No. 24-923

IN THE

Supreme Court of the United States

SAVE JOBS USA,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Respondents.

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

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

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As a longtime advocate for preserving the separation of powers, ALF recognizes the real-world significance of the overarching question presented by this appeal: Does the Department of Homeland Security (DHS) have authority, independent of Congress, to determine, based on its own economic,

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[1] Petitioner's and Respondents' counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

social, and other policy judgments, whether, or how long, various classes of nonimmigrant alien visa holders delineated by the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(15), can work in the United States.

The Court should grant certiorari to address this important, long-percolating, and recurring separation of powers and statutory interpretation issue. Its resolution will directly affect, one way or another, the size, composition, and permanence of the nation's workforce, including, as Petitioner Save Jobs USA explains, in the highly competitive, technology sector. Although ALF recognizes the need for specialized foreign workers to supplement the American workforce in certain industrial sectors, robust employment of U.S. citizens by U.S. employers not only is essential to the nation's economy, but also vital to our national security.

SUMMARY OF ARGUMENT

The D.C. Circuit panel held that the question of whether the INA vests DHS with authority to decide which statutorily defined classes of nonimmigrant alien visa holders can work in the United States—here, H-4 spouses of H-1B specialty occupation workers—is controlled by *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security* ("*Washtech*"), 50 F.4th 164 (D.C. Cir. 2022), *cert. denied* 144 S. Ct. 78 (2023). *See* Pet.App. 1, 4. According to the *Washtech* majority opinion, 8 U.S.C.

§ 1101(a)(15) (defining "classes of nonimmigrant aliens") merely "identifies entry conditions" for nonimmigrant aliens, and a different INA provision, 8 U.S.C. § 1184(a)(1), vests DHA with separate and independent authority "to set the time and conditions of . . . nonimmigrants' stay" in the United States, including the "power to authorize employment reasonably related to the nonimmigrant visa class." *Washtech*, 50 F.4th at 168, 169.[2]

Dissenting from this holding, Circuit Judge Henderson noted that in light of *West Virginia v. EPA*, 597 U.S. 697 (2022), the "major questions inquiry appears to be a threshold question" that should have been briefed in the court of appeals or remanded to the district court. *Id.* at 204 n.11 (Henderson, J., concurring in part and dissenting in part); *see also id.* at 206. And Circuit Judge Rao, dissenting from the D.C. Circuit's denial of rehearing en banc, asserted that in light of *West Virginia,* the INA's "provisions for work visas" are "detailed legislation . . . incompatible with assuming a broad delegation to DHS to confer additional work visas through regulation." *See Washtech*, 58 F.4th 506, 510 (D.C. Cir. 2023) (Rao, J., dissenting from denial of reh'g en banc).

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[2] An "alien" is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). An "immigrant" is "every alien except an alien who is within one of [the] classes of nonimmigrant aliens." *Id.* § 1101(a)(15).

This amicus brief argues that like *West Virginia,* "this is a major questions case." 597 U.S. at 724. As the Court stated in *West Virginia*, "[a]gencies have only those powers given to them by Congress." *Id.* at 723. The issue of whether DHS has the power to decide for itself which particular statutorily defined classes of nonimmigrant alien visa holders should be allowed to work in the United States—complex, policy-driven decisions that affect millions of nonimmigrant aliens and American workers and can have vast economic, social, national security, and foreign relations ramifications—is "a question of exceptional importance." *Washtech*, 58 F.4th at 508 (Rao, J., dissenting). It is an issue that this Court should review through the lens of the major questions doctrine—an interpretive tool that is more important than ever now that the Court, in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), has overruled *Chevron* deference to agency interpretations of the statutes they administer.

ARGUMENT

The Court Should Grant Certiorari To Decide Whether DHS Has Authority To Determine Which Statutorily Defined Classes Of Nonimmigrant Alien Visa Holders Can Work in the United States

A. This is a major questions case

1. The major questions doctrine is a cannon of statutory construction. It "refers to an identifiable body of law that has developed over a series of

significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia v. EPA*, 597 U.S. at 724; *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023) ("As we explained in [*West Virginia*], while the major questions 'label' may be relatively recent, it refers to 'an identifiable body of law that has developed over a series of significant cases' spanning decades."). "[E]xperience shows that major questions cases 'have arisen from all corners of the administrative state.'" *Id.* at 2375.

Under the major questions doctrine, courts

> presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies. . . . Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make [the Court] reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince [the Court] otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.

West Virginia, 597 U.S. at 723 (internal quotation marks and citations omitted); *see also id.* at 716 ("[C]ourts 'expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.'") (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *id.* at 737 ("The major questions doctrine works . . . to protect the Constitution's separation of powers.") (Gorsuch, J., concurring).

The major questions doctrine "serves as an interpretive tool reflecting common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Nebraska,* 143 S. Ct. at 2378 (Barrett, J., concurring). As Justice Barrett's concurring opinion in *Nebraska* discusses at length, the doctrine "emphasize[s] the importance of context when a court interprets a delegation to an administrative agency." 143 S. Ct. at 2376. Context is "relevant to the major questions doctrine [because it] is also relevant to interpreting the scope of a delegation." *Id.* at 2379. Importantly, "[c]ontext is not found exclusively within the four corners of a statute." *Id.* at 2378 (internal quotation marks omitted). "[C]larity may come from specific words in the statute, but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency." *Id.* at 2380.

2. The lengthy preamble to the H-4 Rule, 80 Fed. Reg. 10,284 (Feb. 25, 2015), reflects the highly consequential economic, social, and other policy judgments that unelected DHS bureaucrats made in deciding that H-4 spouses—defined in § 1101(a)(15)(H) as an "alien spouse" who is "accompanying" or "following to join" an H-1B visa holder—should be allowed to work in the United States. Those far-reaching judgments fit squarely within the major questions doctrine. And the most important surrounding circumstance, *i.e.* context, relevant to DHS's claimed authority to make such judgments is the Executive Branch's prior, 45-year policy that an H-4 spouse—is not, or at least should not be, permitted to work in the United States. *See* Pet.App. 2.[3]

Indeed, beginning with promulgation of the H-4 Rule in 2015, *see id.* 2, 4, DHS has continued to claim that it possesses virtually unchecked authority to allow nonimmigrant alien visa holders to work in the United States regardless of how meticulously Congress has delineated in § 1101(a)(15) which specific classes of nonimmigrants are eligible for employment. *See, e.g.*, 80 Fed. Reg. at 10,294-95 (asserting that the INA "recognizes that employment may be authorized by statute or by the Secretary . . . arguments that DHS lacks authority to grant employment eligibility to H-4 spouses because

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[3] The 2015 H-4 Rule amended 8 C.F.R. §§ 214.2(h)(9)(iv), 274a.12(c), and 274a.13(d). *See* 80 Fed. Reg. at 10,311-12.

Congress has not specifically required it by statute are misplaced."). According to DHA, "[t]he fact that Congress has directed the Secretary to authorize employment to specific classes of aliens . . . does not mean that the Secretary is precluded from extending employment authorization to other classes of aliens by regulation." *Id.* at 10,295. In other words, DHS contends that it has authority to allow employment for *any* statutorily defined class of nonimmigrant aliens, including those classes (such as H-4) where the INA is silent as to employment eligibility.

"[A]n interpreter should 'typically greet' an agency's claim to 'extravagant statutory power' with at least "some measure of skepticism.'" *Nebraska* 143 S. Ct. at 2381 (Barrett, J., concurring) (quoting *Util. Air. Reg. Grp.*, 573 U.S. at 324). A large dose of judicial skepticism is warranted here. "To overcome that skepticism the Government must—under the major questions doctrine—point to clear congressional authorization to regulate in that manner." *West Virginia*, 597 U.S. at 731 (internal quotation marks omitted).

3. The major questions doctrine applies here because "[t]he INA's provisions for work visas reflect political judgments balancing the competing interests of employers and American workers." *Washtech*, 58 F.4th at 510 (Rao, dissenting from denial of reh'g en banc). These competing interests have "tremendous practical consequences for who may stay and work in the United States." *Id.* at 508. Yet DHS undertook its own balancing of these same critical competing

interests when it decided that H-4 visa holders should be allowed to work in the United States.

The extensive *Federal Register* preamble to the H-4 Rule discusses the specific policy judgments that DHS made in reversing course and deciding that H-4 visa holders should be eligible to work. DHS decided that "[b]y providing the possibility of employment authorization to certain H-4 spouses, the rule will ameliorate certain disincentives for talented H-1B nonimmigrants to permanently remain in the United States and continue contributing to the U.S. economy." 80 Fed. Reg. at 10,284. According to DHS, "[r]etaining highly skilled workers who acquire [lawful permanent resident] status is important to U.S. businesses and to the Nation." *Id.*

DHS indicated that "the rule will provide economic and social benefits to the H-1B nonimmigrant worker and his or her family as they wait to obtain [lawful permanent resident] status." *Id.* at 10,295. More specifically, "DHS expect[ed] this change to reduce the economic burdens and personal stresses that H-1B nonimmigrants and their families may experience during the transition to [lawful permanent resident] status while, at the same time, facilitating their integration into American society." *Id.* at 10,285.

Delving into foreign relations, DHS asserted that "[t]he rule also will bring U.S. immigration policies concerning this class of [H-1B] highly skilled workers more in line with those of other countries that compete

to attract similar highly skilled workers." *Id.* at 10,285.

As to "the impact of the [rule] on the U.S. labor market," DHS acknowledged that "[m]any commenters believed that the proposed rule would increase competition for jobs; exacerbate the nation's unemployment rate; drive down wages; and otherwise negatively impact native U.S. workers." *Id.* at 10,295. DHS asserted, however, that it "carefully considered the potential for negative labor market impacts," and "affirm[ed] its belief . . . that any labor market impacts will be minimal." *Id.*

These momentous and complex policy judgments are "major questions" that reach deeply into the U.S. economy. Whether the INA embodies "clear congressional authorization" for DHS—rather than Congress alone—to make these judgments is a crucial issue that this Court needs to address.

B. The court of appeals declined to apply the major questions doctrine

1. The panel relied on *Washtech*, which fails to address the major questions doctrine

Citing *Washtech*, the panel asserted here that "this court already has interpreted the relevant provisions of the INA to answer a similar question in favor of DHS." Pet.App. 1. The *Washtech* majority held that DHS has authority to determine how long foreign students holding nonimmigrant "F-1" visas can stay

and work in the United States after receiving a university "STEM" degree under the DHS-created, Post-Completion Optional Practical Training ("OPT") program. *See* 8 U.S.C. § 1101(a)(15)(F)(i); 8 C.F.R. § 214.2(f)(10)(ii). According to the *Washtech* majority opinion, § 1101(a)(15) merely "identifies *entry* conditions" for nonimmigrant aliens (emphasis added), and a different INA provision, 8 U.S.C. § 1184(a)(1), vests DHA with authority "to set the 'time' and 'conditions' of nonimmigrants' stay in the United States," including the "power to authorize employment." *Washtech*, 50 F.4th at 168, 169.

In her dissent from denial of rehearing en banc, Judge Rao emphasized that the *Washtech* majority opinion "concerns not only the large number of F-1 visa recipients, but explicitly applies to all nonimmigrant visas." 58 F.4th at 508; *see generally* U.S. Dep't of State, Rep. of the Visa Office 2023, Table (Classes of Nonimmigrants Issued Visa) (indicating that there were more than 10.4 million nonimmigrant visa holders in 2023).[4]

West Virginia was decided prior to *Washtech*. But as the panel acknowledged here, the *Washtech* majority "did not address the major questions doctrine." Pet.App. 6. Although Petitioner Save Jobs USA urged the panel to consider the effect of *West Virginia* on DHS authority to promulgate the

[4] Available at https://tinyurl.com/yc2c5b2y.

H-4 Rule, *see* Pet. at 11, the panel declined to do so. *Id.* According to the panel,

> vertical stare decisis requires fidelity to *West Viginia* when deciding any open question of statutory interpretation. . . . But *Washtech* was decided after *West Virginia.* So the relationship between those two cases was *Washtech*'s legal issue, not ours.

Id. 7. Thus, although Save Jobs USA raised and pressed the applicability of the major questions doctrine before the court of appeals, the panel did not consider it.

2. The *Washtech* dissents explain why the major questions doctrine should be addressed

The *Washtech* majority's failure to apply the major questions doctrine when considering DHS's claim of expansive regulatory authority over the employment eligibility of nonimmigrant alien visa holders is reason enough for the Court to grant review and address this fundamental issue. Two D.C. Circuit judges' dissents in *Washtech* make the need for review even more compelling.

Dissenting from the *Washtech* majority opinion (except as to the plaintiff-appellant's standing), Judge Henderson indicated that she "would not reach the merits of this dispute" because the district court had not adequately addressed the general INA provision that DHS relied on as authority to operate the OPT

program at issue in that case. *Washtech*, 50 F.4th at 204 (Henderson, J., concurring in part and dissenting in part) (referring to 8 U.S.C. § 1324a(h)(3) (definition of "unauthorized alien" with respect to employment)).

Judge Henderson further argued that "[o]n remand, the district court should also treat the effect of *West Virginia v. EPA* on the section 1324a(h)(3) analysis." *Id.* at 206. After discussing *West Virginia*, she stated that "[a]s in *West Virginia*, section 1324a(h)(3), a definitional provision, may well be too subtle [a] device and a wafer-thin reed on which to rest post-completion OPT." *Id.* (internal quotation marks omitted). DHS relies on § 1324a(h)(3) as a principal authority for its H-4 Rule as well. *See* 80 Fed. Reg. at 10,294 (asserting that § 1324a(h)(3) "recognizes" that DHS, as well as Congress, can authorize employment of nonimmigrant alien visa holders).

When Judge Rao, joined by Judge Henderson, dissented from denial of rehearing en banc, she too invoked *West Virginia*:

> As the Supreme Court recently emphasized, "extraordinary grants of regulatory authority" require not "a merely plausible textual basis for the agency action" but "clear congressional authorization." *West Virginia v. EPA* . . . . Here, as Judge Henderson explained, there is not even a plausible textual basis for DHS to allow student visa holders to

> remain in the country and work long after their student status has lapsed.

58 F.4th at 510.

As Judges Henderson and Rao recognized, the fundamental issue of whether DHS has independent authority to allow nonimmigrant aliens to be employed in the United States, often in competition with U.S. workers, should be informed by the major questions doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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