.

Until now, *every court* applying the nonimmigrant visa statutes has applied them to an alien's entire stay in the United States. In addition to creating a circuit split, the decision below creates a question of exceptional importance because it leaves the largest component of the immigration system—nonimmigrant visas—in an incoherent state. Furthermore, the decision conflicts with the precedent of this Court on the major question doctrine. Judge Henderson's dissent, Judge Rao's dissent, and an array of *Amici* confirm that the

decision below is egregiously misguided.

Respondents[1] have very little—often, nothing at all—to say about the pressing reasons to grant the petition. Instead, Respondents raise their own merits issues. In doing so, they fail to make a plausible argument that Congress ratified OPT, or that Petitioner lacks standing despite the competitive injury suffered by its members. On this last point, Respondents adduce yet another reason to grant the petition, because there is a circuit split, which this Court should resolve, on the precise question of whether technology workers have standing to challenge OPT.

I. Respondents do not rebut Petitioner's showing that the decision of the court below makes a "muddle" of the nonimmigrant visa system.

1. The most urgent reason why this Court should grant this petition is that the court of appeals decision "muddles" the entire system of nonimmigrant visas, creating a "question of exceptional importance."

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[1] Petitioner concurs with Respondents that this petition does not rely on the outcome of *Loper Bright Enterprises* v. *Raimondo*, 143 S. Ct. 2429 (2023), in which this Court will address the validity of *Chevron U.S.A.* v. *NRDC*, 467 U.S. 837 (1984). BIO.19 n. 4. Petitioner described the court of appeals decision as misapplying *Chevron* in determining the scope of DHS's authority. Pet.23–24. Yet that court's principal holdings are independent of *Chevron*, and lead Respondents to describe the court below as creating a new framework in which a judicially-created, "reasonably related" standard guides DHS's exercise of authority. BIO.19–20, IBIO.22–24. The petition thus demonstrates that the problem of lower courts' deferring to and enabling vast agency overreach goes far beyond *Chevron* deference.

Pet.App.279a (Rao, J., dissenting from denial of reh'g en banc). Relegating the statutory terms of nonimmigrant visas to "threshold entry criteria" that do not apply once an alien enters the country effectively removes the distinctions among the various nonimmigrant visas. Pet.14–15, 21–25; Br. *Amicus Curiae* of Kansas, *et al*. at 9–11. There is also no longer any distinction between a work visa and a non-work visa because the decision below permits DHS to allow work on any visa. Br. *Amicus Curiae* of Sen. Ted. Cruz, *et al*. at 18–21. The specific examples of visas that Petitioner and *Amici* demonstrated are now irrational under the decision below are just the tip of the iceberg.

The decision below causes absurdity to flow throughout the nonimmigrant visa system. For example, the terms of the T visa do not apply before entry because the visa is only available to those already in the United States. 8 U.S.C. § 1101(a)(15)(T). Yet, under the court of appeals decision, the terms of the T visa do not apply *after* entry either. Thus, they *never* apply. Respondents do not and cannot dispute that the decision below creates such lunacy in the immigration system. The interpretive wreckage left behind by the court of appeals decision on this point alone cries out for review by this Court.

2. Further muddle comes from the new framework Respondents describe the court of appeals as creating for analyzing the scope of agency authority. BIO.14. IBIO.21–24. Under this framework, regulations can conflict with their enabling statute as long as they are reasonably related to it. *Ibid*. When a regulation can directly conflict with the terms of the enabling statute and still be "reasonably related" to that statute, the

standard has no bounds, as demonstrated both here and by *Save Jobs USA* v. *U.S. Dep't of Homeland Sec.*, No. 15-CV-615, slip op. at 13 (D.D.C. Mar. 28, 2023). Pet. for cert. pending, No. 23-22 (filed July 3, 2023). There, the employment regulations at issue were "reasonably related" to the statute simply because DHS "explain[ed] why it had decided to authorize employment." *Ibid.* Furthermore, it makes no sense that regulations defining *entry conditions* for a visa apply to a nonimmigrant's entire stay while the statutory terms for the visa cease to apply the moment an alien enters the country. See Pet.App.283a–284a (Rao, J., dissenting from denial of reh'g en banc). Perhaps the ultimate muddle is that the court of appeals decision makes *students* out of unemployed aliens who have graduated and have not attended school in years. As this Court observed, "someone who legally entered the United States on a student visa, but stayed in the country long past graduation" would not be in "lawful status." *Sanchez* v. *Mayorkas*, 141 S. Ct. 1809, 1813 (2021).

II. Respondents misread authority to argue that the circuit split the dissent identified does not exist.

An imperative reason for granting the petition is that the "threshold entry criteria" holding of the court below creates a circuit split. Pet.App.279a (Rao, J., dissenting from denial of reh'g en banc). Until now, every court applying the nonimmigrant visa statutes has done so to an alien's entire stay. Pet.15–18. Consequently, Respondents and the courts below have not been able to identify *any* court opinion outside of this litigation that has interpreted the statutory terms of

student visas or nonimmigrant visas in general as mere entry requirements. Meanwhile, Petitioner identified conflicting authority in every numbered circuit, and in this Court, applying statutory visa terms to an alien's stay after entry. Pet.16–17 & n. 4. For example, Petitioner cited *Akbarin* v. *Immigration & Naturalization Serv.,* 669 F.2d 839, 840 (1st Cir. 1982). Pet.10, 17. There, the First Circuit stated that "[i]n order to maintain his student [visa] status, Akbarin is required to meet a number of conditions set out in 8 U.S.C. § 1101(a)(15)(F) and 8 C.F.R. § 214.2(f)." *Id.* at 840. That explicit holding that student visa status requires complying with *both* the statutory admission terms and the regulatory admission conditions directly conflicts with the holding below that the nonimmigrant visa statutes are mere "threshold entry criteria" that do not apply after an alien enters the United States. Pet.App.42a, 53a. In the face of this clear conflict, Intervenor-Respondents resort to airbrushing out *Akbarin*'s reference to the student visa statute, and describe the opinion as "noncitizen violated status by accepting employment in violation of the 'conditions' set out in '8 C.F.R. § 214.2(f)(6).'" IBIO.17 n. 2. Similarly, Petitioner cited *Xu Feng* v. *Univ. of Del.*, 833 F. App'x 970, 971 (3d Cir. 2021), holding that "[f]ederal law imposed the 'full course of study,' 8 U.S.C. § 1101(a)(15)(F)(i), requirement on Feng as a condition of his visa. . . ." Pet.18. This application of the statutory visa terms after entry again directly conflicts with the decision below, a conflict unrebutted by Intervenor-Respondents' recasting the case as "similarly involving full-course-of-study requirement." IBIO.17 n. 2.

Respondents are clearly in error when they dismiss "all of" Petitioner's cases as "stand[ing] for the unremarkable proposition[] that a nonimmigrant may not enter the country with the intent to live here permanently. . . ." BIO.23. As Intervenor-Respondents and the previous paragraph demonstrate, Petitioner cited opinions that address other statutory terms of student visas that courts have applied after entry. The petition's citations on this question (Pet. 17 & n. 4) clearly reveal the circuit split that the dissent also identified. Pet.App. 279a, 285a–286a (Rao, J., dissenting from denial of reh'g en banc).

III. Respondents fail to rebut Petitioner's showing that the court of appeals decision conflicts with this Court's major question precedent.

1. Another reason to grant the petition is that the decision below disregards this Court's recent guidance on the major question doctrine in *West Virginia* v. *Env't Prot. Agency*, 142 S. Ct. 2587 (2022). Pet.15–16, 26–27. Petitioner showed that the court below flagrantly disregarded the major question doctrine by allowing DHS to create a massive foreign labor program without any clear authorization from Congress. Pet.15–16, 26–27. Respondents do not even dispute that OPT offends the major question doctrine.

Intervenor-Respondents[2] gloss over the major question doctrine issue by conflating all the various student visa work programs with various terms that have existed since 1947 in order to claim that the current OPT program does not invoke new claims of power. IBIO.25–26. The 1947 regulations permitted aliens possessing student visas to work in a training program that was required or recommended by their school. Title 8—Aliens and Nationality, 12 Fed. Reg. 5,355–56 (Aug. 7, 1947). Those regulations made no mention of work *after* a course of study had been completed, the issue in this litigation. *Ibid*.

Intervenor-Respondents' conflation does not even address the vast new power over alien employment that the court of appeals conferred on DHS. Pet.App.4a, 12a. The first regulation authorizing alien employment under the claim that DHS has authority to permit alien employment through extra-statutory regulation did not appear until 2015. Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015). Likewise, the first time DHS claimed it had the power to use student visas to supply labor to industry was in 2008. Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and

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[2] Intervenor-Respondents falsely claim that the court below did not address either the major question doctrine or the nondelegation doctrine because Petitioner did not raise them. IBIO.24–25. Respondents raised both issues below. C.A. Op. Br. 29–31. Judge Henderson's dissent even describes Petitioner's raising both of these issues. Pet. App. 82a–83a.

Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions, 73 Fed. Reg. 18,944–56 (Apr. 4, 2008).

2. A further, crucially important question the petition presents is how much authority an agency has to regulate *on its own*, that is, without implementing or conforming to any principle laid down by Congress in a legislative act. This Court has already provided the answer: *none*. *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989); *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 408–09 (1928). The Constitution does not permit the transfer of such power, and therefore agencies act in excess of their legitimately conferred power when they regulate in such a manner. *Ibid*.

Fatally, the decision below confers on DHS the power to allow alien employment on nonimmigrant visas through regulations without identifying any principle laid down by Congress to which such regulations must conform. Pet.App.4a, 55a; Pet.27–28. Respondents never address this issue. Intervenor-Respondents point back to the "reasonably related" to the visa standard created by the court below as the guiding principle. IBIO.26. Yet that is a judicially created standard. Thus, Intervenor-Respondents only confirm that the vast, never-before-seen power to permit alien employment the court below recognized was conferred on DHS by the judiciary, not by Congress.

IV. Respondents conflate the different student visa employment programs that have existed over the years to claim ratification.

Respondents' principal argument in defense of OPT is congressional ratification. BIO.15–17; IBIO.12–14.

There have been many student visa work programs over the years with substantially different terms. Currently, these include Curricular Practical Training, taking place as part of a course of study, and *Optional* Practical Training, taking place *outside* of a course of study. 8 C.F.R. § 214.2(f)(10). Respondents conflate[3] the various student visa programs that have existed over the years to backdate OPT to 1947, before the enactment of the Immigration and Nationality Act. BIO.15–17; IBIO.12–14. Respondents ignore the basic principle that there can be no ratification of an agency action that is contrary to the plain language of the statute. *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991). The direct conflict between the terms of OPT and the terms of the enabling statute, authorizing admission "solely" to pursue a course of study at an academic institution, precludes any ratification argument for OPT. Compare 8 C.F.R. § 214.2(f)(10)(A)(3) with 8 U.S.C. § 1101(a)(15)(F)(i). Furthermore, ratification requires a formal regulation that addresses the question at issue: work after graduation. *Pub. Citizen* v. *U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 669 (D.C. Cir. 2003). The 1947 regulations Respondents reference permitted aliens to work in a training program that was required or recommended by their school. 12 Fed. Reg. at 5,355–56. They make no mention of permitting employment after graduation and, therefore, cannot serve as the basis for congressional

[3] Respondents also conflate the various student visa work programs to argue that OPT is part of a course of study. BIO.13. Yet DHS regulations are explicit that OPT is not part of a course of study. 8 C.F.R. §§ 214.2(f)(5)(i), (6), (10)(ii)(A)(3).

ratification of post-graduate employment.

V. When technology workers challenge a regulatory scheme whose express purpose is to undermine the statutory protections for technology workers, standing should be obvious.

The sole purpose of the 2008 regulations Petitioner originally challenged was to cause injury to American technology workers by undermining the statutory limits on foreign labor that Congress had enacted for them in order to provide benefits to businesses. 73 Fed. Reg. at 19,946–48, 19,950–51, 19,953. The 2016 regulations currently at issue scrubbed the claims that its purpose was to supply labor to industry and replaced them with a pretextual educational justification that would be more palatable in the ongoing litigation. Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040–122 (Mar. 11, 2016). Nonetheless, the 2016 regulations cause the identical injury of increased competition in technology fields. *Id*. at 13,043, 13,110.

Ass'n of Data Processing Serv. Orgs. v. *Camp* established that plaintiffs have standing to challenge agency actions that create increased competition with them. 397 U.S. 150, 152 (1970). Since then, American workers routinely have had standing to challenge agency actions subjecting them to increased competition. *E.g.*, *Saxbe* v. *Bustos*, 419 U.S. 65 (1974); *Mendoza* v. *Perez*, 754 F.3d 1002 (D.C. Cir. 2014); *Int'l Longshoremen's and Warehousemen's Union* v. *Meese*,

891 F.2d 1374 (9th Cir. 1989); Pet.App.18a–23a, 100a–111a, 148a–153a. Nonetheless, Respondents raise standing again.

Respondents' standing argument relies on two flawed interpretations that the courts have repeatedly rejected. First, they recast the injury of increased competition as the injury of lost jobs and ignore the other harms increased competition causes, such as reduced prices (salaries). BIO.21; cf. *Bristol-Myers Squibb Co.* v. *Shalala*, 91 F.3d 1493, 1499 (D.C. 1996). Second, Respondents make the unrealistic assumption about the job market that workers who have made repeated job changes over the years will not have to look for a job in the future. BIO.21. This assumption is particularly unrealistic in the case of Petitioner's contractor members, whose job search is continuous. C.A. App. 209–213 (Smith Decl.). Petitioner's standing should fall into the realm of the obvious.

That said, while Petitioner consistently has had standing in the courts below, *under absolutely identical facts,* the Third Circuit held that another group of technology workers lacked standing to challenge the same regulations. *Programmers Guild* v. *Chertoff*, 338 F. App'x 239 (3d Cir. 2009) (cert. denied 559 U.S. 1067 (2010)). Because circuit splits call for resolution by this Court, Respondents raise yet another reason to grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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