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 *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Landmark Legal Foundation (Landmark) is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities. In this case, the Department of Homeland Security (DHS) has improperly circumvented congressional authority by extending employment eligibility to nonresident aliens via regulatory fiat. Landmark previously filed an amicus brief urging the Court grant certiorari in another similar case where DHS abused its authority in matters of nonimmigrant visas—*Wash. All. of Tech. Workers v. U.S. Department of Homeland Security*, Case No. 22-1071 (cert. denied Oct. 2, 2023).

INTRODUCTION AND SUMMARY OF ARGUMENT

DHS's efforts to remake the United States' nonimmigrant visa system continue unabated. The power to decide who enters and under what conditions those individuals remain in the country on nonimmigrant visas—the exclusive purview of Congress—has been appropriated by an administrative agency. And lower

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Amicus Curiae informed Petitioner and Respondents of its intent to file this brief on March 6, 2024. No person other than Amicus Curie, its members, or its counsel made a monetary contribution to its preparation or submission.

courts, in this case the United Sates Court of Appeals for the District of Columbia Circuit (D.C. Circuit or lower court), have abetted this appropriation. Granting certiorari and overturning the lower court's decision will begin to restore the delicate balance Congress set for nonimmigrant employment.

Here, the D.C. Circuit ignored recent decisions by this Court to rein in administrative overreach and relied on flawed precedent in upholding DHS's efforts to extend employment privileges to potentially over 600,000 individuals. Failure to reverse this decision would upset the delicate balance set by Congress for employment eligibility—including the statutory limits placed on said eligibility via the H-1B visa program.

Recent decisions by this Court have attempted to restore the balance of legislative and executive powers contemplated by our Founders. *See West Virginia v. EPA*, 597 U.S. 697 (2022); *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Recognizing that administrative agencies are constrained by statutory limitations; the Court has recognized those institutions do not have carte blanche to usurp power from Congress by establishing and operating programs well beyond their authority.

Granting certiorari will affirm separation of powers and correct a series of appellate court decisions permitting DHS's illegal appropriation of authority to set new conditions under which nonimmigrant visa holders remain in the country and seek employment. In this case, DHS has set aside decades of precedent and determined that an entire class of individuals (potentially exceeding 600,000

nonimmigrants) who enter and remain on H-4 visas are eligible for employment. Both DHS and the lower court broadly and improperly interpret the Immigration and Naturalization Act (INA) in a manner inconsistent with congressional intent. Under this incorrect interpretation, DHS has virtually unlimited authority when regulating nonimmigrant work and stay. This case does not exist in isolation: the regulation in question here is the latest in a series of DHS actions—all permitted by lower courts—empowering DHS to extend new privileges and set more permissive conditions for nonimmigrant visa holders. In this case, the carefully calibrated balance of meeting demand for skilled jobs while preserving domestic employment opportunities enshrined in INA has been and continues to be upset by an administrative agency with no limitations on its authority.

ARGUMENT

A. Extending employment privileges via regulatory fiat violates Congress's plenary authority to define categories of aliens eligible for employment.

DHS has adopted an expansive reading of the provisions that permit the agency to regulate nonimmigrant visas. This revisionist interpretation nullifies the conditions set by Congress. If DHS can depart from years of precedent and unilaterally alter employment conditions for nonimmigrant residents, then it has virtually unlimited authority to establish new criteria governing both entry and stay. Concluding that INA vests DHS with broad authority to extend employment eligibility to a large class of nonimmigrant visa holders is inconsistent with long-standing case law holding that Congress has plenary

authority to define conditions under which aliens can enter and remain in the country. Permitting DHS to extend employment privileges also runs counter to consistent congressional action on access to employment visas.

Extending employment privileges to H-4 dependent spouses opens the door to employment for any spouse of the over 600,000 individuals currently authorized to work in the country under the H-1B visa classification. *See* H-1B Authorized-to-Work Population Estimate, U.S. Citizenship and Immigration Services, available at https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf (February 13, 2025).

Enactment of INA in 1952 served as a "comprehensive and complete code covering all aspects of admissions of aliens to this country." *Elkins v. Moreno*, 435 U.S. 647, 664 (1978). INA structures the privileges and limitations that apply to nonimmigrant aliens. These govern whether an alien may be eligible for permanent residence, types of jobs the alien may hold under certain visas, and whether their presence is subject to a quota. *Id.* at 664-65. Congress specifically established classes of nonimmigrant aliens "to provide for the needs of international diplomacy, tourism, and commerce" that would be nearly impossible to fulfill if all aliens were subject to a quota system. *Id.* at 665.

In 1954, the Court reaffirmed Congress's broad authority to structure the nation's immigration system. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) ("[T]he formulation of [immigration] policies is entrusted exclusively to Congress. [That authority] has become about as firmly

imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.") *Id.* Congress, not administrative agencies, has the authority to set terms for entering and remaining in the United States. And Congress sets the number of individuals eligible for employment via the statutory limits proscribed under the H-1B visa program. 8 U.S.C. § 1184(g).

Established within the Immigration Act of 1990, the H-1B Visa program set an initial cap of 65,000 visas with an additional 20,000 for those holding a US master's degree or higher. Neil G. Ruiz, *Key facts about the U.S. H-1B visa program*, Pew Research Center (Apr. 27, 2017), https://www.pewresearch.org/short-reads/2017/04/27/key-facts-about-the-u-s-h-1b-visa-program/ (Mar. 19, 2025). Demand for these visas is high once the application period opens, the cap is usually reached within a week. *Id.* The statutory cap number is the result of what one legislator termed an "anguishing" compromise that sought to increase the number of skilled nonimmigrant employees without replacing American workers. 136 Cong. Rec. S35612 (daily ed. Oct. 26, 1990) (statement of Sen. Alan Simpson).

Access to H-1B visas is tightly regulated and subject to periodic debate in Congress. *See*, *e.g.*, 146 Cong. Rec. S9644 (daily ed. Oct. 3, 2000). These debates consider the needs of the labor market and the educational outputs of American universities, and the potential impact on wages and job availability for American workers. In fact, Congress has held a long-standing interest in "revising the permanent employment-based immigration system while not disadvantaging native-born workers." Sarah

A. Donovan et al., Cong. Rsch. Serv., R47164, U.S. Employment-Based Immigration Policy (2024).[2]

Along with concerns about adversely affecting American workers, Congress routinely debates the merits of "increasing the number of employment-based immigrants while eliminating and/or reducing restrictions on other permanent immigrant categories." *Id.*

Consistent and regular debate in Congress on conditions and quotas for holders of H-1B visas demonstrates that Congress never intended to delegate the authority to extend employment eligibility to DHS. Immigration policies—particularly those related to employment eligibility—are entrusted exclusively to Congress. Any reading of INS's vesting clauses that suggests otherwise defies congressional intent.

A strict reading of Section 1184 supports the conclusion that the time and conditions clause only conveys to DHS the authority to regulate within congressionally determined bounds. This clause, contrary to what DHS claims, cannot functionally override congressional prerogative to set employment standards. DHS's "time and conditions" authority exists only "to ensure" that departure of the visa holder will occur if the visa holder fails to maintain the congressionally mandated "status." *See Wash. All. of Tech. Workers v. United States Dep't of*

2. In the 2005 Violence against Women Act reauthorization, H-4 spouses gained the statutory ability to be given employment authorization by U.S. Citizen and Immigration Services in cases of domestic violence/spousal abuse. This law, now codified at 8 U.S.C. § 1105a, aimed to protect abused women from intractable financial dependency on their abuser.

Homeland Sec., 58 F.4th 506, 510 (D.C. Cir. 2023) (Rao, J., dissenting from denial of reh'g en banc). In other words, Section 1184 deputizes DHS to enforce congressional visa requirements and mandate any additional time and conditions towards that end. It does not convey vague plenary authority to set any time or condition the executive may choose—and it does not authorize regulatory action that could add 600,000 employees to the job market and upset the delicate balance between native and immigrant labor.

If DHS can simply circumvent the carefully considered employment caps set in INA, then Congress's legislative authority is meaningless. Nowhere within the statute is there any language providing employment for those holding H-4 visas. Nor is there any intelligible principle suggesting that Congress has delegated authority to extend employment privileges to a potential pool of over 600,000 individuals.

B. The lower court failed to adequately consider the major questions doctrine in concluding that DHS has authority to establish a new class of nonimmigrant visa holders eligible for employment.

The D.C. Circuit disregarded the relevance of the major questions doctrine by incorrectly relying on its earlier decision in *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 50 F.4th 164 (D.C. Cir. 2022) ("*Washtech*"). The present case provides an opportunity to consider applicability of the major questions doctrine in regulatory actions involving the conditions by which nonimmigrants enter, remain, and work in the country.

The lower court rejected Petitioner's attempts to "displace *Washtech* because it did not address the major questions doctrine." *Save Jobs USA v. United States Dep't of Homeland Sec.*, 111 F.4th 76, 80 (D.C. Cir. 2024). According to the lower court, *Washtech* was decided after *West Virginia v. EPA* and it therefore would have been incumbent upon the *Washtech* court to consider major questions. *Id*. Thus, in the present case, stare decisis prevents consideration of whether DHS's decision to extend employment privileges to H-4 visa holders will have significant political or economic effects. *Id*.

This curt analysis, however, misses a critical point: the D.C. Circuit never considered whether the regulatory action in question conformed with the major questions doctrine. The Court, therefore, should seize the opportunity to apply the doctrine within the nonimmigrant employment framework. At the time of the D.C. Circuit's decision in *Washtech*, the major questions doctrine was tethered to Chevron analysis and thus the lower court never considered it independently from *Chevron*. The conditions underlying this case are ideal for considering how major questions will be applied now that the Court has revoked the longstanding doctrine set forth in *Chevron U.S.A. Inc. v. National Res. Def. Council*, 467 U.S. 837 (1984).

Here, Respondents cannot point to any statutory language that provides DHS with the specific authority to extend employment privileges to a class of nonimmigrant aliens. DHS now allows spouses of H-1B nonimmigrants who have applied for permanent residence (H-4 visas) to work with no restrictions.

Awarding authorization to several hundred thousand nonimmigrant workers annually amounts to a major policy decision that circumvents the limits Congress has placed on nonimmigrant workers and contravenes INA's general prohibition on alien employment. *See* 8 U.S.C. § 1184(g)(1)(A)(vii) (limiting the number of H-1B visas); *see also* 8 U.S.C. § 1324a. The D.C. Circuit's incorrect decision in *Washtech* should not permit DHS to double down and create another large class of individuals who are now eligible for employment.

DHS's other regulatory actions that alter conditions for nonimmigrants to remain in the country should also be subject to the major questions doctrine. DHS's statutory authority permitting alien employment in programs such as Deferred Action for Childhood Arrivals (DACA), and parole in place should be subject to scrutiny under major questions. *See* Br. for Pet. at 4. In general, DHS's efforts to remake the nonimmigrant visa system via regulation should trigger application of major questions. For example, programs like Optional Practical Training (OPT) encompass hundreds of thousands of nonimmigrant aliens. David J. Bier, The Facts about Optional Practical Training (OPT) for Foreign Students, Cato Inst., May 20, 2020, available at https://www.cato.org/blog/facts-about-optional-practical-training-opt-foreign-students (March 18, 2025).

Both expansion of the OPT program and the work authorization extension to holders of H-4 visas upset Congress's "political judgements balancing the competing interest of employers and American workers." *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 58 F.4th 506, 510 (D.C. Cir. 2023)

(Rao, J., dissenting from denial of reh'g en banc). INA's "detailed" provisions pertaining to employment is thus "incompatible with assuming a broad delegation to DHS to confer additional work visas through regulation." *Id.* Moreover, the nonimmigrant categories who are eligible for visas "exemplify Congress's detailed attention to the very specific conditions that attach to each nonimmigrant visa." *Id.* at 509.

The lower court failed to identify any clear congressional authorization that would provide the authority to DHS to create a jobs program for potentially over 600,000 individuals. Reliance on the broad language of 28 U.S.C. § 1184(a)(1) and 28 U.S.C. § 1103(a)(3) to justify such a deviation from the long-held interpretation does not pass muster under *West Virginia v. EPA*. DHS has established a new class of potentially 600,000 individuals who are eligible for employment. It justifies both actions not based on any "clear congressional authorization" but rather on a tortured reading of INA's enabling language. Again, such action is incompatible with the major questions doctrine. Similarly troubling is DHS's efforts to expand the duration under which students who are no longer enrolled in a college or university may remain in the country under a "student" visa.

In short, reliance on these two sections of INA to justify such an enormous employment expansion is misplaced. No language in INA provides "clear congressional authorization" to justify its expansion of employment privileges to H-4 visa holders. *West Virginia v. EPA*, 597 U.S. at 723 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). DHS must twist the plain text of INA to justify its actions. Permitting spouses of

H-1B visa holders to obtain employment requires "clear authorization," and neither DHS nor the lower court can point to a clear statutory delegation providing such authority.

C. The lower court's decision now permits DHS to change conditions under which nonresident aliens remain in the country.

In her opinion dissenting from rehearing the circuit court's decision to deny en banc review in *Washtech*, Judge Rao noted that "nonimmigrant visa holders must satisfy the statutory [admissions] criteria both at entry *and during* their presence in the United States." *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 58 F.4th at 511 (D.C. Cir. 2023) (Rao, J., dissenting from denial of reh'g en banc (emphasis added)). And at least one court has held that conditions in other visa categories must apply throughout the nonresident's stay—not simply at the time of entry. *See Anwo v. Immigr. & Naturalization Serv.*, 607 F.2d 435 (D.C. Cir. 1979) (holding that a nonimmigrant admitted under an F-1 visa must not intend to abandon his residence in a foreign country throughout his stay). In other instances, courts have found that INA's requirements to obtain and maintain a visa apply throughout the nonimmigrants' stay. The lower court's decision, coupled with its decision in *Washtech*, now means that statutory provisions relating to the conditions for awarding nonimmigrant visas are only to apply when those individuals are entering the country—not for their continuing presence. Conditions for continuing eligibility to remain in country are set via statute and altered by DHS. It is therefore the purview of Congress, not DHS, to extend privileges.

Under "many of these nonimmigrant categories, Congress has precluded the covered alien from" violating an original condition of their visa. *Toll v. Moreno*, 458 U.S. 1, 14 (1982) (noting that Congress has precluded many nonimmigrant classes from establishing domiciles as a condition to remain in the United States). The Court has also noted that "a nonimmigrant alien who does not maintain the conditions attached to his status can be deported." *Elkins v. Moreno*, 435 U.S. 647, 666 (1978). Recognizing INA's visa regime as a "comprehensive and complete code covering all aspects of admission of aliens to this country," the Court has consistently enforced these "deliberate" policy choices. *Id.* at 664-66.

Circuit courts have followed. Respecting the F-1 student visas for example, lower courts demand fidelity to Congress's statutory nonimmigration visa requirements. These cases recognize DHS's "authority to order the deportation of those nonimmigrants who fail to maintain the conditions attached to their nonimmigrant status while in the United States." *Khano v. Immigr. & Naturalization Serv.*, 999 F.2d 1203, 1207 (7th Cir. 1993). But these cases also rely on statutory requirements—not agency discretion—to determine when a nonimmigrant visa holder failed to meet those conditions.

For example, in a case involving a nonimmigrant who had graduated from college but remained in the United States without adjusting his visa status, the Fifth Circuit concluded that "after failing to maintain the student status required by his visa, [a nonimmigrant] was without authorization to remain in this country." *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985). And in *Anwo v. Immigr. & Naturalization Serv.*, the D.C. Circuit found

that a nonimmigrant who "violated the conditions of his student visa . . . was not here 'lawfully.'" 607 F.2d 435, 437 (D.C. Cir. 1979).

INA's primacy in delineating the maintenance of conditions to remain in country was also summarized well in *Shoja v. Immigr. & Naturalization Serv.*, 679 F.2d 447 (5th Cir. 1982). In *Shoja*, the Fifth Circuit specifically addresses whether F-1 visas impose continued admission requirements on a nonimmigrant student. The court noted that meeting the requirements of the F-1 visa at *entry* is not enough. The nonimmigrant must also *continue* attending school to maintain status as a student. A student must not only attend school but must attend the specific school approved by the federal government on admittance to the country. The court stated, "we find no merit to petitioner's argument that he was only required to have an intention to attend the school designated on his I-94 form at the time he was admitted, and that he was not required to actually attend such school." *Id.* at 450 (citing 8 U.S.C. §§ 1101(a)(15)(F)(i) and § 1251(a)(9)). The court concluded that "[t]hese two statutes make it clear that one of the qualifications for being classified as a nonimmigrant alien student is *attending* an institution approved by the Attorney General, and that failure to comply with such condition of status will result in deportation." *Shoja*, 679 F.2d, at 450 (emphasis added).

Courts recognize that administrative agencies, in setting their own enforcement discretion, must continue to apply and adhere to the statutory regime implemented by Congress. *See Khano v. Immigr. & Naturalization Serv.*, 999 F.2d 1203, 1207 (7th Cir. 1993); *Anwo v. Immigr. & Naturalization Serv.*, 607 F.2d 435, 437 (D.C. Cir. 1979);

Elkins v. Moreno, 435 U.S. 647, 666 (1978). *See also Akbarin v. Immigr. & Naturalization Serv.*, 669 F.2d 839, 840 (1st Cir. 1982) ("petitioners deportable . . . for failing to maintain nonimmigrant status under 8 U.S.C. § 1101(a)(15)(F)"); *Lok v. Immigr. & Naturalization Serv.*, 681 F.2d 107, 109 & n. 3 (2d Cir. 1982) (upholding deportation for failure to meet statutory conditions of admission); *Graham v. Immigr. & Naturalization Serv.*, 998 F.2d 194, 196 (3d Cir. 1993) (holding that a nonimmigrant who "violated the conditions of his visa" acted unlawfully); *Mortazavi v. Immigr. & Naturalization Serv.*, 719 F.2d 86 (4th Cir. 1983) (finding F-1 student visa requirements do not cease at entry); *Gazeli v. Session*, 856 F.3d 1101, 1106 (6th Cir. 2017) (holding that B-2 visa holders "must satisfy the eligibility requirements that Congress imposed"); *Birdsong v. Holder*, 641 F.3d 957, 958 (8th Cir. 2011) (upholding nonimmigrant's deportation for "fail[ure] to comply with the terms of her K-1 visa"); *Braz. Quality Stones, Inc. v. Chertoff*, 531 F.3d 1063, 1066 (9th Cir. 2008) (upholding deportation of an L-1A visa holder who failed to maintain a position in some "'managerial' or 'executive capacity,'" therefore violating the statutorily-defined requirements for receiving his nonimmigrant visa); *Olaniyan v. Dist. Dir., Immigr. & Naturalization Serv.*, 796 F.2d 373, 374 (10th Cir. 1986) (upholding deportation "for failing to comply with the condition of their admission into the United States as nonimmigrants"); *Touray v. United States AG*, 546 F. App'x 907, 912 (11th Cir. 2013) ("An alien who was admitted as a nonimmigrant is removable if he fails 'to maintain the nonimmigrant status in which the alien was admitted . . . or to comply with the conditions of any such status. . . .'" (citations omitted)).

D. Ensuring DHS stays within its legal mandates will restore sanity to a broken system.

Certiorari will present the Court the opportunity to address DHS's regulatory excess that has led to a crisis in the American immigration system. Extending employment privileges to nonimmigrant aliens who reside in the country under the H-4 visa program is simply the latest in a string of regulatory actions circumventing the clear provisions of INA and undermining congressional authority to set the conditions for entering, remaining, and working in the country.

Consider other administrative actions such as the Optional Practical Training Program (OPT). Administrative changes to the OPT function as an end run around the carefully created conditions Congress has placed on nonresident aliens who enter and remain under student visas. DHS's regulations pertaining to OPT turn the statutory requirements for continuing eligibility under the F-1 program on their head, and in so doing, establish a program affecting hundreds of thousands of workers throughout the country. The Court's decision to deny certiorari in *Washtech* means this power has remained unchecked.

E. Extending employment to H-4 visa holders circumvents the limits Congress has placed on the number of nonresident alien workers.

DHS's regulatory action extending employment privileges to spouses of H-4 visa holders works as an end run around the clear limits Congress has set of the number

of technology workers admissible through the H-1B visa program. 8 U.S.C. § 1184(g). It makes an existing class of aliens eligible for employment and circumvents Congress's "plenary authority to prescribe rules for the admissions and exclusion of aliens." *Miller v. Christopher*, 96 F.3d 1467, 1470 (D.C. Cir. 1996). In other words, Congress has spoken on the issue of the number of guest workers allowed in the United States and Congress sets these conditions.

DHS, an administrative agency with no political accountability, has managed to repeatedly circumvent the carefully mandated limits on employment through creative and improper interpretation of the terms of INA. DHS's interpretation perhaps allows hundreds of thousands of aliens to seek employment. Congress has specifically designated the classes of aliens who may enter and work in the United States. It is incumbent upon Congress to create another statutory program permitting spouses of H-1B visa holders to seek employment. DHS has no authority to establish new classes of nonimmigrant visa holders who are eligible for employment.

The lower court concluded that providing H-4 visa holders (dependent spouses of H-1B visa holders) the opportunity to seek employment will decrease the difficulties "'U.S. employers have in retaining highly educated and skilled nonimmigrant workers.'" *Save Jobs USA v. United States Dep't of Homeland Sec.*, 111 F.4th 76, 78 (D.C. Cir. 2024) (quoting *Save Jobs USA v. United States Dep't of Homeland Sec.*, 942 F.3d 504, 507-508 (D.C. Cir. 2019)). The widespread assumption that employers need to search for qualified candidates for "highly skilled and educated" workers is not supported

by data. For a significant portion of the jobs within the technology industry, there appears to be an abundance of educationally qualified individuals. From 2021 to 2022, U.S. universities, for example, conferred 789,264 degrees in science, technology, engineering, or mathematics (STEM), with 685,086 of these degrees going to U.S. residents. Digest of Education Statistics, *Table 318.45*, National Center for Education Statistics, https://nces.ed.gov/programs/digest/d23/tables/dt23_318.45.asp (last visited Mar. 11 2025). This represents a 37.5 percent increase from 2012 to 2013, a rapid increase that suggests market forces responding to increasing demand. *Id.* These statistics suggest efforts to further incentivize H-1B applications are unnecessary—particularly when those efforts flood the employment sector with additional foreign workers.

CONCLUSION

Repeated decisions by lower courts have abetted DHS's usurpation of congressional authority to set the conditions by which nonresident aliens can enter and remain in the country. Congress sets the numbers of nonimmigrant visa holders who are eligible for employment under the H-1B visa program. DHS cannot extend employment privileges to an existing class of visa holders without clear statutory authorization. For these reasons, the Court should grant Save Jobs USA's petition.

Respectfully submitted,

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