No. 22-1071

# In the Supreme Court of the United States

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS, PETITIONER

*v.*

DEPARTMENT OF HOMELAND SECURITY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

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## QUESTIONS PRESENTED

Congress has provided 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). The Secretary has promulgated a regulation prescribing that certain noncitizens admitted as nonimmigrants to "pursue a full course of study," 8 U.S.C. 1101(a)(15)(F)(i), may remain in this country for up to 36 months after graduation if engaged in optional practical training, supervised and approved by their schools, in furtherance of their studies. See 8 C.F.R. 214.2. The questions presented are:

1. Whether the Secretary had authority to promulgate the regulation.

2. Whether petitioner, a labor union, has Article III standing to challenge the regulation.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-87a) is reported at 50 F.4th 164. A prior opinion of the court of appeals (Pet. App. 140a-165a) is reported at 892 F.3d 332. The opinion of the district court (Pet. App. 88a-139a) is reported at 518 F. Supp. 3d 448. A prior opinion of the district court is reported at 395 F. Supp. 3d 1. Another prior opinion of the district court (Pet. App. 166a-225a) is reported at 249 F. Supp. 3d 524.

## JURISDICTION

The judgment of the court of appeals was entered on October 4, 2022. A petition for rehearing was denied on February 1, 2023 (Pet. App. 276a-286a). The petition for a writ of certiorari was filed on May 1, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. a. The Immigration Act of 1924, ch. 190, 43 Stat. 153, authorized the entry as a "non-quota immigrant" of a noncitizen "who is a bona fide student at least 15 years of age and who seeks to enter the United States solely for the purpose of study at an accredited school." § 4(e), 43 Stat. 155.[1] The 1924 statute further provided that "[t]he admission to the United States of * * * a non-quota immigrant * * * shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed." § 15, 43 Stat. 162-163.

In 1947, the Attorney General promulgated regulations governing the admission of a student "admitted temporarily to the United States as a nonquota immigrant under the provisions of section 4(e) of the" 1924 statute. 12 Fed. Reg. 5355, 5355 (Aug. 7, 1947); 8 C.F.R. 125.1 (1949). Those regulations provided that when "employment for practical training is required or recommended by the school," the student could, if approved, "engage in such employment for a six-month period subject to extension for not over two additional six-month periods." 12 Fed. Reg. at 5357; 8 C.F.R. 125.15(b) (1949). That practical training could occur "after completion of the student's regular course of study." S. Rep. No. 1515, 81st Cong., 2d Sess. 503 (1950) (1950 Senate Report).

In 1952, Congress enacted the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*). Although the 1952 statute overhauled the Nation's immigration laws, it preserved authorization for the entry of a noncitizen "who is a bona fide student

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020).

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 institution of learning" approved by the government. § 101(a)(15)(F), 66 Stat. 168. Such a student was now called a "nonimmigrant" rather than, as in the 1924 statute, a "non-quota immigrant." See § 101(a)(15), 66 Stat. 167. The 1952 statute preserved the Executive's time-and-conditions authority, providing 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 Attorney General may by regulations prescribe." § 214(a), 66 Stat. 189.

Congress has amended the INA many times over the ensuing decades, but the statutory provisions above have remained essentially intact. Today, an admissible "nonimmigrant" is defined to include a noncitizen "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" and approved school. 8 U.S.C. 1101(a)(15)(F)(i). Nonimmigrant students admitted under that provision are said to hold "F-1" visas, named after the relevant subparagraph of Section 1101(a)(15). And the INA continues to provide 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).[2] In addition, since 1986, the INA has expressly recognized

[2] Section 1184(a)(1) refers to the Attorney General, but in 2002, Congress transferred the relevant authority to the Secretary of Homeland Security. See 6 U.S.C. 557; 8 U.S.C. 1103; *Nielsen* v. *Preap*, 139 S. Ct. 954, 959 n.2 (2019).

that a noncitizen is authorized to work in this country when "authorized to be so employed * * * by the [Secretary]." 8 U.S.C. 1324a(h)(3)(B); see Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101(a)(1), § 274A(h)(3)(B), 100 Stat. 3368.

The Attorney General and Secretary have over the years and across multiple presidential administrations maintained and updated the regulations governing practical training. See Pet. App. 10a n.2 (listing regulatory amendments). For example, in 1992, the Commissioner of the Immigration and Naturalization Service, by delegation from the Attorney General, promulgated an interim rule using the term "optional practical training" (OPT) for the first time and limiting such training to "a maximum of twelve months," to be completed "within a 14 month period following the completion of study." 57 Fed. Reg. 31,954, 31,956 (July 20, 1992); see 8 C.F.R. 214.2(f)(10) and (11) (1993); see also Pet. App. 734a-746a. The 1992 rule also made clear that a nonimmigrant F-1 student engaged in OPT was authorized to be employed for purposes of Section 1324a. 57 Fed. Reg. at 31,956; see 8 C.F.R. 274a.12(c)(3)(i) (1993).

b. In 2008, the Secretary promulgated an interim final rule "extend[ing] the maximum period of OPT from 12 months to 29 months for F-1 students who have completed a science, technology, engineering, or mathematics (STEM) degree" and who satisfy certain other requirements. 73 Fed. Reg. 18,944, 18,944 (Apr. 8, 2008); see *id.* at 18,954; see also Pet. App. 677a-733a. The 2008 interim rule also extended the OPT period for an F-1 student with a pending petition for an "H-1B" visa—granted to noncitizens "coming temporarily to the United States to perform [certain] services * * * in [certain] specialty occupation[s]," 8 U.S.C. 1101(a)(15)(H)(i)(b)—

until the resolution of that petition. 73 Fed. Reg. at 18,954. In 2015, a federal district court held that the 2008 interim rule was procedurally invalid because it was promulgated without notice and comment. See *Washington Alliance of Technology Workers* v. *U.S. Department of Homeland Security*, 156 F. Supp. 3d 123, 145-148 (D.D.C. 2015), vacated on mootness grounds, 650 Fed. Appx. 13 (D.C. Cir. 2016); see Pet. App. 226a-227a, 228a-275a.

In 2016, following notice-and-comment rulemaking, the Secretary promulgated a new OPT regulation. 81 Fed. Reg. 13,040 (Mar. 11, 2016); see Pet. App. 290a-676a. The 2016 rule extends the maximum OPT time to 36 months for F-1 students with STEM degrees. 81 Fed. Reg. at 13,117-13,118; see 8 C.F.R. 214.2(f)(10)(ii)(C). And like the 2008 interim rule, the 2016 rule extends the OPT period for an F-1 student with a pending H-1B petition until the resolution of that petition. 81 Fed. Reg. at 13,117; see 8 C.F.R. 214.2(f)(5)(vi). The 2016 rule expressly relies on Section 1184(a)(1)'s grant of "broad authority to determine the time and conditions under which nonimmigrants, including F-1 students, may be admitted," as well as Section 1324a(h)(3)'s grant of "broad authority to determine which individuals are authorized for employment." 81 Fed. Reg. at 13,045.

2. Petitioner, a labor union representing workers in the technology sector, brought this suit challenging the validity of the 2016 rule. The district court dismissed the suit, holding that petitioner had forfeited various arguments on the merits. Pet. App. 166a-225a; see *id.* at 16a. The court of appeals reversed, holding that petitioner had not forfeited its arguments that the 2016 rule exceeds the Secretary's statutory authority and directing the district court on remand to consider whether,

under the D.C. Circuit's "reopening doctrine," petitioner could challenge "the statutory authority for the entire OPT program," and not just the STEM and H-1B extensions in the 2016 rule. *Id.* at 161a; see *id.* at 140a-165a.

On remand, the district court held that because the Department of Homeland Security (DHS) had "reconsidered its authority to implement the OPT Program" in the 2016 rule, the reopening doctrine permitted petitioner to challenge "DHS's statutory authority to implement the OPT Program" in the first place. 395 F. Supp. 3d 1, 14-15. The court also permitted several business organizations—who are respondents in this Court—to intervene as defendants as of right. *Id.* at 15-21.

After the filing of the administrative record and further motions practice, the district court denied petitioner's motion for summary judgment and granted the government's and intervenors' respective motions for summary judgment. Pet. App. 88a-139a. The court first held that petitioner had associational standing to sue on behalf of its members, who themselves would have standing to challenge the OPT regulations under the so-called "competitor standing doctrine." *Id.* at 103a; see *id.* at 100a-111a.

The district court then held that the 2016 rule, and the OPT program more generally, did not exceed the Secretary's statutory authority. Pet. App. 111a-138a. As the court of appeals summarized it, the district court "reasoned that the [statutory] text, together with decades of apparent congressional approval, sufficed to support [DHS's] interpretation that it had authority to allow post-graduation OPT." *Id.* at 18a.

3. The court of appeals affirmed. Pet. App. 1a-87a.

a. The court of appeals agreed with the district court that petitioner had associational standing based on its members' competitor standing. Pet. App. 18a-23a. The government had argued that petitioner lacked associational standing because it had not identified any member who was currently or imminently searching for a job in competition with F-1 students engaged in OPT. The court rejected that argument, reasoning that petitioner's "members can qualify as direct and current competitors even if they were not actively seeking new jobs at the time the suit commenced." *Id.* at 22a. "It is enough," the court held, "that nonimmigrant foreign workers 'have competed with [petitioner's] members in the past, and, as far as we know, nothing prevents them from doing so in the future.'" *Ibid.* (citation omitted).

On the merits, the court of appeals held that "[t]he 2016 Rule is within DHS's statutory authority." Pet. App. 23a; see *id.* at 23a-58a. The court relied on "[t]he plain text of section 1184(a)(1)," which "grant[s] the Executive power to set the duration and terms of statutorily identified nonimmigrants' presence in the United States." *Id.* at 23a; see *id.* at 23a-24a. The court noted that the "dozens of class definitions" of nonimmigrants in Section 1101(a)(15) "specify[] little more than a type of person to be admitted and the purpose for which they seek to enter," but that none "states exactly how long the person may stay" or "spells out precisely what the nonimmigrant may or may not do while here for the specified purpose." *Id.* at 24a. Instead, the court explained, "[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." *Id.* at 24a-25a.

The court of appeals observed that subparagraph (F)(i) of Section 1101(a)(15) "sets the criteria for entry and guides DHS in exercising its authority to set the time and conditions of F-1 students' stay," but that "it does not, itself, delineate the full terms of that stay." Pet. App. 25a. The court explained that the agency therefore "must ensure that the times and conditions it attaches to the admission of F-1 students [under Section 1184(a)(1)] are reasonably related to the purpose for which they were permitted to enter." *Id.* at 27a. The court observed that ample evidence in the administrative record supported the conclusion that "'practical training is an accepted and important part' of F-1 students' education." *Id.* at 28a (citation omitted); see *id.* at 27a-29a. The court thus concluded that the 2016 rule "is reasonably related to the nature and purpose of the F-1 visa class." *Id.* at 27a.

The court of appeals also explained that the 1952 Congress had "full knowledge that the Executive was permitting post-graduation practical training for visiting students under the time-and-conditions authority conferred on it by the 1924 statute," and that Congress ratified that exercise of authority when it "'made a considered judgment to retain the relevant statutory text'" in the INA. Pet. App. 32a (citation omitted); see *id.* at 30a-33a. The court further explained that "[m]ore than seventy years of history and practice since it enacted the 1952 INA shows that Congress has not changed its mind." *Id.* at 33a; see *id.* at 33a-40a. "Congress's repeated amendments of INA provisions regarding foreign students and nonimmigrant work opportunities," the court concluded, "evidence its approval of the practical training programs it left undisturbed." *Id.* at 37a.

The court of appeals rejected petitioner's argument that subparagraph (F)(i) "imposes a bright-line graduation-day limit on the Secretary's authority to set nonimmigrants' terms of stay." Pet. App. 40a; see *id.* at 40a-48a. The court observed that the subparagraph's text "makes no mention of 'graduation' as the bright-line outer bound for an F-1 student's stay." *Id.* at 46a. Instead, the court explained that by addressing the "purpose" for which the noncitizen "seeks to enter" the country, 8 U.S.C. 1101(a)(15)(F)(i), the subparagraph simply "sets threshold criteria for entry; it does not spell out the ongoing terms of stay." Pet. App. 42a. The court also rejected petitioner's claim that upholding the 2016 rule would permit the Secretary to "'allow [F-1 students] to abandon' their purpose of studying * * * 'immediately after their entry' into the United States and stay here indefinitely." *Id.* at 49a (brackets and citation omitted). The court reiterated that, in light of the "INA's structure and basic principles of administrative law," "the exercise of the time-and-conditions authority must 'reasonably relate' to the distinct composition and purpose of the subject nonimmigrant class," which is sufficient to "constrain DHS's regulatory authority." *Ibid.* (brackets and citations omitted).

Finally, the court of appeals rejected petitioner's argument that the Secretary lacked statutory authorization to permit F-1 students to work. Pet. App. 55a. The court explained that Section 1184(a)(1)'s grant of authority to set "conditions" is broad enough to encompass work authorization. See *id.* at 52a-53a. The court observed that "in 1961, Congress also 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. And the court

reasoned that Section 1324a(h)(3)'s acknowledgment that a noncitizen may be "authorized to be so employed * * * by the Attorney General," 8 U.S.C. 1324a(h)(3)(B), confirms that "employment authorization need not be specifically conferred by statute; it can also be granted by regulation," Pet. App. 55a.

The court of appeals concluded that "[t]he most straightforward reading of the INA is that it authorizes DHS to" promulgate the 2016 rule. Pet. App. 55a. In the alternative, the court held that "even if" the statute were ambiguous, the agency's longstanding interpretation is reasonable and "thus merits [the court's] deference" under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Pet. App. 55a; see *id.* at 55a-58a.

b. Judge Henderson concurred in part and dissented in part. Pet. App. 60a-87a. She agreed with the majority's conclusion that petitioner had standing, but was "not so persuaded" that Section 1101(a)(15) "impose[s] only *entry* requirements." *Id.* at 70a-71a. Judge Henderson instead viewed subparagraph (F)(i)'s reference to "student" as unambiguously foreclosing the possibility of permitting an F-1 visa holder to remain in the country for "post-graduation *employment*." *Id.* at 75a; see *id.* at 69a-77a. Judge Henderson did not address whether Section 1184(a)(1) or Section 1324a(h)(3) provides statutory authority for the 2016 rule, and instead would have left those questions to the district court to address in the first instance. See *id.* at 82a-87a.

c. The court of appeals denied rehearing. Pet. App. 276a-286a. Judge Henderson dissented from the denial of rehearing "[f]or the reasons explained in [her] panel dissent." *Id.* at 278a. Judge Rao, joined by Judge Henderson, also dissented. *Id.* at 279a-286a. In her view, "Congress's detailed attention to the very specific con-

ditions that attach to each nonimmigrant visa" is "incompatible with assuming a broad delegation to DHS to confer additional work visas through regulation." *Id.* at 281a-282a.

**ARGUMENT**

Petitioner renews its contention (Pet. 14-29) that the Secretary lacked authority to promulgate the 2016 rule. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Moreover, this case would be a poor vehicle in which to address the question presented because petitioner lacks Article III standing, which is a threshold issue that this Court would have to address before reaching the merits of petitioner's claim. Further review is unwarranted.

1. a. The court of appeals correctly held that the Secretary has statutory authority to permit F-1 students to engage in OPT in general and to promulgate the 2016 rule in particular.[3] Section 1184(a)(1) 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] may by regulations prescribe." 8 U.S.C. 1184(a)(1). F-1 students are admitted as "nonimmigrant[s]," 8 U.S.C. 1101(a)(15), and the challenged provisions of the 2016 rule plainly prescribe both the "time"—the duration of the course of study plus a limited time thereafter, potentially for up to 36 months or until resolution of a pending H-1B petition—and "conditions"—including that any OPT be both ap-

[3] The pending petition for a writ of certiorari before judgment in *Save Jobs USA* v. *Department of Homeland Security*, No. 23-22 (filed July 3, 2023), concerns the Secretary's authority to promulgate a rule granting work authorization for certain "H-4" visa holders.

proved and supervised by the school—of an F-1 student's admission. The plain text of Section 1184(a)(1) thus authorizes the 2016 rule and the OPT program more generally.

Petitioner does not seriously dispute that conclusion. Instead, it argues that subsection (F)(i) itself precludes the Secretary's exercise of his authority under Section 1184(a)(1) to permit OPT. See Pet. 16-21. Because that subsection defines an F-1 visa holder to be "a bona fide student" who "seeks to enter the United States temporarily and solely for the purpose of pursuing * * * a course of study" at an "academic institution," 8 U.S.C. 1101(a)(15)(F)(i), the argument goes, anyone admitted under that subsection may neither remain in the United States after formal graduation nor engage in employment while here.

The court of appeals correctly rejected that argument. The quoted language on which petitioner relies simply requires someone who "seeks to enter" the country to have the specified "purpose." 8 U.S.C. 1101(a)(15)(F)(i). It does not specify the time and conditions for the admission of a student who is found to have that purpose—much less impose a bright-line "graduation" or "no employment" limit on the Executive's authority under Section 1184(a)(1) to prescribe, by regulation, what the times and conditions of admission will be. Indeed, as the court observed, "two of the twenty-two nonimmigrant visa class definitions" in Section 1101(a)(15) "state the maximum allowable time of admission for that class." Pet. App. 24a n.3 (citing 8 U.S.C. 1101(a)(15)(Q) and (R)). That Congress expressly specified the maximum stay for those two classes—and thereby constrained DHS's time-setting authority under Section 1184(a)(1) with respect to those

classes—but did not specify an outer limit for the other classes, indicates that no such constraint applies to the F-1 class. Cf. *Department of Homeland Security* v. *MacLean*, 574 U.S. 383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.").

Moreover, the Executive Branch has long viewed practical training approved and supervised by an F-1 student's school to be a component of the student's "*full* course of study," 8 U.S.C. 1101(a)(15)(F)(i) (emphasis added), because a critical part of the educational experience is the "development of knowledge and skills which occurs through meaningful practical training" outside the classroom. 48 Fed. Reg. 14,575, 14,577 (Apr. 5, 1983). "Indeed, the purpose of OPT is to better position students to begin careers in their fields of study by providing ways for them to supplement and enhance the knowledge they gained in their academic studies through application of that knowledge in work settings." 81 Fed. Reg. at 13,051. Therefore, "at its core, such work-based learning is a continuation of the student's program of study." *Ibid.* And such learning is all the more critical for students in the STEM fields. See *id.* at 13,047-13,049. As the court of appeals observed, "[h]undreds of students and academic institutions confirmed that view during the [2016] rulemaking." Pet. App. 28a (citing examples). Petitioner does not seriously dispute any of those conclusions either. To the contrary, in the lower court, petitioner "accept[ed] that the Executive's time-and-conditions authority empowers it to authorize students' presence in the United States beyond the time they are actually enrolled in and attending classes." *Id.* at 26a.

The Secretary's time-and-conditions authority under Section 1184(a)(1) of course is not unbounded. As the court of appeals recognized, the Secretary's authority is limited not just by "basic principles of administrative law," Pet. App. 49a; see 5 U.S.C. 706(2)(A), but also by the specific nonimmigrant class definitions in Section 1101(a)(15). See Pet. App. 26a-30a, 49a-51a. The court thus explained that "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; cf. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) ("Where the empowering provision of a statute states simply that the agency may 'make such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'") (citation, ellipsis, and footnote omitted). That is the best way to harmonize Section 1101(a)(15)'s descriptions of the various classes of nonimmigrants with Section 1184(a)(1)'s express grant of time-and-conditions authority to the Secretary. Cf. *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1619 (2018) ("It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another.").

Applying that principle here, the court of appeals correctly determined that the 2016 rule "is reasonably related to the nature and purpose of the F-1 visa class: pursuing a full course of study at an established academic institution." Pet. App. 27a. As the court explained, the 2016 rule requires that a school official recommend an F-1 student for OPT before the student may

even apply for participation in such a program; that the OPT be "directly related to the student's major area of study," 8 C.F.R. 214.2(f)(10)(ii)(A); and that the school remain intimately involved in the development and ongoing supervision of the student's "training plan" and educational progress. See Pet. App. 29a. Indeed, DHS expressly rejected a suggestion from commenters to relax the requirement that OPT be "directly related to the student's major fields of study," explaining that because "work-based learning is a continuation of the student's program of study," allowing the student "to engage in OPT in areas unrelated to [the student's] fields of study would be inconsistent with the purpose of OPT." 81 Fed. Reg. at 13,051. As the court of appeals concluded, "[a]t every stage of the program, OPT and its STEM extensions are confined to professional opportunities that enhance the value and practical effectiveness of the classroom study for which all F-1 nonimmigrants come in the first place." Pet. App. 29a.

b. The statutory and regulatory history confirm what the INA's plain text already indicates: that the Secretary has authority to permit F-1 students to remain in the country for a limited time after graduation to engage in practical training. Congress has expressly authorized the Executive Branch to use regulations to prescribe the time and conditions of a nonimmigrant's admission since 1924, and the Executive Branch has exercised that authority to permit such practical training since at least 1947. See pp. 2-3, *supra*. Congress was well aware of the 1947 regulation as it was considering the legislation that ultimately became the INA in 1952. See Pet. App. 31a-32a. For example, a 1950 Senate Judiciary Committee report—the product of a multiyear "general investigation of our immigration system" that

spurred the INA's enactment—expressly discussed the availability and contours of post-graduation practical training for nonimmigrant students. 1950 Senate Report 1; see *id.* at 482-483, 503. Yet Congress did not act to eliminate such training in the 1952 INA; to the contrary, it left both the definition of a nonimmigrant student and the grant of time-and-conditions authority essentially intact. That is strong evidence that Congress approved of and effectively ratified the Executive Branch's interpretation of its time-and-conditions authority under the immigration laws. See *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) (holding that "Congress intended to ratify [the agency's] interpretation when it reiterated the same definition" the agency had already construed); see also *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366 & n.3 (1951); Antonin Scalia & Bryan A. Garner, *Reading Law* 323-324 & n.8 (2012).

Moreover, in the more than seven decades since the INA was first enacted in 1952, the Executive Branch has consistently and repeatedly exercised its time-and-conditions authority to reauthorize the availability of post-graduation practical training for nonimmigrant students—promulgating regulations in the Nixon, Carter, Reagan, G.H.W. Bush, G.W. Bush, and Obama Administrations. See Pet. App. 34a (listing the regulations). As the court of appeals observed, "[t]hat long-standing practice was no secret to Congress." *Ibid.*; see *id.* at 34a-35a (listing examples of congressional awareness). Yet during that period Congress has repeatedly amended the INA—including "provisions bearing specifically on F-1 visas and nonimmigrant work rules"—without "disturb[ing] the [agency's] determination that it has authority to allow post-graduation practical training for F-1 visa-holders." *Id.* at 36a; see *id.* at 36a-37a

(listing examples). "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted).

c. The court of appeals also correctly rejected petitioner's contention that "OPT is unlawful because DHS lacks the authority to provide any work authorization at all." Pet. App. 51a; see *id.* at 51a-55a. As the court explained, the plain meaning of "conditions" in Section 1184(a)(1) comfortably encompasses work authorization as part of the "comprehensive control over nonimmigrant students' time in the United States" that DHS exercises. *Id.* at 52a. And the statutory and regulatory history confirm that Congress shared and ratified that understanding. See pp. 15-17, *supra*.

Indeed, Congress specifically addressed the unlawful employment of noncitizens in 8 U.S.C. 1324a(h)(3), which expressly *excludes* from the definition of "'unauthorized alien'" any noncitizen who is "authorized to be so employed by this chapter or by the [Secretary]." 8 U.S.C. 1324a(h)(3). That provision plainly reflects Congress's understanding that "DHS may lawfully authorize employment for nonimmigrants, including F-1 students," by regulation. Pet. App. 53a. The Executive Branch has long understood Section 1324a(h)(3) in that manner, explaining that "the only logical way to interpret [Section 1324a(h)(3)] is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, * * * approv[ed] of the manner in which he has exercised his authority." 52 Fed. Reg.

46,092, 46,093 (Dec. 4, 1987) (denial of petition for rulemaking).

To be sure, Section 1324a(h)(3) is a definitional provision, not a direct conferral of authority. But "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Parker Drilling Management Services, Ltd.* v. *Newton*, 139 S. Ct. 1881, 1888 (2019) (citation omitted), and thus "[w]hat matters is that section 1324a(h)(3) expressly *acknowledges* that employment authorization need not be specifically conferred by statute; it can also be granted by regulation," Pet. App. 55a (emphasis added). Indeed, petitioner's own heavy reliance on subparagraph (F)(i) to limit the express time-and-conditions authority conferred by Section 1184(a)(1) belies any notion that definitional provisions are irrelevant to the interpretation of related authority-conferring provisions, for subsection (F)(i) also is merely definitional. See 8 U.S.C. 1101(a)(15) (defining classes of noncitizens who are deemed to be "nonimmigrant[s]" rather than "'immigrant[s]'").

Various other longstanding statutory provisions further confirm Congress's understanding that F-1 students may be engaged in employment pursuant to regulations. For example, the Internal Revenue Code excludes from the definition of "employment" for certain tax purposes any "[s]ervice which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) * * * and which is performed to carry out the purpose specified in subparagraph (F)." 26 U.S.C. 3121(b)(19); accord 26 U.S.C. 3306(c)(19); see 26 U.S.C. 3231(e)(1) (excluding from "compensation" for certain purposes any "remuneration for service

which is performed by" an F-1 student). The Social Security Act does the same for certain purposes. See 42 U.S.C. 410(a)(19). As the court of appeals observed (Pet. App. 53a), those provisions "would be completely unnecessary if those students lacked authorization to work." Cf. *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation omitted). Indeed, they would be counterproductive. If Congress did not mean for F-1 students to work at all, it would not have taken extra steps to shield them from any of the tax and social-security-related consequences normally associated with employment.

d. Finally, to the extent petitioner contends (Pet. 23-24) that the court of appeals misapplied *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), that contention is incorrect. The court's principal holding was that "[t]he most straightforward reading of the INA is that it authorizes DHS to" promulgate the 2016 rule. Pet. App. 55a. The court invoked *Chevron* only in an alternative holding, stating that "even if" the INA were ambiguous, "the statute may reasonably be understood as [DHS] has read it in support of the" 2016 rule. *Ibid.*; see *id.* at 55a-58a. The court's invocation of *Chevron* as a purely alternative basis to support its primary holding does not warrant this Court's review, for that review would not alter the court of appeals' basic analysis of the INA, much less its actual judgment. See *Jennings* v. *Stephens*, 574 U.S. 271, 277 (2015) ("This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*.").[4]

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[4] For the same reason, this petition need not be held pending the decision in *Loper Bright Enterprises* v. *Raimondo*, 143 S. Ct. 2429

In any event, the court of appeals correctly applied *Chevron*'s rule that "if the statute is silent or ambiguous with respect to the specific issue," a court should uphold the administering agency's regulations "unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 843-844. For the reasons set forth above, the court of appeals here correctly held that, to the extent the INA is silent or ambiguous about whether the Executive may authorize OPT, neither the 2016 rule nor the OPT program more generally is "manifestly contrary" to the INA. *Ibid.*; see Pet. App. 57a ("Even if alternative readings [of subparagraph (F)(i)] are available, making the statute materially ambiguous, it is at least reasonably susceptible of [DHS's] interpretation.").

2. This case would be a poor vehicle in which to review the Secretary's statutory authority to permit OPT because petitioner lacks Article III standing. Article III limits the federal "judicial Power" to the adjudication of "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. An "essential and unchanging part of the case-or-controversy requirement" is Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). And because "Article III jurisdiction is always an antecedent question," *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 101 (1998), the Court would have to address petitioner's standing before it

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(2023), in which the Court granted certiorari on May 1, 2023, limited to the question "[w]hether the Court should overrule [or clarify] *Chevron*." Pet. at i-ii, *Loper Bright*, *supra* (No. 22-451). A different approach to *Chevron* would not alter the court of appeals' rejection of petitioner's reading of the INA. And in future cases the court of appeals will be bound by whatever this Court says in *Loper Bright*, not necessarily by the alternative holding in the decision below.

could reach the merits of petitioner's challenge to the 2016 rule.

Article III standing requires a plaintiff to demonstrate an actual or imminent injury that is personal, concrete, and particularized; that is fairly traceable to the defendant's conduct; and that likely will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-561. In the lower courts, petitioner did not assert that it had standing in its own right to challenge the 2016 rule. Instead, petitioner claimed associational standing to sue on behalf of its members. Pet. C.A. Reply Br. 21-23. An association may have standing on behalf of its members if, among other things, those members "are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). Petitioner asserted below that its members suffer a competitive injury by having to compete for jobs against F-1 students engaged in OPT. Pet. C.A. Reply Br. 21-23.

But petitioner did not identify a single member that is "suffering *immediate or threatened* injury as a result of the" 2016 rule or OPT more generally. *Warth*, 422 U.S. at 511 (emphasis added). Petitioner submitted declarations from three of its members, none of whom stated that he or she was currently or imminently seeking a new job or otherwise competing against F-1 students engaged in OPT. See C.A. App. 201-208 (Blatt Decl.); *id.* at 209-213 (Smith Decl.); *id.* at 214-221 (Sawade Decl.). Instead, all three simply listed *past* instances in which they had applied or interviewed for jobs in the technology sector. See *ibid.* But a past injury, standing alone, does not establish that a future injury is sufficiently imminent to support Article III

standing for prospective relief. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 103 (1983) ("[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy.").

Notwithstanding that flaw, the court of appeals found that petitioner had standing because "nonimmigrant foreign workers 'have competed with [petitioner's] members in the past, and, as far as we know, nothing prevents them from doing so in the future.'" Pet. App. 22a (citation omitted). But that is precisely the type of speculative "'some day'" injury that this Court has found insufficient to establish "the 'actual or imminent' injury that [the Court's] cases require." *Lujan*, 504 U.S. at 564 (citation omitted); see *Carney* v. *Adams*, 141 S. Ct. 493, 501-502 (2020) (holding that the plaintiff lacked standing to challenge a state law imposing requirements on judicial appointments because he "did not show that he was 'able and ready' to apply for a vacancy in the reasonably imminent future"); cf. *Lujan*, 504 U.S. at 561 (explaining that a "plaintiff can no longer rest on * * * 'mere allegations'" of standing at summary judgment). Indeed, petitioner's failure to demonstrate standing is all the more evident because its members' "asserted injur[ies] arise[] from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*"—namely, F-1 students. *Lujan*, 504 U.S. at 562. As this Court has explained, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing * * * is ordinarily 'substantially more difficult' to establish." *Ibid.* (citation omitted). This Court's need to address petitioner's Article III standing as a threshold issue would complicate review of the question presented.

3. Petitioner mischaracterizes the decision below in contending that it "creates a circuit split on the scope of statutory nonimmigrant visa terms." Pet. 17; see Pet. 17 n.4 (alleging a "7-1 split" or "11-1 split"). Contrary to petitioner's characterization (Pet. 16-17), the court of appeals did not hold that, "after entry, the statutory requirements [in Section 1101(a)(15)] no longer apply and regulation alone dictates the conditions of an alien's stay." Rather, the court held that the provisions of Section 1101(a)(15)(F)(i) must "guide[] DHS in exercising its authority to set the time and conditions of F-1 students' stay" under Section 1184(a)(1), and that "the agency's exercise of that authority ordinarily must be '"reasonably related" to the purposes'" of the F-1 provision. Pet. App. 25a-26a (citation omitted). The court thus made clear that Section 1101(a)(15) plays a critical role in shaping the limits of the authority conferred by Section 1184(a)(1)—which is quite the opposite of the purported conclusion that Section 1101(a)(15) "no longer appl[ies]," Pet. 16.

None of the many cases that petitioner cites (Pet. 17-18) contains any reasoning that conflicts with the decision below. Instead, all of them stand for the unremarkable propositions that a nonimmigrant may not enter the country with the intent to live here permanently, and that a noncitizen may be removed or deported once out of status. For example, the cited passage in *Toll* v. *Moreno*, 458 U.S. 1 (1982), states only that "[f]or many of the[] nonimmigrant categories [defined in the INA], Congress has precluded the covered alien from establishing domicile in the United States." *Id.* at 14; see *id.* at 14 n.20 (listing statutory provisions). Similarly, *Elkins* v. *Moreno*, 435 U.S. 647 (1978), simply explains that Congress wished to bar noncitizens from being ad-

mitted as nonimmigrants "if their real purpose in coming to the United States was to immigrate permanently," and observed that "a nonimmigrant alien who does not maintain the conditions attached to his status can be deported." *Id.* at 665-666. The issue here, of course, is precisely what "the conditions attached to [an F-1 student's] status" are in the first place. *Id.* at 666. Petitioner thus begs the question in suggesting that *Elkins* somehow precludes the Secretary from including OPT as one of those conditions under the express grant of authority in Section 1184(a)(1).

Petitioner's assertion (Pet. 18-19) of a conflict with the Fifth Circuit's decision in *Texas* v. *United States*, 809 F.3d 134 (2015), affirmed by an equally divided court, 579 U.S. 547 (2016) (per curiam), is also unsound. In *Texas*, the Fifth Circuit held that Section 1324a(h)(3) did not authorize the granting of "lawful presence or deferred action" with respect to noncitizens who were concededly present in the country without lawful status. *Id.* at 183. That holding has no bearing on whether Section 1184(a)(1)'s express grant of time-and-conditions authority to the Secretary authorizes him to permit certain F-1 students who are lawfully present to engage in temporary post-graduation OPT as a part of their "full" course of study, 8 U.S.C. 1101(a)(15)(F)(i).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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