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 D.C. Circuit

BRIEF OF *AMICI CURIAE* PHYLLIS SCHLAFLY EAGLES AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Department of Homeland Security can grant work authorization for classes of nonimmigrants for whom Congress has refused to grant work authorization.

2. Whether the statutory terms defining nonimmigrant visas in 8 U.S.C. § 1101(a)(15) are mere threshold entry requirements that cease to apply once an alien is admitted or whether they persist and dictate the terms of a nonimmigrant's stay in the United States.

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae Phyllis Schlafly Eagles was founded in 2016 as an association to carry on the work of its namesake in advocacy and educational work. Phyllis Schlafly was an early, outspoken opponent of expanding H-1B visas. *See, e.g.*, Phyllis Schlafly, "Congress faces decision on visas for foreign workers," Copley News Service (Apr. 30, 2003) ("Tell your representatives in Congress that importing hundreds of thousands of alien workers … is not only absurd, but an insult to all U.S. citizens.").

Amicus Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") was founded in 1981 by Phyllis Schlafly, to advance conservative educational and legal goals. Eagle Forum ELDF has filed many amicus briefs in immigration cases, including its brief against porous immigration in *Arizona v. United States*, 567 U.S. 387 (2012).

Amici thereby have strong interests in this Petition for a Writ of Certiorari in order to oppose illegality with respect to expanding worker visas for foreign workers.

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[1] *Amici* file this brief after providing the requisite ten days' advance written notice to counsel for all the parties. Pursuant to Rule 37.6, counsel for *amici curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amici*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court has "often recognized that a 'primary purpose in restricting immigration is to preserve jobs for American workers.'" *INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 194 (1991) (quoting *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 893 (1984)). But the D.C. Circuit has twice ignored this command, in siding with the nearly open-border policies of the Obama and Biden Administrations by giving American jobs to foreigners contrary to federal law.

Congress created a visa system, with carefully defined criteria for immigrants, workers, students, and tourists. Yet under the Obama and Biden Administrations, the Department of Homeland Security (DHS) decided to let aliens act as if they have a visa that they do not statutorily qualify for. First DHS allowed F-1 students to remain long after graduation to take American jobs under the fiction of ongoing training, and then DHS gave away more American jobs with its H-4 visa at issue here. DHS has thereby ignored congressionally enacted policy in favor of American workers, and has instead been giving jobs to foreigners like party hats at a fraternity event.

This Court should grant the Petition in order to restore Rule of Law to this issue, by extending the reasoning of the seminal *Loper Bright* decision to immigration law. The violation by the ever-growing administrative state of clear congressional immigration policy about workers' visas needs to stop, and this case presents an ideal vehicle for reining in the administrative state as to immigration.

A grant of the Petition is also warranted to end growing divergence between the D.C. and Fifth Circuits as to immigration. By allowing DHS to

circumvent the limitations on workers' visas as enacted by Congress, the D.C. Circuit ignores the fundamental principle of immigration law: American jobs are for American workers. The Petition should be granted to reverse the decision below.

ARGUMENT

At issue here are not difficult low-paying seasonal migrant farm workers, but high-paying jobs in demand by far more Americans than there are positions available. The number of jobs for computer programmers – a staple of tech employment – has fallen to its lowest level since 1980, even though our population has grown by 50%. Sasha Rogelberg, "Employment for computer programmers in the U.S. has plummeted to its lowest level since 1980—years before the internet existed," Fortune (Mar. 17, 2025).[2]

Congress has made the decision, not surprisingly, that scarce good job opportunities like computer programming are for American citizens, not aliens. More than two decades ago, Phyllis Schlafly observed that:

> some observers estimate that there are about 890,000 H-1B aliens working now in the United States. The Immigration and Naturalization Service said that its official count of H-1B aliens probably represents less than 50 percent of those who actually are in the United States. …
>
> It is a fiction that the United States suffers a shortage of skilled labor, and most H-1B aliens fill entry-level jobs.

Phyllis Schlafly, *Copley News Serv.*, *supra.*

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[2] https://fortune.com/2025/03/17/computer-programming-jobs-lowest-1980-ai/ (viewed Mar. 23, 2025).

Congress expressly limits nonimmigrant visas in 8 U.S.C. § 1101(a)(15), and DHS lacks the authority to create its own entire new categories of nonimmigrant visas for the benefit of foreign workers to take American jobs. The U.S. Constitution confers this authority on Congress, where members of the House of Representatives can take office only if elected and then face reelection every two years, not on unaccountable bureaucrats working within the administrative state. Yet the D.C. Circuit has rendered two decisions, the second relying heavily on the first, that ignore this fundamental rule enacted by Congress: American jobs are for American workers except under narrow conditions approved by Congress.

I. The Petition Should Be Granted to Extend *Loper Bright* to Immigration Law.

The U.S. Constitution grants to Congress the authority over immigration, Art. I, Sec. 8, cl. 18, and it has long recognized that there is a shortage of good jobs in the United States, as in most countries. Yet the D.C. Circuit has twice ignored this fundamental principle, first in *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 50 F.4th 164 (2022) ("*WashTech*") and then in reliance on it by the decision below. *Save Jobs USA v. United States Dep't of Homeland Sec.*, 111 F.4th 76 (D.C. Cir. 2024).

In *WashTech* the D.C. Circuit allowed the Obama Administration to vastly expand F-1 student visas, which Congress had limited "to only an alien (1) 'having a residence in a foreign country which he has no intention of abandoning,' (2) 'who is a bona fide student qualified to pursue a full course of study' and (3) 'who seeks to enter the United States temporarily and solely for the purpose of pursuing

such a course of study.'" 50 F.4th at 198-99 (Henderson, J., dissenting, quoting 8 U.S.C. § 1101(a)(15)(F)(i)). DHS during the Obama Administration insisted that the latter two requirements include on-the-job training and impose only *entry* requirements. DHS asserted the authority to allow them to remain and take American jobs however DHS likes, without congressional approval.

Rather than expand exemptions for foreigners to take American jobs as DHS has improperly done, Congress has instead created a visa program limited to foreigners who create new jobs for Americans:

> The EB-5 visa program sets aside visas for "employment creation" immigrants who invest in new commercial enterprises that create full-time jobs for American workers. 8 U.S.C. § 1153(b)(5). The EB-5 visa process is administered by United States Citizenship and Immigration Services ("USCIS") and DOS.

Bo Li v. Blinken, Civil Action No. 22-cv-2331 (TSC), 2024 U.S. Dist. LEXIS 223667, at *3 (D.D.C. Sep. 23, 2024).

There is no shortage under federal law of many varieties of visas available to foreigners. For example, the University of Illinois men's basketball team has done well in the famous NCAA March Madness tournament this year and last with three foreign players who are its leading scorers, including a Lithuanian who played ball in Barcelona for three years before matriculating to this state university. Overall, "264 international student-athletes make up roughly 15% of all players competing in this year's [March Madness] tournament," many of whom are

NBA and WNBA prospects, touts the NCAA itself on its website.[3]

A variety of visas are generously available to foreigners to come here as college "students", including:

* F-1 student visa
* H-1B worker visa
* P-1A worker visa
* O-1 temporary worker visa

Alicia Jessop, "International Intercollegiate Athletes: A Legal Pathway to Benefit from Their Name, Image, and Likeness in the United States," 52 California Western International Law Journal 309 (2022).[4]

Other visa categories generously created by Congress include wide-ranging religious worker visas:

> In 1990, Congress created new visa classifications for religious workers, R-1 nonimmigrant classifications (temporary) and I-360 special immigrant visas (allowing for permanent resident alien status). See 8 U.S.C. § 1101. One category of "employment-based immigrants" specifically provided for by the statute is "special immigrant religious workers." See 8 C.F.R. § 204.5(m). In addition to fulfilling other requirements,

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[3] "Global Stars to Watch," https://www.ncaa.org/news/2025/3/20/media-center-march-madness-2025-10-international-players-who-could-shape-the-ncaa-tournaments.aspx (viewed Mar. 22, 2025).

[4] https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=2024&context=cwilj (viewed Mar. 15, 2025).

> individuals applying for such visas must be sponsored by one of two kinds of organizations: a "bona fide nonprofit religious organization" or a "bona fide organization which is affiliated with the religious denomination." Id.

Arden Wood, Inc. v. United States Citizenship & Immigration Servs., 480 F. Supp. 2d 141, 144 (D.D.C. 2007).

Congress has not been stingy with its vast alphabet soup of worker visas in nearly every flavor. DHS cannot properly bypass Congress to create DHS's own vast new visa categories for foreign workers to take American jobs.

This Court was clear enough in its reasoning in *Loper Bright*: "agencies have no special competence in resolving statutory ambiguities. Courts do." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400-01 (2024). The Petition should be granted to apply this against DHS's invention of new worker visas contrary to the congressionally enacted policy of favoring American workers.

II. The Petition Should Be Granted to Resolve the Circuit Split.

On August 3, 2020, President Trump declared that "[a]s we speak, we're finalizing [H-1B] regulations so that no American worker is replaced ever again. [H-1Bs] should be used for top, highly paid talent to create American jobs, not as inexpensive labor program to destroy American jobs." *Remarks by President Trump in a Meeting with U.S. Tech Workers and Signing of an Executive Order on Hiring American*, White House (Aug. 3, 2020) (quoted by *Purdue Univ. v. Scalia*, No. 20-3006 (EGS), 2020

U.S. Dist. LEXIS 234049, at *34 (D.D.C. Dec. 14, 2020)). President Trump's comments reflect what Congress has enacted, yet the D.C. Circuit departs from this and from rulings by the Fifth Circuit on this issue.

As the Fifth Circuit explained 40 years ago:

> Although the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., does not define the term "illegal alien," it is clear that an alien who is in the United States without authorization is in the country illegally. After failing to maintain the student status required by his visa, [defendant] was without authorization to remain in this country. He thus was in the same position legally as the alien who wades across the Rio Grande or otherwise enters the United States without permission.

United States v. Igbatayo, 764 F.2d 1039, 1040 (5th Cir. 1985). "In order to sustain its burden of proving that a legally admitted noncitizen is subject to deportation because of an overstay, the INS need only show that the alien was admitted as a nonimmigrant for a temporary period, that the period has elapsed and that the alien has not departed." *Equan v. United States Immigration & Naturalization Serv.*, 844 F.2d 276, 278 (5th Cir. 1988) (citing *Hwei-Jen Chou v. I.N.S.*, 774 F.2d 1318, 1319 (5th Cir.1985)).

Deportation depends on what Congress enacted, but the D.C. Circuit essentially held that DHS may allow an illegal alien to remain in our country – and take employment here – however DHS rather than what Congress enacted:

> [DHS's] "H-4 Rule" allows select H-4 visa holders to work in the United States while their H-1B spouses transition to lawful permanent resident status. *See* Employment Authorization for Certain H—4 Dependent Spouses, 80 Fed. Reg. 10,284, 10,311 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214.2, 274a.12, 274a.13) ("H-4 Rule"); *see also* [*Save Jobs USA v. United States Dep't of Homeland Sec.*, 942 F.3d 504, 507-08 (2019)] (explaining the rule in detail). With the H-4 Rule, DHS hopes to "ameliorate certain disincentives for talented H-1B nonimmigrants to permanently remain in the United States and continue contributing to the U.S. economy as" lawful permanent residents. 80 Fed. Reg. 10,284, 10,284 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214.2, 274a.12, 274a.13).

Save Jobs USA, 111 F.4th at 78. Missing in the above analysis is any consideration of the interests of Americans in jobs, as emphasized by Congress as the top priority.

Rule of Law requires adherence to the limits on foreigners taking jobs in the United States, as carefully prescribed by Congress. The panel below emphasized that is bound by the (erroneous) *WashTech* ruling of that same Circuit, thereby compounding its own error. But this Court is not so bound, and should grant the Petition to correct this line of decisions before it diverges further.

Congress defined the path to citizenship in our country, and job opportunities await those who comply. Foreigners who want to work in the United States already have powerful political advocates: corporate sponsors, billionaires who own those

companies, and a major political party expecting to receive their future votes. Their remedy is in Congress, not with a federal agency that circumvented federal law to give scarce American jobs to foreigners.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant the Writ of Certiorari.

Respectfully submitted,

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