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

AMICUS CURIAE BRIEF OF FORMER ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY CHAD WOLF IN SUPPORT OF THE PETITION

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Chad Wolf serves as Executive Vice President, Chief Strategy Officer, and Chair of the Center for Homeland Security and Immigration at the America First Policy Institute ("AFPI"). Prior to joining AFPI, Mr. Wolf served as Acting Secretary of the U.S. Department of Homeland Security ("DHS"). During his time at DHS, he successfully navigated numerous global and domestic challenges to America's security, including border and immigration crises, civil unrest, historic natural disasters, and threats to global aviation security.

As Acting Secretary, he made key reforms to protect American workers while continuing to welcome legal immigrants. Among these reforms was an interim final rule to strengthen the H-1B nonimmigrant program to protect U.S. workers, restore integrity to the H-1B program, and provide better guarantees that H-1B petitions are approved only for those who are qualified. The rule was aimed at combatting the wage depression associated with the H-1B workers being hired to serve as low-cost replacements for otherwise qualified U.S. workers.

Former Acting Secretary Wolf speaks and writes frequently on national security, border security, and immigration issues. He has received the U.S. Secretary

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

of Transportation 9/11 Medal, the U.S. Secretary of Homeland Security Distinguished Service Medal, and the National Intelligence Distinguished Service Medal.

SUMMARY OF ARGUMENT

Congress determined that certain levels of alien employment are beneficial to the United States and would not have a negative impact on American workers. These protections are reflected in the employment visa provisions, which set the procedures, requirements, and limits for the various types of alien work visas.

Beginning approximately ten years ago, the Department of Homeland Security began expanding alien work authorizations beyond the bounds provided by Congress in the Immigration and Nationality Act. Despite the clear statutory language limiting alien employment authorization, DHS has repeatedly enacted regulations that grant work authorizations for classes of aliens Congress never intended, all at the expense of U.S. workers. These new authorizations exceed DHS's statutory authority, contravene the INA, and are detrimental to U.S. workers in direct opposition to Congress's intent to ensure U.S. workers are not harmed by alien work authorization. This Court's intervention is necessary to clarify the bounds of agency authority and to protect U.S. workers from runaway alien employment programs.

ARGUMENT

I. This Court Should Grant Certiorari to Clarify the Bounds of the Department of Homeland Security's Authority.

Congress's broad constitutional authority to "establish a uniform Rule of Naturalization," U.S. Const. Art I., § 8, cl. 4, has long been recognized by this Court. Using this constitutional power, Congress "developed a complex scheme governing admission to our Nation and status within our borders." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). This "complex scheme" is the Immigration and Nationality Act ("INA"), first enacted by Congress in 1952. The INA contains various provisions on things like admission requirements, 8 U.S.C. §§ 1181-1189, exclusion and removability, 8 U.S.C. §§ 1221-1231, and as relevant here, authorizations for certain classes of aliens to work in the United States, *see, e.g.,* 8 U.S.C. §§ 1160, 1184, 1254a(a)(1)(B).

"Agencies in the Department of Homeland Security play a major role in enforcing" Congress' complex statutory scheme. *Arizona v. United States*, 567 U.S. 387, 397 (2012); 6 U.S.C. §§ 101 *et seq.* Enforcement and implementation, however, do not give the DHS Secretary free reign to enact whatever policies they want. Even the broadest authorizing statutes from Congress contain limits.

As Justice Scalia explained, "agencies must operate within the bounds of reasonable interpretation. And reasonable statutory interpretation must account for both the specific context in which . . . language is used and the

broader context of the statute as a whole." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014) (internal quotation marks and citations omitted). In the context of the INA as a whole, there can be no conclusion other than Congress knew how to create alien employment authorization, did so in several places, and did not choose to authorize DHS to create new classes of aliens eligible for work.

Yet for the last decade, DHS has expanded alien work authorization far beyond the bounds set by Congress. Instead of following the path away from agency deference and back to statutory interpretation as this Court has done, *see, e.g., Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) ("*Loper*"), the D.C. Circuit has taken the opposite approach. The opinion below permits activity that contravenes the INA and improperly expands agency power at the expense of both Congress and American workers.

A. The Department of Homeland Security must follow the statutory requirements set out by Congress in the Immigration and Nationality Act.

Separation of federal power among the legislative, executive, and judicial branches is a fundamental aspect of the government created by the Founders. *See, e.g., Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) ("To the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution.") (Thomas, J., concurring). Each branch plays an important yet distinct role: Congress makes the laws, the executive interprets and enforces

the laws, and the judiciary ensures that the laws enacted, interpreted, and enforced by the other branches comply with the constitution.

This Court has explained "that [while] Congress generally cannot delegate its legislative power to another branch[,] . . . separation-of-powers principles, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). (internal quotation marks and citation omitted). Accordingly, "[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* In other words, Congress must provide the parameters and boundaries under which agencies must operate.

Despite these well-established principles, the D.C. Circuit has opined that DHS had concurrent authority with Congress, explaining that the comprehensive nonimmigrant visa statutes enacted by Congress simply "identif[y] entry conditions" that do not necessarily apply following the alien's entrance into the United States. *Wash. All. of Tech Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164 (D.C. Cir. 2022), cert. denied 144 S. Ct. 78 (2023) ("*WashTech*"). According to *WashTech*, DHS's interpretation of the INA to permit an expansive alien post-graduate work program created for nonimmigrants with student visas was permissible because the work authorization was "reasonably related" to the student visa statute. *Id.* Effectively, in the D.C. Circuit, Congress sets the terms of alien entry but DHS has the power to reject

these terms in favor of its own regulations once an alien enters the United States. Such a system ignores rules of statutory interpretation and disrupts the balance of power between the legislative and executive branches.

The D.C. Circuit opted for a broad interpretation of Congress's immigration statutes in order to uphold the work program in *WashTech*. The *WashTech* court approved of DHS's interpretations of implicit authority to create new classes of aliens eligible to work in the United States derived from two provisions of the INA. The first provides:

> The 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, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

8 U.S.C. § 1184(a)(1). Ignoring the language at the end of the provision which ties the authority to ensuring a nonimmigrant leaves the United States, the D.C. Circuit instead focused on the bond language and interpreted this provision to mean that after entry into the U.S., "Congress gave [] control to the Executive." *WashTech*, 50 F.4th at 168.

The D.C. Circuit also held that Congress defined the term "unauthorized alien" in section 1324a to grant concurrent authority to DHS because it included the phrase "authorized to be so employed by this chapter or by the [Secretary of Homeland Security]." 8 U.S.C. § 1324a(h)(3). Instead of reading this provision in the context of the INA as a whole, which contains various provisions *limiting* alien employment, the D.C. Circuit interpreted the statute in the broadest manner possible to find that subsection (h)(3) contained an implicit grant of authority to the Secretary of Homeland Security to authorize employment for classes of aliens not provided by Congress. *WashTech*, 50 F.4th at 190.

Neither of these provisions provide explicit support for creating a massive alien employment program; yet that is what has happened. For example, the post-graduate work program approved of in *WashTech* is now one of the biggest alien employment programs in the U.S. *See* Miano, John, *A History of the Optional Practical Training Guestworker Program*, Center for Immigration Studies (Sep. 18, 2017), available at: https://cis.org/Report/History-Optional-Practical-Training-Guestworker-Program. In fact, a 2024 report from the Congressional Research Service showed that "[p]articipation in the OPT program has more than doubled since 2007." Congressional Research Service, *Optional Practical Training (OPT) for Foreign Students in the United States*, Apr. 9, 2024, available at: https://www.congress.gov/crs-product/IF12631.

Because Congress has spoken extensively on the need to limit alien employment, a delegation to create such a large alien employment program should be explicit and not subject to "verbicide" in order to be upheld. *WashTech*, 50 F.4th at 200 (Henderson, J., dissenting).

Implicit agency authority is generally disfavored where Congress has legislated extensively on a subject. Indeed, this Court recently clarified that agency interpretations of implicit statutory authority are limited when they involve what are commonly referred to as "major questions." *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697 (2022). This Court's "precedent teaches that . . . cases in which the history and the breadth of the authority that [the agency] has asserted and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *Id.* at 721. The greater and more impactful the agency action, the clearer Congress must be when granting the agency that authority. The creation of massive alien employment programs certainly falls into this category.

For example, in *Utility Air*, this Court rejected the EPA's broad construction of the term "air pollutant" in a provision of the Clean Air Act. *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 310 (2014). Explaining that while a plausible interpretation of the text, ultimately

> EPA's interpretation [wa]s unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.

Id. at 324. Here, DHS is relying on the same suddenly discovered yet previously unused authority in a longstanding statute to create a new class of aliens eligible for work in the United States. This Court's intervention is needed to ensure that such impactful programs are clearly authorized by Congress.

Furthermore, permitting work authorization for classes of aliens not so authorized by Congress certainly provides "reason to hesitate" with respect to DHS's claimed authority here. *W. Virginia*, 597 U.S. at 721. In light of the general principle that alien employment is the exception and not the rule, 8 U.S.C. § 1324a, DHS cannot be allowed to exercise such great authority without the explicit permission of Congress. Authorizing alien employment where Congress did not is the exact kind of agency overreach this Court has warned against and held to be unconstitutional in cases like *West Virginia* and *Utility Air*. Accordingly, the present Petition should be granted to clarify that DHS's actions must be within the boundaries set by Congress.

II. Certiorari Is Needed to Ensure The Long Recognized Purpose of Protecting American Workers When Authorizing Alien Employment.

This Court "ha[s] often recognized that a 'primary purpose in restricting immigration is to preserve jobs for American workers.'" *I.N.S. v. Natl Ctr. for Immigrants' Rts., Inc.*, 502 U.S. 183, 194 (1991) (quoting *Sure–Tan, Inc. v. NLRB,* 467 U.S. 883, 893 (1984); 8 U.S.C. § 1182(a)(14)). As mentioned, subject to certain exceptions, aliens are not permitted to work in the United States. 8 U.S.C. § 1324a. Accordingly, this Court only upholds regulations

that are "wholly consistent with this established concern of immigration law and thus squarely within the scope of the [Secretary of Homeland Security]'s statutory authority." *Id*. Neither requirement is met here; the actions of DHS to expand work authorization for different classes of aliens directly contravenes this principal purpose of Congress and exceeds the agency's authority.

The rule challenged by Petitioners, Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284-312 (Feb. 24, 2015) (the "H-4 Rule"), interpreted 8 U.S.C. § 1184(a) as conferring authority on DHS to grant authorization for any nonimmigrant to work in the United States. Under the H-4 Rule, DHS granted work authorization to alien spouses of H-1B nonimmigrant workers who are seeking legal permanent residence status in the U.S. *Id*. at 10,284-85. While Congress authorized the spouses and dependents of H-1B visa holders to "accompany" or "join" the authorized alien worker, it did not authorize those spouses or dependents to work in the United States. 8 U.S.C. § 1101(a)(15)(H).

As Petitioners explain, these work expansions come at the expense of U.S. workers. Pet. At 6. Congress enacted comprehensive statutory provisions governing alien employment with the explicit purpose of protecting U.S. workers. The 1952 House Report to the INA recited many of the previous restrictions on immigration that were directly tied to impacts on U.S. workers, such as the importation of cheap contract labor. H.R. Rep. No. 82-1365 at 1663. Congress explained that the INA "provides strong safeguards for American labor," such as excluding alien workers when "there are sufficient available workers in the locality of the aliens' destination who are able, willing,

and qualified to perform such skilled or unskilled labor and that the employment of such aliens will adversely affect the wages and working conditions for workers in the United States similarly employed." *Id*; 8 U.S.C. § 1182(a)(5)(A). In fact, Congress was clear that they only intended to grant the authority "to admit *temporarily* certain alien workers . . . *for the purpose of alleviating labor shortages* as they exist or may develop." *Id*. at 1698 (emphasis added). A general grant of employment authorization such as that contained in the H-4 Rule contravenes Congress's instruction that alien employment be temporary and in consideration of the impact on U.S. workers.

This Court too has recognized the impact of immigration on American workers. Justice Brennan wrote that illegal alien employment "deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms . . . seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." *DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976) (superseded by statute on other grounds).

Recognizing that the U.S. labor market was a major impetus of illegal immigration, Congress decided it could both protect U.S. workers and deter illegal immigration by disincentivizing employers from hiring illegal aliens. *See* U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by Commissioners, 97th Cong., 1st Sess. (Mar 1, 1981). In response to the determination that "[t]he primary incentive for illegal immigration is the

availability of U.S. employment," Immigration Reform and Control Act of 1985, S. Rep. No. 99-132 at 1, 99th Cong., 1st Sess. 5 (1985), Congress enacted the Immigration Reform and Control Act ("IRCA"). IRCA was a comprehensive framework for 'combatting the employment of illegal aliens.'" *Arizona v. United States*, 567 U.S. 387, 404 (2012), quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

With IRCA, Congress made it illegal for employers to "hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment." 8 U.S.C. § 1324a(a)(1). IRCA also addressed the impact of legal immigration on the labor market. For example, visas for temporary agriculture workers "[r]equire[] . . . certif[ication] that there are *not enough local U.S. workers* for the job and similarly employed U.S. workers' wages and working conditions will not be adversely affected." H. Rept. 99-1000 (1986) (emphasis added). These provisions reflect Congress's understanding that U.S. workers are impacted by both legal and illegal immigrant workers.

Limits on alien employment benefit U.S. workers in several ways. First, restrictions on alien employment preserves opportunities for U.S. workers. *See, e.g.,* Press Release: *Cotton, Romney, Capito, Collins, Portman Introduce Bill to Raise Minimum Wage, Protect Jobs for Legal Workers*, Feb. 25, 2021, available at: https://www.cotton.senate.gov/news/press-releases/cotton-romney-capito-collins-portman-introduce-bill-to-raise-minimum-wage-protect-jobs-for-legal-workers. This is especially relevant in certain industries that are prone to job security

challenges and high unemployment. Second, the limits imposed by Congress on the number of aliens eligible for different employment opportunities and the various certification requirements are aimed at protecting wages of U.S. workers from being driven lower by alien workers willing to do the same jobs for less. *See, e.g.,* Mehlman, Ira, *New Prevailing Wage Rule for Foreign Workers Add Additional Layer of Protection for American Workers*, Feb. 2021, Federation for American Immigration Reform, available at: https://www.fairus.org/issue/new-prevailing-wage-rule-foreign-workers-add-additional-layer-protection-american-workers. (explaining that "In order to prevent U.S. employers from undermining or displacing American workers, the Department of Labor (DOL) determines what the "prevailing wage" is for any particular job and requires that foreign workers be paid no less than that benchmark."). Congress also sought to protect American workers by ensuring employers could not hire lower wage alien workers instead. *Id.* Finally, limiting the classes of aliens eligible for work avoids oversaturation of the market in certain skill areas.

The H-4 Rule ignores these principles and instead focuses on the need to "ameliorate certain disincentives that currently lead H-1B nonimmigrants to abandon efforts to remain in the United States while seeking LPR status[.]" H-4 Rule at 10,285. Yet evidence shows that U.S. workers, especially in the Tech sphere, are often replaced by H-1B workers. As recently as 2023, bipartisan legislation was introduced following information that "tech companies [were] applying for thousands of new H-1B visas despite the fact that the tech industry has recently laid off thousands of American and immigrant workers." U.S. Senate Committee on the Judiciary,

Press Release, *Durbin, Grassley Introduce Bipartisan H-1B, L-1 Visa Reform Legislation to Protect Workers and Stop Outsourcing of American Jobs*, Mar. 7, 2023, available at: https://www.judiciary.senate.gov/press/dem/releases/durbin-grassley-introduce-bipartisan-h-1b-l-1-visa-reform-legislation-to-protect-workers-and-stop-outsourcing-of-american-jobs.

Additionally, the Center for Immigration Studies published a report explaining that "[t]he H-1B program has transformed over time from a means to supplement the American tech workforce to a means of cheaply replacing it." Center for Immigration Studies, *Untold Stories: The American Workers Replaced by the H-1B Visa Program*, May 4, 2019, available at: https://cis.org/Report/Untold-Stories-American-Workers-Replaced-H1B-Visa-Program. In fact, some argue that "H-1B visas undercut the wages of American workers by design." Matloff, Norman, *How the H-1B System Undercuts American Workers*, Compact Magazine, Jan. 3, 2025, available at: https://www.compactmag.com/article/no-there-arent-good-h-1b-visas/. In a February 2025 article, CIS's Steven Camarota broke down recently published data from the U.S. Department of Labor which shows that "since since January 2020, right before Covid, 88 percent of all employment growth has gone to immigrants (legal and illegal) . . . . All this at a time when a near-record share of working-age U.S.-born men remain out of the labor force." Camarota, Steven, *New January Data Still Shows Most Job Growth Going to Immigrants; 88% Since 2020, 72% in the last year*, Center for Immigration Studies, Feb. 7, 2025, available at: https://cis.org/Camarota/New-January-Data-Still-Shows-Most-Job-Growth-Going-Immigrants-88-2020-72-last-year.

Allowing the H-4 Rule to stand will perpetuate the problem created by the H-1B program to the disadvantage of U.S. workers. This Court's intervention is necessary to stop DHS's unauthorized expansion of alien work and to return to protecting U.S. workers and U.S. jobs as Congress intended.

CONCLUSION

For the foregoing reasons, the Petition should be GRANTED.

Respectfully submitted,

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