No. 23-22

In the Supreme Court of the United States

SAVE JOBS USA, PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
GLENN M. GIRDHARRY
AARON S. GOLDSMITH
JOSHUA S. PRESS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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 regulations prescribing that the nonimmigrant spouses of certain noncitizens admitted to perform services in certain "specialty occupation[s]," 8 U.S.C. 1101(a)(15)(H)(i)(B), may themselves apply for work authorization in certain circumstances. See 8 C.F.R. 214.2(h)(9)(iv) and 274a.12(c)(26). The questions presented are:

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

2. Whether petitioner, an advocacy association, has Article III standing to challenge the regulations.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (D.C. Cir.):

Save Jobs USA v. *United States Department of Homeland Security*, No. 23-5089 (May 22, 2023) (granting petitioner's motion to hold appeal in abeyance)

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 12
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Barton v. *Barr*, 140 S. Ct. 1442 (2020) 2
Biden v. *Nebraska*, 600 U.S. 477 (2023) 19
Bragdon v. *Abbott*, 524 U.S. 624 (1998) 17
Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 11
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 20
Commodity Futures Trading Commission v. *Schor*, 478 U.S. 833 (1986) 8, 17
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 22
Epic Systems Corp. v. *Lewis*, 138 S. Ct. 1612 (2018) 14
Gundy v. *United States*, 139 S. Ct. 2116 (2019) 9
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 19-21
Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973) 14
NLRB v. *Gullett Gin Co.*, 340 U.S. 361 (1951) 17
Nielsen v. *Preap*, 139 S. Ct. 954 (2019) 3
Parker Drilling Management Services, Ltd. v. *Newton*, 139 S. Ct. 1881 (2019) 16
Pension Benefit Guaranty Corp. v. *LTV Corp.*, 496 U.S. 633 (1990) 9
Steel Co. v. *Citizens for a Better Environment*, 523 U.S. 83 (1998) 19

Cases—Continued: Page

Summers v. *Earth Island Inst.*, 555 U.S. 488 (2009) 21
Warth v. *Seldin*, 422 U.S. 490 (1975) 19, 20
Washington Alliance of Technology Workers v. *United States Department of Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022), petition for cert. pending, No. 22-1071 (filed May 1, 2023) 7, 9, 11-14, 16, 22
West Virginia v. *EPA*, 142 S. Ct. 2587 (2022) 18

Constitution, statutes, regulations, and rules:

U.S. Const.:
Art. III 6, 12, 19, 21
§ 2, Cl. 1 19
21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11030A, 116 Stat. 1836-1837 (2002) 4
§ 11030A(a) 15
§ 11030A(b), 116 Stat. 1836 15
Act of Apr. 7, 1970, Pub. L. No. 91-225, § 1(a), 84 Stat. 116 2
Administrative Procedure Act, 5 U.S.C. 706(2)(A) 10
American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1253:
§ 104(c), 114 Stat. 1253 ..... 4, 15
§ 106(a), 114 Stat. 1253 ..... 4, 15
§ 106(b), 114 Stat. 1254 ..... 4, 15
Immigration Act of 1924, ch. 190, 43 Stat. 153 1
§ 4, 43 Stat. 155 2
§ 15, 43 Stat. 162-163 2
Immigration and Nationality Act, ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*) 2

Statutes, regulations, and rules—Continued: Page

§ 101(a)(15), 66 Stat. 167 2
§ 101(a)(15)(H)(i), 66 Stat. 168 2
§ 214(a), 66 Stat. 189 2
8 U.S.C. 1101(a)(15) 3, 12-14, 16
8 U.S.C. 1101(a)(15)(H) 3, 4, 14
8 U.S.C. 1101(a)(15)(H)(i)(b) 3
8 U.S.C. 1103 3
8 U.S.C. 1103(a)(1) 5
8 U.S.C. 1103(a)(3) 5, 7
8 U.S.C. 1153(b) 3, 4
8 U.S.C. 1184(a) 5, 7
8 U.S.C. 1184(a)(1) 3, 12, 13, 16, 18
8 U.S.C. 1184(g)(4) 3
8 U.S.C. 1184(i)(1) 3
8 U.S.C. 1255(a) 3, 4, 14
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3360 4
8 U.S.C. 1324a 4
8 U.S.C. 1324a(a) 4
8 U.S.C. 1324a(h)(3) 7, 15, 16, 18
8 U.S.C. 1324a(h)(3)(A) 4
8 U.S.C. 1324a(h)(3)(B) 4, 5
6 U.S.C. 112 5
6 U.S.C. 557 3
8 C.F.R.:
Section 214.2(h)(9)(iv) 5
Section 274a.12(c)(26) 5
Sup. Ct. R.:
Rule 11 ..... 12, 22
Rule 12.6 6

Miscellaneous: Page

46 Fed. Reg. 25,079 (May 5, 1981) 4
52 Fed. Reg. 46,092 (Dec. 4, 1987) 16
80 Fed. Reg. 10,284 (Feb. 25, 2015) 5, 6, 10, 11, 15
Antonin Scalia & Bryan A. Garner, *Reading Law* (2012) 17

In the Supreme Court of the United States

No. 23-22

SAVE JOBS USA, PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-18a) is not yet published in the Federal Supplement but is available at 2023 WL 2663005. A prior opinion of the court of appeals (Pet. App. 19a-32a) is reported at 942 F.3d 504. A prior opinion of the district court (Pet. App. 33a-52a) is reported at 210 F. Supp. 3d 1.

JURISDICTION

The judgment of the district court was entered on March 28, 2023. Petitioner filed a notice of appeal on April 25, 2023. The court of appeals' jurisdiction rests on 28 U.S.C. 1291. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

1. a. The Immigration Act of 1924, ch. 190, 43 Stat. 153, authorized the entry of various noncitizens as "non-

quota immigrant[s]." § 4, 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 1952, Congress enacted the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), which expanded the categories of noncitizens admissible as what were now called "nonimmigrants" rather than "non-quota immigrants." See § 101(a)(15), 66 Stat. 167. As relevant here, the INA authorized the admission as a nonimmigrant of a noncitizen "who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability." § 101(a)(15)(H)(i), 66 Stat. 168. Congress subsequently also authorized the admission as nonimmigrants of such a noncitizen's "spouse and minor children * * * if accompanying him or following to join him." Act of Apr. 7, 1970, Pub. L. No. 91-225, § 1(a), 84 Stat. 116. The INA 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." Ch. 477, § 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 certain noncitizens "who [are] coming temporarily to the United

---

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

States to perform [certain] services * * * in a specialty occupation," 8 U.S.C. 1101(a)(15)(H)(i)(b), which generally means an occupation that requires "theoretical and practical application of a body of highly specialized knowledge" and "attainment of a bachelor's or higher degree in the specific specialty," 8 U.S.C. 1184(i)(1). Nonimmigrant workers admitted under that provision are said to have "H-1B" status, named after the relevant subparagraph of Section 1101(a)(15). The INA also provides that admissible nonimmigrants include the "spouse and minor children of any" noncitizen specified in subparagraph (H) "if accompanying him or following to join him." 8 U.S.C. 1101(a)(15)(H). Such spouses and children are said to have "H-4" status. 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]

b. Two other aspects of the immigration laws are relevant to this case. First, a nonimmigrant generally may become a lawful permanent resident (LPR) by filing an application and demonstrating eligibility to receive an immigrant visa, among other requirements. See 8 U.S.C. 1255(a). As relevant here, nonimmigrant H-1B workers seeking to become LPRs generally may seek employment-based immigrant visas. See 8 U.S.C. 1153(b). Although the period of authorized admission for a nonimmigrant H-1B worker generally may not exceed six years, 8 U.S.C. 1184(g)(4), Congress has di-

---

[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).

rected that the Secretary shall extend H-1B status beyond that six-year limit during the pendency of an application for an employment-based immigrant visa, if certain other conditions are satisfied. See American Competitiveness in the Twenty-first Century Act of 2000 (2000 Act), Pub. L. No. 106-313, §§ 104(c), 106(a)-(b), 114 Stat. 1253-1254; see 21st Century Department of Justice Appropriations Authorization Act (2002 Act), Pub. L. No. 107-273, § 11030A, 116 Stat. 1836-1837 (2002).

Second, Congress has prohibited an employer from employing any noncitizen unless the noncitizen is authorized to work. 8 U.S.C. 1324a(a); see Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101(a)(1), 100 Stat. 3360 (enacting 8 U.S.C. 1324a). Congress has stated that a noncitizen is generally authorized to work in three circumstances. One is when the noncitizen is "lawfully admitted for permanent residence," 8 U.S.C. 1324a(h)(3)(A)—such as when granted an adjustment of status under 8 U.S.C. 1255(a) based on an available employment-based immigrant visa, see 8 U.S.C. 1153(b). Another is when the noncitizen is "authorized to be so employed by [the INA]," 8 U.S.C. 1324a(h)(3)(B)—such as when admitted in H-1B status under Section 1101(a)(15)(H). And the last is when the noncitizen is "authorized to be so employed * * * by the [Secretary]," *ibid.*—such as when the Secretary has promulgated a regulation to make eligible for employment authorization a particular class of nonimmigrants, *e.g.*, 46 Fed. Reg. 25,079, 25,081 (May 5, 1981) (final rule extending eligibility for employment authorization to the nonimmigrant spouses of certain foreign government officials, exchange visitors, and international organization officers and employees).

2. In 2015, following notice-and-comment rulemaking, the Secretary promulgated a final rule "extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who are seeking employment-based [LPR] status." 80 Fed. Reg. 10,284, 10,284 (Feb. 25, 2015); see *id.* at 10,285; 8 C.F.R. 214.2(h)(9)(iv) and 274a.12(c)(26). The Secretary cited and relied on his general immigration rulemaking authority in 6 U.S.C. 112 and 8 U.S.C. 1103(a)(3), as well as his time-and-conditions authority in 8 U.S.C. 1184(a) and his authority to grant employment authorization under 8 U.S.C. 1103(a)(1) and 1324a(h)(3)(B). See 80 Fed. Reg. at 10,285, 10,294-10,295.

The Secretary observed that H-1B workers often "must wait many years for employment-based immigrant visas to become available," and that those delays "increase the disincentives for H-1B nonimmigrants to pursue LPR status and thus increase the difficulties that U.S. employers have in retaining highly educated and highly skilled nonimmigrant workers." 80 Fed. Reg. at 10,284. The Secretary further observed that the "lack of employment authorization for H-4 dependent spouses often gives rise to personal and economic hardships for the families of H-1B nonimmigrants" and that those "hardships may increase the longer these families remain in the United States." *Ibid.* Accordingly, the Secretary explained that extending eligibility for work authorization to H-4 nonimmigrant spouses of the subset of H-1B workers who are seeking employment-based LPR status (and have satisfied the conditions set forth in the rule) would "ameliorate certain disincentives that currently lead H-1B nonimmigrants to abandon efforts to remain in the United States while seeking LPR status"; "minimiz[e] disruptions to U.S. busi-

nesses employing such workers"; "support the U.S. economy, as the contributions H-1B nonimmigrants make to entrepreneurship and research and development are expected to assist overall economic growth and job creation"; and "bring U.S. immigration policies concerning this class of highly skilled workers more in line with those of other countries that compete to attract similar highly skilled workers." *Id.* at 10,285.

3. Petitioner is an advocacy association formed by "former technology workers at Southern California Edison" who allege that they "lost their jobs and were replaced by" H-1B workers. Pet. App. 53a-54a. Petitioner brought this suit challenging the 2015 rule. In 2015, the district court denied petitioner's motion for a preliminary injunction against enforcement of the rule, finding that petitioner had not demonstrated the irreparable injury required to obtain such equitable relief. See *id.* at 53a-68a. When ruling on motions for summary judgment in 2016, the court held that petitioner lacked Article III standing because none of its members had suffered a cognizable injury to support associational standing. *Id.* at 33a-52a.

In 2019, the court of appeals reversed that ruling, finding that petitioner had standing because the rule would "subject its members to an actual or imminent increase in competition" for jobs. Pet. App. 19a; see *id.* at 19a-32a. The court also permitted two individual H-4 nonimmigrants and a nonprofit advocacy organization to intervene. See 16-5287 C.A. Doc. 1764518 (Dec. 17, 2018). The organization and one of the individuals have participated in subsequent proceedings and are therefore respondents in this Court. See Sup. Ct. R. 12.6.

4. On remand, the district court issued the decision that petitioner now asks this Court to review. It

granted the government's motion for summary judgment, which was supported by the intervenors, and denied petitioner's motion for summary judgment. Pet. App. 1a-18a.

a. The district court first rejected petitioner's contention that "Congress has never granted [the Department of Homeland Security (DHS)] authority to allow foreign nationals, like H-4 visa-holders, to work during their stay in the United States." Pet. App. 6a; *id.* at 6a-12a. The court observed that the D.C. Circuit had addressed a similar contention in *Washington Alliance of Technology Workers* v. *United States Department of Homeland Security*, 50 F.4th 164 (2022), petition for cert. pending, No. 22-1071 (filed May 1, 2023), and had rejected it based on "the text of the INA, decades of Executive-branch practice, and both explicit and implicit congressional ratification of that practice." Pet. App. 6a.

As for the text of the INA, the district court observed that DHS "promulgated the H-4 Rule here pursuant to its time-and-conditions and general regulatory authority" in Sections 1184(a) and 1103(a)(3), respectively. Pet. App. 8a. "On their face," the court explained, "the 'time' and 'conditions' of a visa-holder's stay in the United States include 'what an accompanying spouse may do while in the country,' as well as * * * 'whether they can work.'" *Ibid.* (brackets, citation, and ellipsis omitted). The court further explained that Section 1324a(h)(3) "verifies the plain meaning of those terms in the INA by recognizing that some visa-holders may be 'authorized to be employed by' DHS." *Ibid.* (citation and ellipses omitted). "In short," the court concluded, "Congress has expressly and knowingly empowered [DHS] to authorize employment as a permissible condi-

tion of an H-4 spouse's stay in the United States." *Ibid.* The court also observed that petitioner had failed to address or contest "the explicit statutory grant of time-and-conditions authority" in its briefing. *Id.* at 10a.

As for executive practice, the district court observed that "the Executive Branch has had longstanding and open responsibility for authorizing employment for similar visa classes." Pet. App. 9a. The court noted examples of such classes dating back to 1965, including "J-2 spouses," "spouses of foreign government officials," and "spouses of employees or officers of international organizations." *Ibid.*

As for congressional ratification, the district court explained that "Congress has repeatedly blessed" the Executive Branch's longstanding practice "by leaving the relevant provisions of the INA untouched, even as it [h]as amended other portions of the statute during the last several decades." Pet. App. 9a. "That constitutes 'persuasive evidence that the interpretation is the one intended by Congress.'" *Ibid.* (quoting *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 846 (1986)). The court rejected petitioner's reliance on a purported absence of "legislative history," explaining that in fact "the 1950 Senate study that was the 'genesis' of the INA recognized that the Executive branch was already authorizing employment for nonimmigrant visa-holders," yet "Congress nonetheless decided to maintain all the relevant grants of authority to the Executive." *Id.* at 10a-11a. The court also rejected petitioner's reliance on Congress's having failed to enact proposed legislation to extend work authorization to H-4 spouses, observing that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, in-

cluding the inference that the existing legislation already incorporated the offered change." *Id.* at 11a (quoting *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990)).

b. The district court next rejected petitioner's contention that the INA's delegation of authority to the Secretary to authorize employment for H-4 spouses "violate[s] the constitutional separation of powers and related 'nondelegation doctrine.'" Pet. App. 12a; see *id.* at 12a-14a. The court explained that this Court has "held time and again, that a statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Id.* at 13a (quoting *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019)) (brackets and internal quotation marks omitted). The district court further explained that "[t]he 'intelligible principle' standard is 'not demanding,' and is satisfied unless 'Congress has failed to articulate *any* policy or standard' at all." *Ibid.* (quoting *Gundy*, 139 S. Ct. at 2129) (brackets omitted).

Here, the district court explained, the "INA uses visa classes to identify who may enter temporarily and why," and so "DHS must ensure that the times and conditions it attaches to the admission of nonimmigrant visa-holders are reasonably related to the purpose for which they were permitted to enter." Pet. App. 14a (quoting *Washington Alliance*, 50 F.4th at 178-179) (brackets omitted). That requirement, the court explained, "provides an intelligible principle of delegation." *Ibid.*

c. The district court also rejected petitioner's contention that the 2015 rule was arbitrary and capricious,

in violation of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). Pet. App. 15a-18a.

First, the district court rejected petitioner's argument that the rule "reversed without explanation a prior policy established by Congress and DHS." Pet. App. 15a. The court observed that the agency in fact "did explain why it had decided to authorize employment for H-4 spouses": namely, "recent data and reports from experts" indicated that "'the lack of employment authorization for H-4 dependent spouses'" was causing H-1B workers "to 'abandon efforts to remain in the United States.'" *Id.* at 16a (quoting and citing 80 Fed. Reg. at 10,284-10,285, 10,304-10,305). As the court observed, the agency explained that "granting employment authorization for H-4 spouses" would address that lack of retention and thus "further[] the dual statutory purposes of H-1B workers performing specialty services in the United States, and H-4 spouses accompanying them." *Id.* at 17a (citing 80 Fed. Reg. at 10,284-10,285). The court also found petitioner's arguments forfeited, observing that petitioner's reply brief "did not address any of the arguments opposing its arbitrary and capricious challenge and thereby effectively concedes them." *Id.* at 16a (citation omitted).

Second, the district court rejected petitioner's contention that DHS "'entirely failed to consider' the 'negative effect' that the H-4 Rule could have on American workers." Pet. App. 17a (citation omitted). The court observed that petitioner itself acknowledged "in the next paragraph" of its brief that the agency "did consider that effect." *Ibid.* The court explained that DHS had "noted that the H-4 Rule would 'not result in "new" additions to the labor market' because 'it simply accelerates the timeframe by which H-4 spouses can enter

the labor market,'" *ibid.* (quoting 80 Fed. Reg. at 10,309) (brackets omitted); that DHS had "calculated that 'even if every eligible H-4 spouse took advantage of the rule in the first year (the year with the most newly-eligible H-4 spouses) it would amount to less than 0.12% of the U.S. workforce,'" *ibid.* (citing 80 Fed. Reg. at 10,295, 10,309); and that DHS had "noted that commenters predicting negative impacts on American jobs did not provide any empirical support for that prediction," *ibid.* (citing 80 Fed. Reg. at 10,296). The court thus found DHS's conclusion "that the H-4 Rule's benefits outweighed its 'minimal' economic costs" was sufficient "to establish a 'rational connection between the facts found and the choice made.'" *Ibid.* (citations omitted).

d. Finally, the district court made clear that "[b]ecause the statute's text and history plainly permit [DHS] to authorize employment for H-4 spouses," the court was not relying on any deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Pet. App. 9a n.2. The court alternatively held that "[w]ere there any ambiguity in the INA," the government had "reasonably resolved it" under *Chevron*. *Id.* at 10a n.2.

5. Shortly after filing its notice of appeal, petitioner moved the court of appeals to hold its appeal in abeyance pending this Court's consideration of the petition for a writ of certiorari in *Washington Alliance*, *supra* (No. 22-1071). Petitioner argued that "the issues in this appeal are likely to be substantially affected by the Supreme Court's resolution of [*Washington Alliance*]. Therefore, this case should be held in abeyance until the Supreme Court either denies certiorari in [*Washington Alliance*] or resolves that case." 23-5089 C.A. Doc. 1999006, at 2 (May 12, 2023). The government took no position on that motion. See *ibid.*

On May 22, 2023, the court of appeals granted petitioner's motion to hold the appeal in abeyance. 23-5089 C.A. Doc. 2000195; see Pet. 7.

ARGUMENT

Petitioner asks this Court to take the extraordinary and rare step of granting certiorari before judgment to review its challenge to the 2015 rule. This Court should reject that invitation. This case is not "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. In addition, the district court correctly rejected petitioner's contention that the Secretary lacked statutory authority to promulgate the 2015 rule, and its decision does not conflict with any decision of this Court or a court of appeals. This case also would be a poor vehicle in which to address the rule's legality 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. Review by this Court—much less certiorari before judgment—is not warranted.

1. a. The district court correctly held that the Secretary had statutory authority to promulgate the 2015 rule. Pet. App. 6a-12a. The INA 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). H-4 spouses are admitted as "nonimmigrant[s]," 8 U.S.C. 1101(a)(15), and the challenged provisions of the 2015 rule plainly prescribe both the "time"—for the duration of the H-1B spouse's authorized presence in the United States—and the "conditions"—including that the H-1B spouse be seeking employment-based LPR status and have satisfied the re-

quirements set forth in the rule—of an H-4 spouse's admission. The plain text of Section 1184(a)(1) thus authorizes the rule.

Petitioner does not seriously dispute that conclusion; indeed, it forfeited any argument to the contrary in the district court. See Pet. App. 10a. Instead, in this Court petitioner argues (Pet. 10-13) that Section 1101(a)(15)(H) itself precludes the Secretary's exercise of his authority under Section 1184(a)(1) to grant eligibility for work authorization to H-4 nonimmigrants. Because subparagraph (H) "does not state or imply anything about employment," the argument goes, any nonimmigrant spouse admitted under that provision may not work while in this country. Pet. 12.

That argument lacks merit. Subparagraph (H) provides that the spouse of an H-1B worker may be admitted as a nonimmigrant "if accompanying him or following to join him." 8 U.S.C. 1101(a)(15)(H). It does not purport to specify the time and conditions for the admission of a spouse who satisfies that requirement—much less impose a bright-line "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.

The Secretary's time-and-conditions authority under Section 1184(a)(1) of course is not unbounded. That authority is limited not just by "basic principles of administrative law," *Washington Alliance of Technology Workers* v. *United States Department of Homeland Security*, 50 F.4th 164, 189 (D.C. Cir. 2022), petition for cert. pending, No. 22-1071 (filed May 1, 2023), but also by the specific nonimmigrant class definitions in Section 1101(a)(15). See *id.* at 178-180, 189-190. As the district court explained, "DHS must ensure that the times and

conditions it attaches to the admission of nonimmigrant visa-holders are reasonably related to the purpose for which they were permitted to enter." Pet. App. 14a (quoting *Washington Alliance*, 50 F.4th at 179) (brackets omitted); 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 and ellipsis 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 district court correctly determined that the 2015 rule "is reasonably related to the nature and purpose of the H-4 visa class." Pet. App. 16a (brackets and citation omitted). As the court explained, H-4 spouses are admitted for the purpose of "accompanying" or "join[ing]" H-1B nonimmigrants, who in turn have been admitted to "perform services in a specialty occupation." *Ibid.* (quoting 8 U.S.C. 1101(a)(15)(H)) (ellipsis omitted). Congress also has provided that such H-1B workers may adjust to LPR status by establishing eligibility for an employment-related immigrant visa and satisfying certain other conditions, see 8 U.S.C. 1255(a), and expressly directed DHS to extend the duration of those workers' stay be-

yond otherwise-applicable statutory limits during the pendency of their applications for LPR status, if certain conditions are met. See 2002 Act § 11030A(a)-(b), 116 Stat. 1836-1837; 2000 Act §§ 104(c), 106(a)-(b), 114 Stat. 1253-1254.

At the same time, DHS recognized that the inability of H-4 spouses to work "'often gives rise to personal and economic hardships for the families of H-1B nonimmigrants,' leading them to 'abandon efforts to remain in the United States.'" Pet. App. 16a (quoting 80 Fed. Reg. at 10,284-10,285). Such abandonment would directly undermine Congress's express goal in the 2000 Act and 2002 Act of encouraging many H-1B workers to remain in the United States during the pendency of the LPR application process. It likewise would undermine Congress's goal in authorizing admission for H-4 spouses and children in the first place—namely, to eliminate a strong disincentive for H-1B workers with families to come to or remain in the United States to fill the economic needs for their specialty services. Extending eligibility for employment authorization to H-4 spouses would therefore "further[] the dual statutory purposes of H-1B workers performing specialty services in the United States, and H-4 spouses accompanying them." *Id.* at 16a-17a. Accordingly, the 2015 rule "is reasonably related to the nature and purpose of the H-4 visa class." *Id.* at 16a (brackets and citation omitted).

b. It would be particularly anomalous to read subparagraph (H)'s *silence* about employment for H-4 spouses as a categorical *prohibition* on such employment, as petitioner urges (Pet. 10-13), given the 1986 enactment of 8 U.S.C. 1324a(h)(3). That provision, which specifically addresses the unlawful employment of noncitizens, expressly *excludes* from the definition of

"'unauthorized alien'" any noncitizen who is "authorized to be so employed * * * 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 by regulation. See *Washington Alliance*, 50 F.4th at 191-192. 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," *Washington Alliance*, 50 F.4th at 191-192 (emphasis added). Indeed, petitioner's own heavy reliance on subparagraph (H)'s silence 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 subparagraph (H) itself is also definitional. See 8 U.S.C. 1101(a)(15) (defining classes of noncitizens who are deemed to be "nonimmigrant[s]" rather than "'immigrant[s]'").

c. The statutory and regulatory history confirm what the INA's plain text already indicates: that the Secretary has authority to permit H-4 spouses to be eligible for employment authorization under certain circumstances. 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 grant eligibility for employment authorization to noncitizen spouses for many decades. See Pet. App. 9a. As the district court observed, Congress was well aware of that exercise of authority and "repeatedly blessed it by leaving the relevant provisions of the INA untouched, even as it as amended other portions of the statute during the last several decades." *Ibid.* "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.'" *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted); see *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998); *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).

d. Petitioner further contends (Pet. 13) that the district court's decision "flouts the major questions doctrine" because of what petitioner views as a large number of noncitizens who could potentially enter the workforce as a result of the rule. That contention lacks merit. This Court has stated that the major-questions doctrine reflects the interpretive principle that "[e]xtraordinary grants of regulatory authority are rarely accomplished

through 'modest words,' 'vague terms,' or 'subtle devices.'" *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2609 (2022) (brackets and citation omitted).

Here, there is nothing "[e]xtraordinary," "'radical,'" or "'unusual'" about the Secretary's exercise of his time-and-conditions authority to extend eligibility for work authorization to nonimmigrant H-4 spouses. *West Virginia*, 142 S. Ct. at 2608-2609 (citations omitted). As explained above, the Executive Branch has extended work authorization to nonimmigrants for decades, including to noncitizens admitted as the spouses of other nonimmigrants, and Congress has never questioned—indeed, has effectively ratified—that exercise of authority. Nor does the 2015 rule rely on "'modest words,' 'vague terms,' or 'subtle devices'" in the INA. *Id.* at 2609 (citation omitted). Congress has expressly stated both that a nonimmigrant's admission "shall be for such time and under such conditions as the [Secretary] may by regulations prescribe," 8 U.S.C. 1184(a)(1), and that a noncitizen may engage in employment when "authorized to be so employed * * * by the [Secretary]," 8 U.S.C. 1324a(h)(3).

Together, those provisions make clear that Congress authorized the Secretary to include eligibility for employment among the conditions that attach to a nonimmigrant's admission and continued presence in this country. Petitioner's policy objections (Pet. 13-16) to the number of noncitizens potentially affected by the 2015 rule do not convert a clearly authorized exercise of regulatory authority into a "major question" unauthorized by Congress. As Justice Barrett has observed, the major-questions doctrine neither "requires an unequivocal declaration from Congress authorizing the *precise* agency action under review" nor "purports to depart

from the best interpretation of the text." *Biden* v. *Nebraska*, 600 U.S. 477, 511 (2023) (Barrett, J., concurring) (citation and internal quotation marks omitted).

2. In any event, this case would be a poor vehicle in which to review the Secretary's statutory authority to promulgate the 2015 rule 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 could reach the merits of petitioner's challenge to the 2015 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 district court, petitioner did not assert that it had standing in its own right to challenge the 2015 rule. Instead, petitioner claimed associational standing to sue on behalf of its members. See Pet. App. 40a. 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 competitive injuries from having to compete for jobs against foreign

workers, and in its 2019 decision, the court of appeals held that petitioner had standing because the rule "increas[es] competition for jobs from H-1B visa holders." Pet. App. 25a; see *id.* at 26a ("Absent the rule, argues [petitioner], at least some H-1B visa holders awaiting permanent residence would leave the United States—exiting the labor pool—because their spouses are unable to work.").

But petitioner did not identify a single member who is "suffering *immediate or threatened* injury" that is fairly traceable to the 2015 rule. *Warth*, 422 U.S. at 511 (emphasis added); cf. *Lujan*, 504 U.S. at 561 (explaining that a "plaintiff can no longer rest on * * * 'mere allegations'" of standing at summary judgment) (citation omitted). Petitioner submitted declarations from three of its members who asserted that they had lost their jobs in the past to H-1B workers. See D. Ct. Doc. 2-2, at 1-4 (Apr. 23, 2015) (Bradley Decl.); *id.* at 5-6 (Buchanan Decl.); *id.* at 7-9 (Gutierrez Decl.). But "past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy" to support prospective injunctive relief. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 103 (1983). Moreover, all three lost their jobs *before* the Secretary issued the 2015 rule, so their injuries are not fairly traceable to that rule.

The court of appeals brushed past those flaws on the ground that "H-1B visa holders 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. 29a. 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.

Moreover, the court of appeals' reasoning is wrong even on its own terms. The question is not whether petitioner's members would face competition from H-1B workers generally, but instead whether they would compete for jobs against the subset of H-1B workers who (1) are eligible for and actively seeking LPR status; (2) have dependent spouses admitted as H-4 nonimmigrants who obtained work authorization under the 2015 rule; and (3) would have left this country but for their spouses' having obtained such work authorization. None of the three members who submitted declarations provides any basis to believe that he or she would compete against such an H-1B worker, making an injury based on such competition entirely speculative. Nor does it matter that "the rule will cause more H-1B visa holders to remain in the United States than otherwise would," Pet. App. 28a, for that is the sort of "statistical probability" of injury that this Court has consistently rejected as a basis for standing. *Summers* v. *Earth Island Institute*, 555 U.S. 488, 497 (2009).

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, H-4 spouses. *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 does not contend that the district court's decision conflicts with any decision of this Court or a court of appeals. The case would therefore not warrant certiorari even had the court of appeals already affirmed the district court's ruling. That petitioner seeks to skip that critical step and obtain certiorari before judgment makes denial of the petition all the more appropriate.

Observing that the Court is currently considering the petition for a writ of certiorari in *Washington Alliance*, *supra* (No. 22-1071), petitioner urges the Court to "consolidate this case with" that one "because the questions presented are identical." Pet. 17. But *Washington Alliance* involves a 2016 rule addressing optional practical training for nonimmigrant F-1 students, see 50 F.4th at 170-174, whereas the 2015 rule at issue here addresses work authorization for the H-4 spouses of certain H-1B workers seeking LPR status. Petitioner identifies no appellate court that has addressed the legality of the 2015 rule, and provides no sound reason why this Court should be the first. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

Moreover, this Court has made clear that certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Petitioner has not made that showing. Indeed, having successfully persuaded the court of appeals to hold its own appeal in abeyance, see Pet. 7; pp. 11-12, *supra*, petitioner is poorly suited to demand immediate resolution from this Court.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
GLENN M. GIRDHARRY
AARON S. GOLDSMITH
JOSHUA S. PRESS
Attorneys

SEPTEMBER 2023