No. 24-923

IN THE
Supreme Court of the United States

SAVE JOBS USA,
Petitioner,
v.
U.S. 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 U.S. SENATOR TED CRUZ, REPRESENTATIVE BRIAN BABIN, AND SEVEN OTHER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are United States Senator Ted Cruz, Representative Brian Babin, D.D.S., and seven other members of Congress.

Amici sit on Committees that oversee matters related to immigration and the economy, and *Amici* have a strong interest in courts interpreting the Immigration & Nationality Act in a way that gives meaning to the detailed requirements Congress imposed on receiving and maintaining nonimmigrant visas, and respects the judgments Congress made to protect American workers by limiting which aliens receive work authorization.

The following is the full list of *amici*:

United States Senate

Ted Cruz

Marsha Blackburn
Ted Budd
Jim Banks
Mike Lee
Eric S. Schmitt

United States House of Representatives

Brian Babin

Lance Gooden
Troy Nehls

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notification of the filing of this brief.

SUMMARY OF THE ARGUMENT

Congress carefully described who can enter the country on nonimmigrant visas, how long they can stay, and whether they can lawfully work while here. The Department of Homeland Security, by contrast, believes it can broadly authorize permanent nonimmigrant presence and even employment in the United States regardless of whether the visa holders satisfy ongoing statutory visa requirements, and regardless of whether Congress granted work authorization for that class of visa holder. DHS now claims it can do the same for visa holders' *spouses*, too. The D.C. Circuit has now twice blessed this extraordinary agency circumvention of plain statutory text, structure, and logic, with disastrous consequences. This Court's review is needed to restore Congress's carefully calibrated nonimmigrant visa regime.

The defining characteristic of a "nonimmigrant visa" is that it allows an alien to stay in the United States only for a specific and time-limited purpose. For example, an F-1 student visa is available only to an alien who (1) "is a bona fide student qualified to pursue a full course of study" in the United States and (2) who "seeks to enter the United States *temporarily* and *solely for the purpose of pursuing such a course of study*." 8 U.S.C. § 1101(a)(15)(F)(i) (emphases added).

Congress has created nearly two dozen such categories of nonimmigrant visas with extremely specific eligibility requirements. *See, e.g.*, *id.* § 1101(a)(15)(E)(iii) (applying to certain Australians);

id. § 1101(a)(15)(H)(ii)(a) (applying to aliens who press "apples for cider on a farm"); *id.* § 1101(a)(15)(H)(i)(c) (applying to a "registered nurse").

Only a few of those categories authorize the visa holder to work while in the United States. Most notably, H-1B and H-2B visas have strict numerical and industry employment limitations to minimize the risk that corporate employers will use those visa recipients to displace American workers. *Id.* § 1101(a)(15)(H); *id.* § 1184(g); *see* Julia Preston, *Lawsuits Claim Disney Colluded to Replace U.S. Workers With Immigrants*, N.Y. Times (Jan. 25, 2016), https://tinyurl.com/mru464f3; *see also* Ron Hira & Daniel Costa, *New Evidence of Widespread Wage Theft in the H-1B Visa Program*, Econ. Pol'y Inst. (Dec. 9, 2021), https://perma.cc/7TPP-BGSA.

In addition to strictly limiting which nonimmigrant visa holders can work in the United States, Congress provided that "upon failure to maintain the status under which he was admitted, … such alien will depart from the United States." *Id.* § 1184(a)(1); *see also id.* § 1227(a)(1)(C)(i).

But the Department of Homeland Security has long been dissatisfied with Congress's nonimmigrant visa regime, in particular the numerical limits on H-1B visas. So, without regard for Congress or American workers, DHS devised several implausible workarounds to let nonimmigrant visa holders gain employment in the United States despite the notable

obstacle of Congress having never given such authorization.

One such workaround involved F-1 student visa holders, where DHS issued a regulation saying that those "students" could keep their visa despite not being students at all and would *also* be given authority to work legally in the United States for years down the road.

Over several persuasive dissents, the D.C. Circuit blessed that implausible scheme in *Washington Alliance of Technology Workers v. DHS*, 50 F.4th 164 (D.C. Cir. 2022) ("*WashTech*"), which held that the statutory requirements for obtaining any of the twenty-two categories of nonimmigrant visas are "entry conditions" only—i.e., they apply only at the moment of the alien's entry into the United States and are irrelevant thereafter. Accordingly, aliens could maintain their F-1 "student" visas for years after they were no longer "students."

But that still didn't provide F-1 visa holders with authority to work legally in the United States, so *WashTech* also had to bless DHS's equally dubious assertion that 8 U.S.C. § 1184(a)(1)—which provides that 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"—impliedly includes the power to authorize employment for any and all nonimmigrant visa holders, even though § 1184(a) says nothing about employment, and even though Congress elsewhere *affirmatively provided* work

authorization for other types of nonimmigrant visas—but not for F-1 holders.

WashTech blessed DHS's assertion of nearly unfettered power to rewrite Congress's nonimmigrant-visa and work-authorization regimes to allow for permanent presence and work authorization, directly in the face of statutory restrictions.

DHS tried the same trick with H-4 visa holders, who are spouses of other H visa holders. Congress never authorized H-4 visa holders to work in the United States—a particularly notable omission because Congress elsewhere did authorize spouses of certain visa holders to obtain employment—yet that didn't stop DHS from invoking § 1184(a)'s generic language about setting admission conditions to assert the power to let H-4 holders work lawfully in the United States.

In the decision below, the D.C. Circuit upheld that scheme, too, holding that it was squarely covered by the opinion about F-1 work authorization in *WashTech*. Again, this was despite the notable fact that Congress granted spousal work authorization only for *two narrow types* of visas, and H-4 visas are not among them. *See* Pet.App.5a.

Certiorari is warranted because *WashTech* was grievously wrong and has only gotten worse with age, as the decision below proves. The D.C. Circuit's precedent vitiates the nonimmigration visa system and renders numerous other provisions of the INA

entirely illogical or superfluous. *See* Part I, *infra*. The decision is already having profound consequences for American workers. *See* Part II, *infra*. Finally, as Judge Rao explained in her *WashTech* dissent, the D.C. Circuit has also created a circuit split and deviated from this Court's holdings, confirming the cert-worthiness of the matter. *See* Part III, *infra*.

The Court should grant review.

ARGUMENT

I. *WashTech* Eviscerated Congress's Carefully Crafted Nonimmigrant Visa Scheme.

To understand the dramatic consequences that result from the D.C. Circuit's *WashTech* line of precedent, discussed in Part II, *infra*, one must first understand the nature of *WashTech's* errors. As *amici* explain below, the D.C. Circuit's numerous implausible and illogical interpretations of the INA render unrecognizable the nonimmigrant visa system that Congress enacted to protect American workers, replacing it with an easily circumvented scheme to benefit corporate employers and foreign nationals that is operated almost entirely at DHS's discretion, in direct contravention of basic statutory text and structure.

A. Section 1101(a)(15)'s Nonimmigrant Visa Requirements Are Not Exclusively Entry Conditions.

The twenty-two categories of nonimmigrant visas listed in § 1101(a)(15) represent a "carefully calibrated scheme" spread over 4,200 words describing the specific requirements for who is eligible to come into the country temporarily and what they are allowed or required to do once here, including whether employment is authorized. *Wash. All. of Tech. Workers v. DHS*, 58 F.4th 506, 509 (D.C. Cir. 2023) (Rao, J., dissenting from the denial of rehearing *en banc*). Given the extraordinary detail in these provisions, it is clear they represent a balancing of difficult political judgments. *Id.* at 510.

1. However, *WashTech*—which the panel below held was directly controlling here—rendered the distinctions between nonimmigrant visas almost meaningless by holding that they apply only at the moment of entry into the United States, after which they are irrelevant. 50 F.4th at 190. That conclusion was illogical and atextual.

Given that a defining characteristic of a nonimmigrant visa is that the alien is allowed to be in the country only for a specific purpose, it is a most "'unnatural reading'" to conclude that the alien need only possess that purpose at the precise moment of entry—and never again. *Id.* at 199 (Henderson, J., concurring in part and dissenting in part). *WashTech* never explained why Congress would have spent so

much time and attention on the excruciatingly detailed § 1101(a)(15) nonimmigrant visa requirements if they applied only for a single moment in time and could be completely ignored thereafter, without the alien losing his visa status.

The text of § 1101(a)(15) demonstrates that many of the nonimmigrant visa requirements must continue applying after entry. For example, there are a dozen types of nonimmigrant visas that apply to an alien "having a residence in a foreign country which he has no intention of abandoning" or who "maintains actual residence and place of abode in the country of nationality." *E.g.*, 8 U.S.C. § 1101(a)(15)(B), (F), (H), (J), (M), (Q). Under the D.C. Circuit's view, an alien can obtain one of those visas, enter the United States, and then immediately "abandon" his "actual residence" or "abode" in his home country—yet still maintain his visa.

The D.C. Circuit's conclusion that § 1101(a)(15) imposes only entry conditions is especially unpersuasive in the context of the F-1 student visas at issue in *WashTech* itself. Congress provided that an alien is eligible for an F-1 visa only if he "*is* a bona fide student" seeking "solely" to pursue a course of study in the United States. *Id.* § 1101(a)(15)(F)(i) (emphasis added). These requirements contain "no temporal restriction[s]," 50 F.4th at 199 (Henderson, J., concurring in part and dissenting in part), but instead convey present-sense requirements—i.e., *ongoing* requirements. The requirement that the alien "is" a

student most obviously conveys this, but even phrases like "seeks to enter" and "coming" are used elsewhere in the INA to indicate ongoing requirements. *Id.* at 200, 206 (Henderson, J., concurring in part and dissenting in part). And the original student-visa statute, which even *WashTech* acknowledged is "materially the same as its modern F-1 counterpart," Pet.App.8a, turned on "the termination of attendance of each immigrant student," Immigration Act of 1924, Pub. L. No. 68-139, § 4(e), 43 Stat. 153, 155.

But "[w]ords no longer have meaning"[2] if—as *WashTech* concluded—the statutory text "is a … student" can be construed, in effect, to mean "was or intended at one specific moment in time to be a … student." Under that view, F-1 visa holders can keep their visa for years after completing any studies and embarking on a full-time gainful career. Judge Henderson aptly described *WashTech*'s interpretation as "tortured" and "'verbicide.'" 50 F.4th at 200 (Henderson, J., concurring in part and dissenting in part); *see id.* at 201 ("I am at a loss to see ambiguity in 'student' that would capture post-graduation *employment*.").

Most importantly, because *WashTech* was not limited to F-1 visas, it is necessarily true that no other § 1101(a)(15) requirements apply after entry, either. For example, C-1 holders need not remain "in

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[2] *King v. Burwell*, 576 U.S. 473, 500 (2015) (Scalia, J., dissenting).

immediate and continuous transit through the United States" to maintain their visas, B holders need not remain only "temporarily for business" to maintain visas, A-1 holders need not remain "accredited by a foreign government," and so on—yet explicably they will all keep their visas even though the entire purpose for which they were allowed into the country had now lapsed. 8 U.S.C. § 1101(a)(15)(F), (C)(i), (B), (A)(i).

2. *WashTech*'s conclusion that § 1101(a) sets only entry conditions for *every* visa type also rendered several other INA provisions entirely superfluous or illogical.

For example, § 1258 authorizes most types of nonimmigrant visa holders to change their status to a *different* nonimmigrant visa at the Secretary's discretion. 8 U.S.C. § 1258. Under the D.C. Circuit's precedent, however, someone changing status would presumably not have to satisfy the statutory requirements for the new visa, as he had already complied with all the existing requirements at the moment of entry, and *WashTech* says no further requirements apply afterwards. For example, DHS could authorize someone who entered on a B visa for tourists or a P visa for entertainers to switch to almost any other nonimmigrant visa without making any showing; after the initial entry requirement is satisfied, the visa holder is apparently freed from any new or ongoing requirements. That nonsensical conclusion could be avoided by acknowledging that

many of § 1101(a)(15)'s requirements must be satisfied even after entry—a point that *WashTech* rejected.

Further, *WashTech* trivializes § 1184(a)(1), which provides that "upon failure to maintain the status under which he was admitted, … such alien will depart from the United States." *Id.* § 1184(a)(1). That provides a simple rule: fail to maintain your nonimmigrant visa requirements, and you must leave. But under the D.C. Circuit's view, there *are no* ongoing statutory requirements "to maintain" in the first place. The decision suggests that § 1184(a)(1) must apply only to the requirements DHS itself imposes, *see* 50 F.4th at 178, but that means DHS has nearly unfettered discretion to decide how long the alien remains in the country (a point discussed further below in Part I.B). That turns the concept of a nonimmigrant visa on its head by presuming that the INA imposes no conditional limitations on how long an alien can remain.

As demonstrated next, the D.C. Circuit's statutory-construction errors are not limited to whether § 1101(a)(15) imposes only conditions of entry or whether DHS has authority to authorize continued presence.

As most relevant to the pending petition, D.C. Circuit precedent also inexplicably holds that DHS can grant work authorization even when Congress itself did not do so. That allowed the panel below, holding itself bound by *WashTech*, to conclude that

DHS can further grant work authorization to nonimmigrant visa holders' *spouses* even when Congress never granted such power—and even when Congress did grant work authorization to *other* spouses.

B. The D.C. Circuit's Interpretation of § 1184(a) Makes a Hash of the INA's Work Authorization Scheme.

Having held that § 1101(a)(15)'s requirements did not apply after the moment of entry, *WashTech* had to figure out what regime *does* apply after entry. The answer, in the majority's view, was § 1184(a), which the court interpreted as empowering DHS to act as a junior varsity Congress with almost unfettered discretion over the nonimmigrant visa system, including the power to grant work authorization in the United States even when Congress declined to do so.

1. At the threshold, it was telling in *WashTech* that DHS itself could not say with certainty which statutory provision supposedly allows it to authorize employment for all nonimmigrant visa holders the moment after they enter the United States. DHS claimed that some combination of 8 U.S.C. §§ 1103, 1184(a)(1), and 1324a(h)(3) provided this power. *See Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students*, 81 Fed. Reg. 13,040, 13,044–45 (Mar. 11, 2016); *see* 50 F.4th at 204 (Henderson, J., concurring in part and

dissenting in part). The necessity of resorting to a grab-bag of vague provisions is evidence enough that DHS was not given the tremendous power to authorize employment for millions of aliens.

For its part, *WashTech* settled on § 1103(a)(3) and especially § 1184(a)(1) as the sources of DHS's purported power to authorize employment. 50 F.4th at 190–91 (rejecting argument that § 1324a(h)(3) affirmatively provided authority). But neither provision says anything about employment. Section 1103(a)(3) grants only generic power to "establish such regulations" as "necessary for carrying out [the Secretary's] authority." 8 U.S.C. § 1103(a)(3). And § 1184(a)(1) says only that the "admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as [DHS] may by regulations prescribe," 8 U.S.C. § 1184(a)(1). The *WashTech* majority concluded that this implicitly includes the ability to authorize employment. And in the opinion below, the D.C. Circuit held itself bound by that same ruling. Pet.App.5a.

But § 1184 provides only a limited power over "admission," which is defined as "the lawful entry of the alien into the United States." 8 U.S.C. § 1101(a)(13)(A). That means DHS can prescribe regulations to carry out Congress's requirements for *entry* on nonimmigrant visas, but there is no independent power for DHS to affirmatively authorize employment *after* entry, and most certainly not when

Congress itself declined to do so. That alone should have resolved the matter.

D.C. Circuit is also internally inconsistent about the meaning of "entry." As discussed above in Part 1.A, *supra*, when it comes to Congress's requirements for a visa under § 1101(a), the court has said "enter" and "entry" refer only to the moment of physically entering the United States. But when it comes to DHS's power to set terms on "entry" under § 1184, suddenly that word allows for authorizations and requirements extending years after physical entry. It can't be both ways, and the D.C. Circuit has never explained this obvious contradiction.

2. The D.C. Circuit's conclusion regarding DHS's authority to grant work authorization is also impossible to square with numerous other provisions in the INA.

For example, Congress expressly authorized—with strict limitations—certain nonimmigrant visa holders to work lawfully in the United States. Most notable are H-1B and H-2B visas, which are numerically capped and apply only to certain industries. 8 U.S.C. § 1184(g).

Neither *WashTech* nor the decision below have bothered to explain why Congress would use such circuitous language in § 1184(a) to let DHS authorize employment for other visa holders, when Congress already did so expressly for H-1B and H-2B nonimmigrant visa holders. The absence of similar

language for F-1 and H-4 visa holders strongly indicates Congress did *not* authorize them to seek employment. *See, e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Tellingly, *WashTech* referenced H-1B visas only once in passing, and never mentioned the caps on those visas. 50 F.4th at 169. That is unsurprising, given that the tight restrictions on H-1B and H-2B visas demonstrate the illogic of the court's precedent holding that DHS can freely grant employment to *any* nonimmigrant visa holder.

Further, as noted above, while in lawful status, most types of nonimmigrant visa holders can change their status to a *different* nonimmigrant visa. 8 U.S.C. § 1258. But under the D.C. Circuit's precedent, there is minimal-to-nonexistent benefit in changing from one nonimmigrant visa to another because DHS can grant work authorization to *any* nonimmigrant visa holder regardless of his type of visa. For example, those "visiting the United States temporarily for business" can obtain a B visa, 8 U.S.C. § 1101(a)(15)(B), but DHS can directly authorize employment for those visa holders without the hassle of having to change their status to a visa type that expressly authorizes employment. There is little point in bothering to change visas, rendering § 1258 largely superfluous.

In short, the D.C. Circuit has rendered superfluous every single provision in the INA that authorizes employment for nonimmigrant visa holders. Yet the court has never once even attempted to explain this

extraordinary deviation from bedrock rules of statutory interpretation, nor why Congress would allow such easy "end run[s]" around its statutory restrictions. 58 F.4th at 510 (Rao, J., dissenting from the denial of rehearing *en banc*).

Unsurprisingly, DHS has exploited *WashTech*'s weak reasoning to justify granting work authorization to nonimmigrant visa holders' spouses. The D.C. Circuit, in its decision below, tersely held that *WashTech*'s logic directly controlled and authorized DHS's further expansion of work authorization, despite the notable flaw that Congress nowhere granted DHS such power and has allowed work authorization only for a very narrow set of spouses—none of which include the H-4 visa holders at issue here. *See* 8 U.S.C. § 1184(c)(2)(E); *id.* § 1184(e)(2).

Under *WashTech*, statutory text and structure are largely irrelevant. DHS has asserted nearly unlimited discretion to remake the nonimmigrant visa system, and the D.C. Circuit has now repeatedly blessed this extraordinary power grab.

3. One final point of particular importance to *amici* warrants mention. Perhaps aware that its textual arguments were sorely lacking in persuasiveness, the *WashTech* majority decision repeatedly looked beyond the provisions of the INA and contended that Congress had acquiesced in the court's unusual interpretations of the nonimmigrant visa system. The court cited examples of Presidents relying on § 1184's predecessor to let students stay in the country for

"practical training" after their student visas had expired—and then claimed Congress had not "disapprove[d]" of that power when enacting the INA in 1952. 50 F.4th at 170.

This "acquiescence" argument is unpersuasive and illogical for several reasons. *First*, *WashTech* never explained why Congress would have acquiesced in an interpretation of the INA that no court had ever previously adopted, until *WashTech* itself. The "consistent judicial interpretation" of these statutes is directly counter to *WashTech*. *Pierce v. Underwood*, 487 U.S. 552, 567 (1988).

Second, the President has long disagreed with Congress about the INA's limits, as demonstrated by President Truman's veto of the INA because he viewed it as far too restrictive of immigration.[3] Congress overrode that veto to enact the INA into law. H.R. 5678, 82d Cong. (1951), Pub. L. No. 82-414, 66 Stat. 163 (1952) (overriding veto, *see* House Roll No. 165, 98 Cong. Rec. 8214–26 (June 26, 1952); Senate Roll No. 298, 98 Cong. Rec. 8253–68 (June 27, 1952)). The D.C. Circuit nonetheless has seen fit to give more weight to the interpretation espoused by the branch that vetoed the INA than to the text written by the branch that passed it by supermajorities.

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[3] Harry S. Truman, *Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality*, Nat'l Archives (June 25, 1952), https://perma.cc/6B4Z-99TC.

Third, acquiescence is irrelevant when the text is clear, as it is here. "Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

* * *

At nearly every step, D.C. Circuit precedent on immigrant visa holders stretches logic and text to their breaking points, rejecting an orderly and commonsense approach to the nonimmigrant visa system in favor of one that renders numerous statutory provisions illogical or irrelevant, and ultimately grants DHS the novel power to authorize permanent nonimmigrant presence and employment in the United States in direct defiance of the detailed nonimmigrant scheme Congress created for entering, remaining, working, and leaving the United States.

As explained next, these errors are already causing significant consequences for the nation's immigration system.

II. The *WashTech* Line of Cases Is Causing Dramatic Consequences for the Nation's Immigration System and the American Workers It Was Designed to Protect.

The sea change effected by the D.C. Circuit's precedent has already resulted in "serious ramifications for the enforcement of immigration law," and those consequences will only increase over

time. *WashTech II*, 58 F.4th at 508 (Rao, J., dissenting from the denial of rehearing *en banc*).

The D.C. Circuit held that its interpretation of § 1101(a)(15) as setting only entry conditions applies to *all* 22 categories of nonimmigrant visas. 50 F.4th at 189–90. There are over a million F-1 recipients alone every year, and over 100,000 of them remain in the country for DHS's "Optional Practical Training." *Id.* at 167–68.

Compare those figures to the caps for H-1B and H-2B visas, which are generally 65,000 and 66,000 per year, respectively. 8 U.S.C. § 1184(g)(1). DHS's OPT program has now "surpassed the H-1B visa program as the greatest source of highly skilled guest workers." 50 F.4th at 203 (Henderson, J., concurring in part and dissenting in part). Moreover, under DHS's regulations, F-1 holders can now stay in the country longer than most H-1B holders, who are limited to three years for an initial visa and six years total. 8 U.S.C. § 1184(g)(4); 8 C.F.R. § 214.2(h)(9)(iii)(A)(1).

The D.C. Circuit's misinterpretation of § 1184(a) is especially damaging. DHS can now grant work authorization for any and all nonimmigrant visa holders, regardless of whether Congress expressly granted work authorization. The D.C. Circuit has blessed a dubious workaround that yields a visa program bigger, longer, and more expansive in benefits than the H-1B and H-2B programs—all in contravention of Congress's tightly circumscribed scheme. *See* 58 F.4th at 509 (Rao, J., dissenting from the denial of rehearing *en banc*).

The D.C. Circuit claimed its ruling is limited because DHS's grant of work authorization must be "reasonably related" to the particular visa upon which the alien entered. 50 F.4th at 180. There is no textual basis in the INA for this "reasonably related" test. Rather, the proper limits are those Congress actually imposed, which the opinion repeatedly disregarded.

In any event this "reasonably related" test has no teeth. Just look at the decision below, which never even addresses whether allowing spouses (H-4 holders) to work in the United States is "reasonably related" to the purpose of an H-4 visa. Pet.App.5a. The court apparently assumed there was a reasonable relationship, but who knows for sure because the court never actually says. That is not a test at all—it is abdication to DHS.

In *WashTech*, the court said that being a full-time *employee* for years at a time is "reasonably related" to being a student. 50 F.4th at 180. Under such a broad and meaningless test, DHS could presumably authorize full-time productive employment even for H-3 visa holders, who are required to be in "a training program that is *not* designed primarily to provide productive employment." 8 U.S.C. § 1101(a)(15)(H)(iii). And if a future court follows the decision below, DHS's conclusion will be given absolute deference. So much for being a meaningful test.

The consequences are manifest. In the case *sub judice*, the D.C. Circuit applied *WashTech* to hold that

DHS could grant work authorization to nonimmigrant visa holders' *spouses*, too. Pet.App.5a.

That conclusion is especially untenable because Congress expressly authorized employment for spouses of only *two* of those types of visa holders (E and L visas). *See* 8 U.S.C. § 1184(c)(2)(E); *id.* § 1184(e)(2). When Congress creates fifteen types of dependent visas but authorizes employment for only two of them, it is nonsensical to conclude that Congress implicitly gave DHS the power to authorize employment for the other thirteen types, too—but that is exactly what *WashTech* dictated.

Under *WashTech* and its progeny, hundreds of thousands of aliens who are absolutely not authorized by Congress to remain in the country, let alone obtain work authorization, will now be competing for a wide range of jobs with American workers. The damage to Congress's orderly nonimmigrant visa system will only increase with time. This Court should grant review.

III. The D.C. Circuit's Precedent Is Contrary to This Court's and Other Circuits' Decisions.

The magnitude and consequences of the D.C. Circuit's precedent would justify certiorari even if no other circuit had addressed these issues. But here a grant is especially warranted because, as Judge Rao has explained, D.C. Circuit precedent here is contrary to other circuits' decisions holding that the requirements for nonimmigrant visas remain in place

even after the alien has entered the country. 58 F.4th at 511 (Rao, J., dissenting from the denial of rehearing *en banc*) (citing *Khano v. INS*, 999 F.2d 1203, 1207 & n.2 (7th Cir. 1993); *Graham v. INS*, 998 F.2d 194, 196 (3d Cir. 1993); *Castillo-Felix v. INS*, 601 F.2d 459, 464 (9th Cir. 1979)).

This Court has strongly suggested the same rule, noting that, for example, "should a G-4 alien terminate his employment with an international treaty organization, both he and his family would lose their G-4 status." *Elkins v. Moreno*, 435 U.S. 647, 666-67 (1978). In other words, a nonimmigrant visa holder cannot continue to maintain his visa status if he isn't complying with the visa's rules—but the D.C. Circuit has now twice held to the contrary without even acknowledging that language from *Elkins*.

Nor has the D.C. Circuit grappled with this Court's *unanimous* pronouncements that "a foreign national who entered the country legally on a tourist visa, but stayed on for several months after the visa's expiration … founders in showing nonimmigrant status," as would "someone who legally entered the United States on a student visa, but stayed in the country long past graduation." *Sanchez v. Mayorkas*, 593 U.S. 409, 417, 418 (2021). That these examples elicited unanimous support from this Court demonstrates just how counterintuitive the D.C. Circuit's precedent is.

The view espoused by *Elkins* and *Sanchez* represented the uniform interpretation of the INA by

federal appellate courts—until *WashTech*, which has only grown worse with age.

The D.C. Circuit's split from other circuits' holdings and this Court's own opinions more than provides an adequate basis for granting review of the decision below.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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