No. 24-923

In the
Supreme Court of the United States

SAVE JOBS USA,
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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INTRODUCTION

Without authority from Congress, the Department of Homeland Security (DHS) has permitted certain alien spouses of H-1B nonimmigrant guestworkers to work as well. Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284–312 (Feb. 24, 2015) (H-4 Rule) (Reproduced at App.66). The H-4 Rule was the first of many work programs created purely through regulation after DHS declared in 2015 that it shared with Congress the power to permit alien employment.

The central issue of the Petition is whether DHS indeed shares with Congress the power to change the structure of the immigration system by independently creating new alien employment programs. Since its 2015 claim of having shared power with Congress, DHS has repeatedly violated the delegation doctrine[1] by creating massive alien employment programs through regulation without conforming to any statutory principle guiding the content of such regulations. Pet.5–6. The questions presented in the Petition affect every corner of the immigration system, bear on issues that have created a crisis in American communities (such as the propriety of giving work authorizations with mass parole), and provide this Court with an op-

[1] Nondelegation has historically been used to challenge whether a congressional delegation is lawful. Petitioner suggests nondelegation can be a tool for determining whether Congress has made a delegation at all.

portunity to give guidance on how to interpret delegated powers post-*Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Pet.26–28; Cruz.Amicus.Br.18–21.

The Petition describes how some visas become nonsensical under the D.C. Circuit's new entry-requirement-only reinterpretation of the visa statutes. Pet.16–17. Respondents do not dispute this effect. Nor do they dispute how the D.C. Circuit's entry-requirement interpretation blurs the distinction among visas because, when an alien changes status while in the U.S., the statutory terms of the new visa category do not apply. Pet.17; Cruz.Amicus.Br.10–11.

ARGUMENT

I. Respondents cannot erase a circuit split by claiming that the visa statutes persist as nonbinding guidance for regulations.

The decision below relies entirely on the novel holdings of *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.* for authority. 50 F.4th 164 (2022) (*Washtech*), cert. denied 144 S. Ct. 78 (2023). Until *Washtech,* there had been no dispute among the courts that the visa terms in 8 U.S.C. § 1101(a)(15) apply to an alien's entire stay. *Washtech* introduced the never-before-seen interpretation that those visa terms cease to apply after an alien enters the United States, *id.* at 168, and an alien's stay in the United States is entirely governed by regulation, *id.* at 169. Judge Rao and Judge Henderson observed that this interpretation

opened a circuit split, stating "no court of appeals has adopted the approach taken by the panel majority." *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 58 F.4th 506, 508, 511 (2023) (Rao, J., dissenting from denial of pet. for reh'g en banc). The other circuits (and the D.C. Circuit before *Washtech.*[2]) treat the visa terms as applying to an alien's entire stay. *E.g.*, *Akbarin v. Immigration & Naturalization Serv.*, 669 F.2d 839, 840 (1st Cir. 1982) (maintaining student visa status requires meeting the conditions in 8 U.S.C. § 1101(a)(15)(F)); *Touray v. United States AG*, 546 F. App'x 907, 912 (11th Cir. 2013) ("A nonimmigrant student's status continues as long as the student 'is pursuing a full course of study at an approved educational institution'"); *see also* Landmark.Amicus.Br.11–14; *but see* BIO.20 (claiming these cases only hold that nonimmigrants cannot remain permanently). The interpretation of the D.C. Circuit and those of the other circuits are not reconcilable.

Respondents attempt to varnish over the circuit split two federal judges identified by arguing that *Washtect did not hold* that the requirements of Section 1101(a)(15) "cease to apply" after entry because they continue to guide DHS in exercising its rulemaking authority. BIO.17–18. But, of course, those requirements "cease to apply" as limits when they only "ap-

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[2] *E.g., Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 383 & 386 (D.C. Cir. 2018) (Applying after admission the statutory term H-2A visas are for temporary or seasonal employment only).

ply" as guides. *Washtech*, 50 F.4th at 178. Thus, absurdly, *Washtech,* permitted DHS to disregard the statutory limitation that student visas are *solely for pursuing a full course of study at a school* as an entry requirement. 50 F.4th at 168. *Washtech* then held that DHS could permit work after graduation on student visas because the type of work permitted was reasonably related to the *solely to pursue a full course of study at a school* requirement that the court had held DHS could otherwise disregard after entry. *Id.* at 169.[3]

Following this new precedent, the court below never considered whether the terms of the H-4 visa permitted work. App.1–8. In addition, the court of appeals did not even explain how work was reasonably related to the H-4 visa terms. App.21. That it still upheld the H-4 Rule demonstrates that the reasonably related standard "removes any statutory constraint on DHS's authority after admission." *Washtech*, 50 F.4th at 202 (Henderson J., dissenting). No other circuit holds DHS regulations governing nonimmigrant visas merely must be reasonably related to the statutory visa terms but do not have to comply with those terms and Respondents cite none. The circuit split on this question is beyond dispute.

[3] The Cruz.Amicus.Br.6–18 describes this absurdity flowing from *Washtech* in more detail.

II. The D.C. Circuit and Fifth Circuit are indisputably split over the scope of DHS's employment power.

Respondents attempt to camouflage the split between the respective interpretations of Section 1324a(h)(3) in the D.C. Circuit and the Fifth Circuit by noting that the Petition addresses work by lawfully present nonimmigrant aliens, while the Fifth Circuit's opinions have addressed work by illegal aliens. BIO.21. In this argument Respondents ignore the scope of the D.C. Circuit's holding that "'Congress has deliberately granted the Executive power to authorize employment,'" a holding that does not restrict DHS's employment power to lawfully present aliens. Pe-App.16 (quoting *Washtech*, 50 F.4th at 91).

Respondents find it significant that the Fifth Circuit opinion *Texas v. United States*, 126 F.4th 392 (5th Cir. 2025) did not expressly identify Section 1324a(h)(3) when it affirmed the conferral of employment under Deferred Action for Childhood Arrivals (DACA) exceeded DHS's authority. BIO.21. That ignores the fact that the government argued in its opening brief that Section 1324a(h)(3) was the source of its power to authorize employment under DACA. Brief for Federal Government Appellants at 6, 36, *Texas v. United States*, No. 23-40653 (5th Cir. 2025). In rejecting the government's Section 1324a(h)(3) argument, the Fifth Circuit economically followed a chain of earlier precedent, *Texas*, 126 F.4th at 417, leading to *Texas v. United States*, 809 F.3d 134, 182–83 & n.185 (5th Cir. 2015) (expressly rejecting Section 1324a as the source

of vast power), aff'd by an equally divided Court, 579 U.S. 547 (2016).

The upshot is, since 2015, DHS has claimed that "8 U.S.C. 1324a(h)(3)(B) [] recognizes the Secretary's authority to extend employment to noncitizens in the United States" regardless of whether the alien is legal, App.72, 111–12; illegal, 87 Fed. Reg. 53,152, 53,186 & n.151 (Aug. 30, 2022); or a parolee, 82 Fed. Reg. 5,238, 5,239 (Jan. 17, 2017). The Fifth Circuit rejects that claim, and the D.C. Circuit accepts it.

III. Respondents' interpretation of Section 1184(a)(1) relies on omitting the final clause of its first sentence.

Respondents rely extensively on the D.C. Circuit's new, unique interpretation of 8 U.S.C. § 1184(a)(1) that, after an alien enters the U.S., Congress gave exclusive control to the executive to set the terms of the "nonimmigrants' presence in the United States." App.2 (quoting *Washtech*, 50 F.4th at 177). Until *Washtech*, that provision was consistently interpreted as authorizing DHS to set conditions of *admission* "to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted . . . [the] alien will depart from the United States." *See* Pet.19–20 (citing cases); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State,* 45 F.3d 469, 473 (D.C. Cir. 1995) (Section 1184(a)(1) allows regulation to "prescribe conditions of admission to the United States."); *Wash. All. of Tech. Workers*, 58 F.4th at 510–11 (Rao, J., dissenting from denial of pet. for reh'g en

banc); Cruz.Amicus.Br.11–16. The novel parsing of the statute to exclude that final clause allowed the D.C. Circuit to demote the visa statutes to mere entry requirements and promote DHS's power pursuant to Section 1184(a)(1) to regulate admission (lawful entry) into the sole authority governing a "nonimmigrant's presence in the United States." App.2 (quoting *Washtech*, 50 F.4th at 177). Respondents cannot cite to any authority outside the D.C. Circuit or before *Washtech* supporting their interpretation of Section 1184(a)(1), because there is none.

The D.C. Circuit's new parsing of Section 1184(a)(1) "removes any statutory constraint on DHS's authority after admission." *Washtech*, 50 F.4th at 202 (Henderson J., dissenting). Respondents claim that the major question doctrine does not apply because this unbounded interpretation of Section 1184(a)(1) makes its authority explicit. BIO.13, 19. If the final clause of the sentence is included, however, the authority to permit work clearly is not explicit. Indeed, all of Respondents' quotations from Section 1184(a)(1) omit the final clause of the first sentence, erasing the intelligible principle that Congress included to direct the exercise of authority under that section. App.64.

Respondents assert a long history of making work authorizations to argue that the major question doctrine is inapplicable. BIO.19; *but see* Atlantic.Amicus.Br.4–12 (explaining why the major question doctrine applies). Respondents omit that, before the H-4 Rule, no work authorization had been made with the

claim that DHS shared authority with Congress to create alien employment programs. When challenged in court, such regulations were evaluated by the terms of the visa in question, not by whether the Executive shared power to permit alien employment. *E.g., Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374 (9th Cir. 1989); *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985). Indeed, there is a long history of the courts rejecting work programs created by regulation. *Id*. No case law earlier than the H-4 Rule mentions Section 1184 conferring on DHS the power it claims here.

Respondents argue that Congress has "ratified" its claim of shared power over authorizing alien employment. BIO.8, 19. Yet Respondents fail to explain how such ratification took place other than to mention congressional inaction. *Id*.; *but see Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (requiring comprehensive revision of a statute for ratification). Ironically, the District Court found great significance in congressional inaction over work programs created by regulation, App.17–18, while finding Congress's failure to enact bills introduced to authorize H-4 employment insignificant App.19–20. Should not congressional inaction cut both ways? The *amicus* brief filed by members of the House and Senate further rebuts the ratification claim and expresses their institutional concern over this argument. Cruz.Amicus.Br.16–18.

Perhaps realizing how their Section 1184(a)(1) argu-

ments fall apart when reading the full text (Reproduced at App.64) in context, Respondents resort to asserting that Petitioner forfeited the right to dispute the interpretation that Section 1184(a)(1) confers on DHS exclusive authority to regulate all aspects of an alien's stay in the United States, including the power to authorize employment, because it was not raised in the district court. BIO.12–13. This argument has a signal flaw. Briefing in the district court ended on May 31, 2021. The D.C. Circuit's new holding that Section 1184(a)(1) confers on DHS total and exclusive authority to set the terms of a nonimmigrant's stay while in the United States was announced in *Washtech* on October 4, 2022. Petitioner could not have disputed that interpretation in the district court because it had not yet been invented. While timing made it impossible to address the Section 1184 issue in the district court, both the district court and the court of appeals rebuked Petitioner for failing to do so, as Respondents indicate. BIO.13.

IV. This case is an ideal vehicle for addressing the persistent issue of whether DHS shares with Congress the power to authorize alien employment.

A. Prior denials of certiorari are irrelevant.

Respondents contend that the denial of certiorari in *Washtech* warrants denial here as well because the cases present identical issues. BIO.21–22. Such denials, however, have nothing to do with the merits of a

case. *Brown v. Allen*, 344 U.S. 443, 492 (1953). For example, it may have been better for this Court to decide the fate of the *Chevron* Doctrine before addressing the scope of DHS's regulatory power because *Washtech* did not depend on *Chevron*. *See* App.4 n.2. Indeed, this Petition provides an excellent vehicle for distinguishing between regulations that legislate to restructure a statutory system and regulations implementing a statutory system. *See* Eagles.Amicus.Br.4–7 (describing how this Petition could help define limits on agency authority post-*Chevron*).

Regarding the question presented of whether statutory visa terms merely specify entry requirements, this Petition is likely to be the last direct opportunity for the Court to address the split between the D.C. Circuit and the rest of the circuits. No serious new challenge to a DHS regulation governing visas will be brought in the D.C. Circuit as long as its eccentric interpretation that DHS regulations governing visas do not have to comply with the visa statutes and only have to be reasonably related to those statues remains in place because that interpretation "removes any statutory constraint on DHS's authority after admission." *Washtech*, 50 F.4th at 202 (Henderson J., dissenting). The decision below, with its twenty-four references to *Washtech*, demonstrates that the outcome of any future challenge to DHS regulations governing visas has already been decided in favor of DHS. *See* App.1–8. The D.C. Circuit has made forum shopping essential in this area of the law.

Regarding the question presented of whether DHS

has the power to create alien employment programs entirely through regulation, this is at least the sixth petition over the past decade asking this Court to decide the issue. Pet.26. Each regulation creating an alien employment program can also spawn litigation over whether it is within DHS's authority; litigation by states claiming they have no obligation to provide benefits to program beneficiaries, *e.g.*, *Kansas v. United States*, No. 1:24-cv-00150 (D.N.D. Oct. 28, 2024); litigation by program beneficiaries claiming states owe them benefits, *e.g.*, *St-Hilaire v. Comm'r of the Ind. BMV*, 711 F. Supp. 3d 1028 (S.D. Ind. 2024); and litigation over whether such programs can be terminated, *e.g.*, *Doe v. Noem*, No. 1:25-cv-10495-IT (D. Mass. Apr. 14, 2025). Granting certiorari will stanch the expansion of litigation that ten years of indecision and resulting unclarity have spawned. Further delay in resolving the question of whether DHS may independently authorize alien employment would only increase the current chaos in the law, with the resulting bedlam appearing on public display. *See* Pet.27–28; Jordan King, *How Springfield, Ohio Became the Center of a Political Firestorm*, Newsweek, Sept. 14, 2024.

B. Petitioner obviously has standing.

Standing in this case could only be simpler if Petitioner's members were the subject of the regulation. Petitioner's members represent the roadkill of our broken immigration system. Petitioner was formed by

Americans citizens who worked at Southern California Edison until they were replaced by H-1B nonimmigrants.[4] *See* Michael Hiltzik, *A loophole in immigration law is costing thousands of American jobs*, LA Times, Feb. 20, 2015. This sordid event proves Petitioner's members are direct competitors with H-1B nonimmigrants in the job market. They have since been joined by additional American workers who have been displaced by H-1B nonimmigrants and remain, like Petitioner's original members, in competition with these nonimmigrants for wages and jobs.

Petitioner's standing in the courts below is not due to some novel standing argument. It is based upon an injury recognized in a myriad of opinions since *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970) that hold regulations that increase competitors to a party create an injury in fact. *E.g.*, *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403 (1987).

The stated purpose of the H-4 Rule is to increase the number of H-1B workers in the job market, where they are in competition with Petitioner's members. "The administrative record demonstrates as much." *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504, 509 (D.C. Cir. 2019). Nevertheless, Respondents make the unserious argument that Petitioner must identify H-1B workers who "would have left this country but for their spouses' having obtained such work authorization" and show competition with them specifically. BIO.24. No such specific, impossible showing

[4] This practice is sadly lawful. 8 U.S.C. § 1182(n)(2)(E).

has ever been required. The H-4 Rule must fail completely in its stated purpose of increasing the pool of H-1B nonimmigrants for Petitioner to lack injury because even a slight concrete injury is sufficient for standing, *e.g., United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 (1973) (describing slight injuries that have created standing), and increased competition caused by regulation has consistently been held to be a concrete injury, *e.g.*, *Investment Company Institute v. Camp*, 401 U.S. 617 (1971). Petitioner's standing follows ineluctably from that basic, time-honored principle.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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