NO. 22-1071

In the
Supreme Court of the United States

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR IMMIGRATION STUDIES IN SUPPORT OF PETITIONER

Julie B. Axelrod
Center for Immigration Studies
1629 K Street, NW, Suite 600
Washington, DC 20006
(202) 466-8185
jba@cis.org
Counsel for *Amicus Curiae*

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

THE U.S. CODE:

PROPOSED AND FINAL REGULATIONS:

THE CODE OF FEDERAL REGULATIONS:

MISCELLANEOUS:

INTEREST OF *AMICUS CURIAE*[1]

The Center for Immigration Studies ("CIS") is a nonpartisan tax-exempt educational organization. Since 1985, CIS has provided immigration policymakers, academia, the news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of immigration. CIS has provided testimony before Congress on more than 140 occasions.

CIS wishes to share its expertise with the Court, including the insights of Senior Legal Fellow George Fishman, who was Chief Counsel of the House Judiciary Committee's subcommittee with jurisdiction over immigration on the two occasions Congress temporarily increased the "H-1B" program's numerical cap. Congress' goal in sunsetting these increases is crucial to the understanding of the legal and policy issues relevant to this case.

---

[1] Pursuant to Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record received timely notice of the intent to file the brief under this Rule.

I. SUMMARY OF ARGUMENT

The D.C. Circuit Court of Appeals' decision, *Wash All. of Tech Workers v. DHS*, 50 F.4th 164 (D.C. Cir. 2022), is fundamentally flawed because it

1) failed to find arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), the Department of Homeland Security's ("DHS") rule, 81 Fed. Reg. 13040 (Mar. 11, 2016) ("2016 Rule"), extending the length of post-graduation Optional Practical Training ("OPT") for certain alien participants in the "F" nonimmigrant foreign student program, 8 U.S.C. § 1101(a)(15)(F)(i), in a blatant attempt to subvert Congress' goal of protecting American students when it twice increased only temporarily the numerical cap on the "H-1B" nonimmigrant worker program, 8 U.S.C. § 1101(a)(15)(H)(i)(B), and

2) does fundamental harm to the Immigration and Nationality Act ("INA") by confining the requirements Congress set forth for the F program, and potentially for all other nonimmigrant programs, to the visa-issuance process -- negating any need for aliens to continue to comply with them once admitted to the U.S., in conflict with the precedent of this Court and multiple Circuits.

For these reasons, this Court's review is crucial.

II. ARGUMENT

A. DHS's 2016 Rule Is Arbitrary and Capricious

Executive Branch agency action is arbitrary and capricious in violation of the APA "if the agency has relied on factors which Congress has not intended it to consider [or] entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

DHS's 2008 interim final rule, 73 Fed. Reg. 18944 (Apr. 8, 2008) ("2008 IFR"), extended by 17 months the permissible length of OPT employment following the completion of all required coursework for a STEM [science, technology, engineering or mathematics] degree for aliens in the F nonimmigrant program. In the 2008 IFR, DHS components U.S. Citizenship and Immigration Services ("USCIS") and U.S. Immigration and Customs Enforcement ("ICE") unapologetically and openly extended the length of OPT for the express purpose of circumventing the annual numerical limitation Congress has imposed on aliens newly accepted into the H-1B "specialty occupation" foreign worker program. This could not have been a factor which Congress intended to be considered, and therefore, the 2008 IFR was arbitrary and capricious in violation of the APA.

The District Court for the District of Columbia Circuit vacated the 2008 IFR, *Wash. All. of Tech. Workers v. DHS*, 156 F. Supp. 3d 123 (D.D.C. 2015), but stayed the vacatur to allow DHS to correct for its

noncompliance with the APA's notice and comment requirement. DHS did so, publishing a proposed rule, 80 Fed. Reg. 63376 (proposed Oct. 19, 2015), and then promulgating a final rule, 81 Fed. Reg. 13040 (Mar. 11, 2016) ("2016 Rule"), extending the STEM post-completion OPT period for 24 (rather than 17) months.

The 2016 Rule completely abandoned, without any meaningful explanation, DHS's justification for the 2008 IFR. DHS acted pretextually to avoid appearing to, as with the 2008 IFR, deliberately and openly subverting Congress' objective of protecting American students when temporarily increasing the H-1B cap. In reality, DHS based its decision on the same factor, one that Congress could not have intended it to consider, and entirely failed to consider the rule's impact on American students, an important aspect of the problem. Therefore, contrary to the D.C. Circuit's ruling, *Wash. All. of Tech. Workers*, 50 F.4th at 192, the 2016 Rule is arbitrary and capricious.

1. The H-1B Program

The H-1B nonimmigrant program allows employers to petition for foreign workers in specialty occupations requiring the "theoretical and practical application of a body of highly specialized knowledge, and ... attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation." 8 U.S.C. § 1184(i)(1). Congress fashioned the modern program, including a 65,000 annual numerical limitation on aliens who may be issued visas or otherwise provided status, in

the "Immigration Act of 1990." Pub. L. No. 101-649, 104 Stat. 4978, 5019 (1990).

Congress subsequently twice temporarily increased the cap.[2] First, it increased the cap for fiscal years 1999-2000 (to 115,000) and 2001 (107,500). Pub. L. No. 105-277, 112 Stat. 2681, 2681-642 (1998). The House Judiciary Committee report explained the rationale for a temporary increase:

> It is in the nation's interest that the quota for H–1B aliens be temporarily raised....
>
> ***
>
> However, the increase ... should be of relatively brief duration. There will be a bumper crop of American college graduates skilled in computer science beginning in the summer of 2001. These students have been enticed into the field … by the brightening opportunities in this boom or bust profession. [T]he opportunities spawned by a tight labor market are bringing fresh entrants into the field.... [Any] labor shortage … should not last past the graduation dates of these students. Thus, Congress should not imperil the[ir] future careers … by expanding the H–1B quota indefinitely....

[2] Congress has exempted certain employers and workers from the numerical ceiling. *See* 8 U.S.C. § 1184(g)(5).

> …. If a shortage exists at the end of th[e expansion] recommending a further increase … Congress can then act....
>
> The bill requires the GAO to submit to Congress … report[s] on the high-technology/information technology labor market…. [and] on age discrimination…. [that] will aid future Congresses … as to whether increased H–1B quotas will still be justified….

H.R. Rep. No. 105-657 at 19-20 (1998).

The Senate Judiciary Committee report stated:

> The current shortage of … skilled personnel presents both a short-term and a long-term problem. The country needs to increase its access to skilled personnel immediately…. However, to meet these needs over the long term, the American education system must produce more young people in key fields....
>
> ***
>
> [The bill] addresses the long-term problem that too few U.S. students are entering and excelling in [STEM] fields in sufficient numbers. It contains

> measures to encourage more young people to study [in these fields]….

S. Rep. No. 105-186 at 7 (1998).

Congress later raised the cap to 195,000 for fiscal years 2001-03. Pub. L. No. 106-313, 114 Stat. 1251 (2000), and again explained its rationale. The House Judiciary Committee report stated: "Economic conditions may be quite different by 2003 and Congress should re-evaluate the H–1B program at that time. Additionally, the reports required [in 1998] will have been delivered … and may contain information causing Congress to rethink the H–1B program." H. Rep. No. 106-692 at 28. The Senate's rationale was similar to that in 1998. S. Rep. No. 106-260 at 2-3 (2000).

1. DHS Relied on Factors that Congress Had Not Intended To Be Considered

Alexander W. Resar writes:

> [*Chevron* deference depends on a] court agree[ing] that the set of aims an agency seeks to realize are a reasonable construal of the set of aims contained in the statute that Congress tasked that agency to implement.... [W]hile generally implicit, the assessment of the reasonability of the agency's derivation of the aims ... is a precondition to an assessment of the ... [agency's] means for the realization of those statutory aims.

The Parameters of Administrative Reason Giving, 67 U. Kan. L. Rev. 575, 605 (2019) (footnote omitted).

> In most [instances,] the court only implicitly assesses whether the agency reasonably derived permissible considerations or statutory aims….

Id. at 606.

> [But, i]n some [instances] … the court rejects as unreasonable the agency's derivation of permissible factors.... [In] *Michigan v. EPA*[, 576 U.S. 743 (2015), the Court] held that [the statutory term] "appropriate and necessary" was ambiguous but that the agency's interpretation disregarding costs was unreasonable because "appropriate and necessary" mandated consideration of costs.... [T]he agency [had] unreasonably identified the permissible factors for consideration from the statutory aims….

Id. at 605-06 (footnotes omitted).

In the 2008 IFR, USCIS and ICE explicitly and openly based their justification on circumventing Congress' H-1B cap:

> Congress ... has prohibited USCIS from granting H–1B status to more than 65,000....
>
> There is a significant amount of competition among employers of highly-skilled workers for the limited number of H–1B visas....
>
> .... The inability of U.S. employers ... to obtain H–1B status for highly skilled foreign students ... has adversely affected the ability of U.S. employers to recruit and retain skilled workers and creates a competitive disadvantage….

2008 IFR, 73 Fed. Reg. at 18946.

> [T]he United States must be successful in the increasing international competition for … scientists and engineers. The employment-based immigrant visa ceiling makes it difficult for foreign students to stay … permanently after their studies.... [T]he oversubscription of the H–1B program makes obtaining even temporary work authorization an uncertain prospect.… This rule will help ease this difficulty by adding an estimated 12,000 OPT students to the STEM-related workforce…. represent[ing] a significant expansion of the available pool of skilled workers.

Id. at 18953.

It is inconceivable that subverting Congress' objective is a factor Congress wants federal agencies to consider, and thus the 2008 IFR was clearly arbitrary and capricious. However, the 2016 Rule jettisoned 2008's justification. The 2015 proposed rule did not even see fit to mention this abandonment. DHS, however, had to respond to a comment to the proposed rule claiming:

> "[T]he NPRM is procedurally and substantively arbitrary and capricious" because "DHS has entirely failed to provide a reasoned explanation of why its published policy rationale for the proposed rule has so fundamentally changed from … the 2008 [IFR]…." The commenter stated that DHS … has justified the proposed rule by the need to continue and further enhance the educational benefit of the STEM OPT extension, while protecting STEM OPT students and U.S. workers.
>
> ***
>
> The commenter... requested that DHS explain "why its published policy rationale has changed" since 2008.

2016 Rule, 81 Fed. Reg. at 13056.

DHS correctly but misleadingly responded that it "does not agree with the proposition that an agency's decision to state new or revised reasons for its policy renders the agency's policy arbitrary and capricious." *Id.* As this Court has ruled, "[an] agency can 'deal with the problem afresh' by taking **new** agency action.... An agency taking this route is not limited to its prior reasons." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020) (emphasis in original), quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947).

However, DHS had constructed a straw man. It can certainly learn from experience, account for changed realities, and newly realize a program's benefits. What is improper is its total abandonment of a prior rationale with no reasoned explanation. As this Court ruled in *Smiley v. Citibank (S.D.), N.A*, 517 U.S. 735, 742 (1996) (citations omitted), "the mere fact that an agency interpretation contradicts a prior agency position is not fatal. [However, s]udden and unexplained change ... may be 'arbitrary, capricious [or] an abuse of discretion[.]'"

DHS attempted to respond to the commenter:

> [T]he policy rationale ... ha[s] changed based on a range of factors. [T]hese factors include the public comments received on the 2008 IFR and DHS's assessment of the benefits provided by [its] 17-month STEM OPT extension.... This assessment is informed by enduring national priorities, such as …

> helping to ensure that the nation's colleges and universities remain globally competitive in attracting international students in STEM fields and enhancing the United States' economic, scientific, and technological sectors.

2016 Rule, 81 Fed. Reg. at 13056 (citation omitted). Yet, DHS completely failed to explain 1) which public comments occasioned it to abandon its 2008 rationale (even though such comments were nowhere mentioned in the proposed rule), 2) how its assessment of the benefits of the 17-month extension contributed to its abandonment of the prior rationale, and 3) why "enduring national priorities" caused the abandonment (as "enduring," they were presumably also priorities in 2008).

The final rule also noted:

> Some commenters ... suggest[ed] that DHS should infer from the H–1B category implicit limits on DHS's legal authority to allow F–1 students to engage in practical training.... [s]ome ... assert[ing] that DHS had no legal authority … because it "circumvents" the [H-1B] statutory requirements.... [and] permits F–1 students to sidestep restrictions ... enacted by Congress....

Id. at 13061.

DHS's responded that the 2016 Rule did "nothing to modify the congressionally established annual H–1B visa cap" and "disagree[d] that the … extension is an attempt to circumvent the requirements of the H–1B visa program, including the cap...." *Id.*

It is hard to take DHS's assertion seriously given its justification for the 2008 IFR, which, in addition to statements cited previously, stated:

> Representatives of high-tech industries in particular have raised significant concerns that the inability of U.S. companies to obtain H–1B visas for qualified F-1 students in a timely manner continues to result in the loss of skilled technical workers....
>
> ***
>
> Many F-1 students who graduated last spring will soon be concluding their 12-month periods of OPT. Unless employers for those students are able to obtain H-1B visas ... many of these students will need to leave the United States….

2008 IFR, 73 Fed. Reg. at 18947 (citation omitted).

> To avoid a loss of skilled students through the next round of H-1B filings ... DHS is implementing this initiative ...

> without first providing notice and the opportunity for public comment....

Id. at 18950.

As this Court noted in *DOC v. New York*, 139 S. Ct. 2551 (2019), "we are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Id.* at 2575, quoting *United States v. Stanchich*, 550 F. 2d 1294, 1300 (2nd Cir. 1977).

DHS contended in the 2016 Rule that "H–1B … is a unique program designed to meet different policy objectives than those of the F–1 visa program or OPT," 81 Fed. Reg. at 13061, despite the fact that "F–1 and H–1B perform the interlocking task of recruiting students to pursue a course of study in the United States and retaining at least a portion of those individuals to work in the American economy." *Wash. All. of Tech. Workers*, 156 F. Supp. 3d at 135.

Many students participate in STEM OPT precisely in order to find employers willing to sponsor them for the H-1B program and/or be able work in the U.S. should an H-1B slot not be available. In fact, almost half of all H-1B workers were previously foreign students. In 2021, DHS approved H-1B petitions for initial employment for 123,414 aliens -- 58,042 (47 percent) of whom were changing from F status. USCIS, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2021 Annual Report to Congress: October 1, 2020 – September 30, 2021* at 62 (tables 14 and 15) (2022).

The 2016 Rule also stated that H-1B occupations are "far broader than the employment permitted by the OPT program." 81 Fed. Reg. at 13061. It is certainly true that not all H-1B "specialty occupations" qualify for STEM OPT. But the large majority of H-1B workers are employed in STEM OPT occupations. In 2021, 61.1 percent of approved H-1B petitions (initial employment) were in computer-related occupations, 9.5 percent in architecture/engineering/surveying, 3.5 percent in mathematics/physical sciences, and 2.6 percent in life sciences. *Characteristics of H-1B Specialty Occupation Workers* at 48 (table 7). Thus, at the very least, 75 percent are in STEM OPT occupations. *See* 8 C.F.R. § 214.2(f)(10)(ii)(C)(2).

The 2016 Rule did address comments regarding adverse effects on American workers:

> The rule … reflects DHS's consideration of potential impacts on the U.S. labor market and includes important safeguards for U.S. workers in STEM fields.

81 Fed. Reg. at 13061.

> DHS considered comments expressing concerns that STEM OPT students would add to the number of workers competing for jobs … and that they would potentially displace more-experienced U.S. workers. DHS … has included specific labor market

> safeguards…. Specifically, any employer [of a] STEM OPT student must attest that the student will not replace a ... U.S. worker…. [T]he rule requires that the terms and conditions … (including duties, hours, and compensation) be commensurate with those applicable to similarly situated U.S. workers.

Id. at 13108.

But the rule's OPT safeguards are, even in theory, less robust than those in the H-1B program -- which themselves have been widely criticized as inadequate and failed to dissuade Congress from feeling compelled to cap the program to protect American students and workers. As to OPT safeguards, in early 2021 ICE admitted that:

> [ICE] ... must take bold action to ensure that the [OPT] programs operate in a manner that does not harm U.S. workers….
>
> ***
>
> [ICE] is currently unable to evaluate the impact OPT has had on U.S. workers…. To remedy this, [ICE] is … develop[ing] a new unit … dedicated full-time to compliance matters involving wage, hours, and compensation within OPT….

SEVP, ICE, DHS, *Broadcast Message* (Jan. 13, 2021). But only two weeks later (at the beginning of the Biden administration), ICE announced "the creation of a new unit is not necessary at this time." SEVP, ICE, DHS, *Broadcast Message* (Jan. 26, 2021).

The 2008 IFR was arbitrary and capricious. What of the 2016 Rule? Did DHS publically abandon its 2008 rationale upon the realization that openly striving to subvert Congress's intent was legally risky or because the Obama administration was more reticent about openly acknowledging a policy designed to satisfy "Big Tech"? Because of DHS' inability or unwillingness to provide a reasoned explanation for the abandonment, it is clear the 2016 Rule's stated rationale was pretextual.

2. DHS's Rationale Was Pretextual

After a district court had ruled that an action of the Secretary of Commerce "was arbitrary and capricious, based on a pretextual rationale," *DOC*, 139 S. Ct. at 2564, this Court "review[ed] the District Court's ruling on pretext" and its "determination that [a] decision must be set aside because it rested on a pretextual basis." *Id.* at 2573-74. This Court answered in the affirmative (at least to the extent that "[i]n these unusual circumstances, the District Court was warranted in remanding to the agency," *id.* at 2576), concluding that:

> [W]e share the District Court's conviction that the decision to reinstate a citizenship question cannot be

> adequately explained in [the] terms [propounded]….
>
> ***
>
> Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision.... [H]ere the ... rationale—the sole stated reason—seems to have been contrived.
>
> We are presented ... with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process.... [W]e cannot ignore th[is] disconnect.... The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise.... [and] judicial review [would become] an empty ritual....

Id. at 2575-76.

DHS's rationale for the 2016 Rule was clearly pretextual, and without question should meet the same fate as did the Census Bureau's question.

3. DHS Entirely Failed to Consider an Important Aspect of the Problem

In both the 2008 IFR and the 2016 Rule, DHS failed to acknowledge Congress' rationale for sunsetting the H-1B cap increases. It did not address safeguards to protect American college students and did not consider the rules' impacts on American students drawn to STEM fields or the question of how to encourage more youth to study in these fields. DHS "entirely failed to consider an important aspect of the problem," making both rules arbitrary and capricious.

B. Aliens Must Continue to Comply with the Requirements of Their Nonimmigrant Programs

The D.C. Circuit has reached a troubling conclusion: "The F-1 provision itself shows that the student-visa entry criteria are not terms of stay.... Correctly understood, [it] sets threshold criteria for entry; it does not spell out the ongoing terms of stay." *Wash. All. of Tech. Workers,* 50 F.4th at 185-86. And, "the time and conditions DHS sets are not cabined to the terms of the entry definition." *Id.* at 189. The Merriam-Webster dictionary defines the transitive verb "cabin" to mean "confine" or "restrain," https://www.merriam-webster.com/dictionary/cabin (last visited May 26, 2023), and Macbeth proclaimed "But now I am cabined, cribbed, confined, bound in to saucy doubts and fears." William Shakespeare, MACBETH, act 3, sc. 4. The D.C. Circuit has saucily

ruled that section 1184 conditions need not adhere to section 1101 requirements.[3]

As D.C. Circuit Judge Rao concluded: "On the majority's reading, the highly specific requirements of the F-1 provision define only requirements of entry, rather than ongoing conditions for an alien to remain in the United States. The majority explicitly recognizes that its reasoning and analysis applies to all nonimmigrant categories." *Wash. All. of Tech. Workers v. DHS*, 58 F.4th 506, 509 (D.C. Cir. 2023) (dissenting from the denial of rehearing en banc) (citation omitted).

The D.C. Circuit's reading of the INA threatens to undermine aliens' statutory obligations across all nonimmigrant programs. It is contrary to the unambiguous meaning of the INA, disputed by all other Circuit Courts that have addressed the issue and also seemingly at odds with this Court's precedent.

As Judge Rao concluded:

> [N]o [other] court of appeals has adopted th[is] approach…. [T]he Supreme Court and other circuits have consistently held nonimmigrant visa holders must satisfy the statutory criteria both at entry and during their presence in the

[3] The district court concluded in a prior related decision that section 1101's F program requirement "could sensibly be read as an **entry requirement.**" *Wash. All. of Tech. Workers*, 156 F. Supp. 3d at 139 (emphasis in original).

> United States.... Inconsistent with the text and the structure of the INA, the panel's decision has also created a lopsided circuit split.

Id. at 511 (citations omitted).

At issue is the relationship between the congressionally-established requirements of the F program (and, for that matter, all other nonimmigrant programs) and DHS's congressionally-established authority to set time and conditions of admission for nonimmigrants.

The former provides for "an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter … temporarily and solely for the purpose of pursuing such a course of study." 8 U.S.C. § 1101(a)(15)(F)(i).

The latter provides "[t]he admission … of any alien as a nonimmigrant shall be for such time and under such conditions as [DHS] may … prescribe." 8 U.S.C. § 1184(a)(1).

But the D.C. Circuit concluded that:

> The most straightforward reading of the INA is that it authorizes DHS to apply to admitted F-1 students the additional "time" and "conditions" that enable them to remain here while participating in

> OPT.... [E]ven if ... ambiguous on the point, the statute may reasonably be understood as [DHS] has read it. That interpretation thus merits our deference [citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)].
>
> ***
>
> .... [T]he best reading of the F-1 provision is that it imposes threshold entry criteria; it does not itself spell out the ongoing conditions under which F-1 students may lawfully stay but rather constrains the exercise of time-and-conditions authority.... Even if alternative readings are available, making the statute materially ambiguous, it is at least reasonably susceptible of the Department's interpretation.[4]

50 F.4th at 192-93 (citation omitted).

The D.C. Circuit is incorrect. The unambiguous "most straightforward" reading is that section 1184(a)(1)'s "terms and conditions" authority allows

[4] The district court had noted the government's argument that "this text is best read to impose an initial requirement for admission ... rather than a continuing requirement that persists throughout the nonimmigrant's time in the United States." *Wash. All. of Tech. Workers v. DHS*, 518 F. Supp. 3d 448, 466 (D.D.C. 2021).

DHS to supplement section 1101's requirements[5] – not to disregard those continuing requirements.

Section 1184(a)(1) itself makes this reading quite clear, as it provides that DHS may require "the giving of a bond … **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 [other nonimmigrant] status subsequently acquired … **such alien will depart**…." 8 U.S.C. § 1184(a)(1) (emphasis added).

This Court has recognized that section 1101's requirements are ongoing in the context of the required intent not to abandon a foreign residence that is part of the F and most other nonimmigrant programs. In *Elkins v. Moreno*, 435 U.S. 647 (1978), this Court ruled:

> Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States....
>
> **.... [S]ince a nonimmigrant alien who does not maintain the conditions attached to his status can be deported** ...

[5] For example, as Judge Rao noted, "DHS has permitted F-1 students a short period of time to remain in the country after they graduate, because students are not expected to depart the moment their studies end. . . . Providing such details is reasonably within the authority to set the time and conditions of admission." *Wash. All. of Tech. Workers*, 58 F.4th at 510 (citation omitted).

> **it is … clear that Congress intended that … nonimmigrants in restricted classes who sought to establish domicile would be deported.**

Id. at 665-66 (emphasis added) (citation omitted).

This decision recognized that the requirements, or "conditions," of entry, including nonimmigrant intent, are also requirements/conditions of good standing in the U.S.[6]

Other Circuits have demonstrated the same understanding. For instance, in *Wellington v. INS*, 710 F.2d 1357, 1361 (8th Cir. 1983), the Eighth Circuit ruled that "[e]ven if [appellant] had complied with the conditions of her G-1 status [as an employee of an international organization official], she [is] still ... deportable for failing to maintain [her status as the official's nonimmigrant employee] by leaving the employ of the Nigerian Ambassador." And in *Brown v. INS*, 856 F.2d 728, 731 (5th Cir. 1988), the Fifth Circuit ruled that "an alien cannot lawfully possess an intent to be domiciled in this country while he or she is here on a student visa." *See also Londono v.*

---

[6] Current 8 U.S.C. § 1227(a)(1)(C)(i) provides that "[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed … or to comply with the conditions of any such status, is deportable." If "conditions" arguably refer to those set by DHS pursuant to § 1184(a)(1) rather than the requirements of § 1101, "maintain" nonimmigrant status clearly refers to the requirements of § 1101(a)(15).

INS, 433 F.2d 635, 636 (2d Cir. 1970), *Graham v. INS*, 998 F.2d 194, 196 (3d Cir. 1993), *Shoja v. INS*, 679 F.2d 447, 450 (5th Cir. 1982), *Woul Soo Park v. Barr*, 946 F.3d 1096, 1099 (9th Cir. 2020), *Von Kennel Gaudin v. Remis*, 379 F.3d 631, 637 (9th Cir. 2004), and *Melian v. INS*, 987 F.2d 1521, 1525 (11th Cir. 1993).

Even the D.C. Circuit previously had this understanding. *See Anwo v. INS*, 607 F.2d 435, 437-38 (D.C. Cir. 1979). As Judge Rao noted, this "binding circuit precedent [holds that] the F-1 visa provision imposes ongoing conditions…. The panel majority, however, fails even to cite [it]." *Wash. All. of Tech. Workers*, 58 F.4th at 510-11 (citation and footnote omitted).

In the present case, the D.C. Circuit sought support from *Rogers v. Larson*, 563 F.2d 617 (3d Cir. 1977): "Like other visa classes defined in section 1101(a)(15), F-1 identifies entry conditions but 'is silent as to any controls to which these aliens will be subject after they arrive in this country.' [quoting *Rogers*] Those post-arrival controls are spelled out pursuant to section 1184(a)(1)." 50 F.4th at 169-70.

But as Judge Rao pointed out, "[t]he majority primarily relies on [this] … decision.... [which] nowhere stated the nonimmigrant requirements apply only at entry." *Wash. All. of Tech. Workers*, 58 F.4th at 511 n.2. The Third Circuit in *Rogers* was actually analyzing the "H-2" program, for (at that time) aliens who were "coming temporarily to the United States to perform temporary services or labor,

if unemployed persons capable of performing such service or labor cannot be found in this country." *Rogers*, 563 F.2d at 620 n.6. Immediately preceding its discussion of "silence," the *Rogers* court noted that the program "contains only one restriction: they may come to this country only if unemployed persons capable of performing such services cannot be found here," *id.* at 622, clearly a restriction focused on visa-issuance. Such a focus is not the case with the F program's requirements (except to the D.C. Circuit).

The D.C. Circuit's reading also makes no sense in the context of the INA as a whole. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1850). The H-1B and F programs are both contained in the INA, § 101 (8 U.S.C. § 1101), "the comprehensive federal statutory scheme for regulation of immigration and naturalization," whose "central concern ... is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *De Canas v. Bica*, 424 U.S. 351, 353, 359 (1976).

First, the INA permits aliens in one nonimmigrant status to switch to a new one ("change status") without having to first leave the U.S. DHS "may, under such conditions [it] may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a

nonimmigrant who is continuing to maintain that status." 8 U.S.C. § 1258(a).[7]

In this context, it is nonsensical for the requirements of nonimmigrant programs to only apply at the visa-issuance stage. When an alien changes status, there is no visa-issuance stage. Additionally, aliens can only change status who had "continu[ed] to maintain [their prior] status," again making it nonsensical to limit section 1101 requirements to visa-issuance.

Second, it makes no sense for section 1101 requirements to only apply at visa-issuance given that, as discussed, aliens can be deported for failing to continue to fulfill them while in the U.S.

"It was not until the Immigration Act of 1917 that an elaborate list of the causes for deportation ... [was] included in the law." S. Rep. No. 81-1515 at 388 (1950). The Immigration Act of 1924 provided: "Any alien who at any time after entering the United States is found to have been **at the time of entry** not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted ... shall be taken into custody and deported."

[7] This Court concluded in *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 1814 (2021), that "nothing in § 1184 (or any other section) states that admission is a prerequisite of nonimmigrant status—or otherwise said, that the former is a necessary incident of the latter," pointing out that "individuals in two immigration categories have ... nonimmigrant status without admission" and that "[t]here could scarcely be a plainer statement of the daylight between nonimmigrant status and admission."

Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, 162 (emphasis added).

As the D.C. Circuit noted:

> Congress readied itself to enact the INA in 1952 by directing the Senate Judiciary Committee to conduct "a full and complete investigation of our entire immigration system,"... [that] was the "genesis" of the [INA], overhauling the 1924 statutory regime and providing the foundation for U.S. immigration law that persists today.

Wash. All. of Tech. Workers, 50 F.4th at 181 (citations omitted). The 1950 Committee's report recommended that "[t]he deportable classes of aliens ... be[] revised to subject any alien to deportation who ... **has failed to maintain his nonimmigrant status,**" S. Rep. No. 81-1515 at 413 (emphasis added). Congress made clear in 1952 that nonimmigrants must maintain their nonimmigrant status (as set forth in section 1101) or face deportation.

As Judge Rao concluded, "[t]he interpretation most consistent with the text and structure of the INA is that the criteria that apply at admission continue to govern a nonimmigrant's stay in the country after entry." *Wash. All. of Tech. Workers*, 58 F.4th at 510.

Finally, as Judge Rao argued:

> DHS's regulatory authority to set time and conditions applies only to "admission."… explicitly defined as "the lawful **entry** of the alien into the United States." 8 U.S.C. § 1101(a)(13)(A).
>
> …. If the nonimmigrant categories define only the terms of "entry," as the majority holds, then DHS's regulatory authority over "admission" is similarly limited to the terms of entry.

Id. (emphasis in original).

The D.C. Circuit "concedes" that:

> Congress intended the Secretary's time-and-conditions authority to be exercised in a manner appropriate to the types of people and purposes described in each individual visa class.... To be valid, the challenged post-graduation OPT Rule … must reasonably relate to the distinct composition and purpose of the F-1 nonimmigrant visa class.

Wash. All. of Tech. Workers, 50 F.4th at 168.

> The F-1 provision … sets the criteria for entry and guides DHS in exercising its authority to set the time and conditions of F-1 students' stay . . . .

Id. at 178.

This "concession" hardly squares the D.C. Circuit's interpretation with the INA. The court ruled that DHS can establish terms and conditions that "reasonably relate to the distinct composition and purpose" of a nonimmigrant program without actually having to abide by that program's section 1101 requirements. This is not what the INA says and it empowers DHS to embark on regulatory flights of fancy, so long as DHS can argue that the terms and conditions somehow "reasonably relate" to the program at issue.

But what indeed is the "distinct composition and purpose" of the F program apart from its section 1101 requirements regarding "a residence in a foreign country which [the alien] has no intention of abandoning", "a bona fide student qualified to pursue a full course of study", and "solely for the purpose of pursuing such a course of study"? 8 U.S.C. § 1101(a)(15)(F)(i). And how can DHS's terms and conditions possibly "reasonably relate" if they do not respect, but rather supplant, these requirements? They cannot.

CONCLUSION

The 2016 Rule is arbitrary and capricious on multiple grounds under the APA. The D.C. Circuit's decision misconstrues the INA and is in conflict with the precedent of this Court and multiple Federal Circuits. It does fundamental damage to the INA by limiting the applicability of the F program's (and other nonimmigrant programs') requirements to visa-

issuance, rather than being continuing requirements for program participants.

Respectfully submitted,

Julie B. Axelrod
Center for Immigration Studies
1629 K Street, NW, Suite 600
Washington, DC 20006
jba@cis.org
Counsel for *Amicus Curiae*