ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5028

In the

United States Court of Appeals

for the

District of Columbia Circuit

WASHINGTON ASSOCIATION OF TECHNOLOGY WORKERS,

Plaintiff-Appellant,

– v. –

U.S. DEPARTMENT OF HOMELAND SECURITY,

Defendant-Appellee,

NATIONAL ASSOCIATION OF MANUFACTURERS, et al.,

Intervenors-Appellees.

On appeal from a final judgment of the
United States District Court for the District of Columbia
No. 16-cv-01170
Hon. Reggie B. Walton

BRIEF FOR INTERVENORS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiff-Appellant.

New amici in this Court are: Landmark Legal Foundation, Louie Gohmert, Mo Brooks, Madison Cawthorn, Joe Kent, Programmers Guild, American Engineering Association, Inc., and U.S. Tech Workers.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Plaintiff-Appellant.

C. Related Cases

This case was previously before the Court in *Washington Alliance of Technology Workers v. DHS*, No. 17-5110. A previous case involving material identical regulations and arguments was before the Court in *Washington Alliance of Technology Workers v. DHS*, No. 15-5239.

/s/ *Paul W. Hughes*

CORPORATE DISCLOSURE STATEMENT

The Intervenors-Appellees are the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council.

None of the Intervenors-Appellees has a parent company, and no publicly held company has a 10% or greater ownership interest in any of the Intervenors-Appellees. Each Intervenor-Appellee is a trade association for purposes of Circuit Rule 26.1(b).

/s/ *Paul W. Hughes*

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GLOSSARY

APA	Administrative Procedure Act
DHS	Department of Homeland Security
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
OPT	Optional Practical Training
STEM	Science, Technology, Engineering, and Mathematics
Washtech	Washington Alliance of Technology Workers

INTRODUCTION

The optional practical training (OPT) program authorizes certain international students, who have entered the United States on F-1 student visas, to complete their education with term-limited employment opportunities directly related to their fields of study. Practical training programs like OPT have existed at least since 1947, and these programs—along with the regulations authorizing them—have been maintained through every upheaval in the immigration laws in the intervening decades. Today, hundreds of thousands of foreign students participate in optional practical training, and it forms a cornerstone of the international student experience in America. For nearly seventy-five years, OPT has rested on sound legal footing.

With this lawsuit, Washtech seeks to change all that, maintaining that every presidential administration since Harry Truman's has acted lawlessly in approving practical training. Not only that, but if Washtech's broad claims were to succeed, scores of other immigration programs—including, for example, work authorization for H-4 spouses (*see, e.g.*, *Save Jobs USA v. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019))—would crumble too. But Washtech's legal arguments lack substance: The Department of Homeland Security (DHS) has ample statutory authority to permit post-completion practical training for foreign students, and it

has exercised that authority reasonably here. The district court correctly entered summary judgment for the government and Intervenors.

STATUTES AND REGULATIONS

All applicable statutes are contained in the Brief for Appellant.

ISSUE PRESENTED FOR REVIEW

May DHS authorize foreign students in F-1 status to engage in term-limited practical training after the completion of their studies, through temporary employment in a field related to their coursework, as has been permitted since 1947?

STATEMENT

A. Statutory background.

The Immigration and Nationality Act (INA) creates several classes of nonimmigrants, noncitizens permitted to enter the United States temporarily and for a specific purpose. *See* 8 U.S.C. § 1101(a)(15). The optional practical training (OPT) program at issue in this case is available to students in F-1 status, which may be obtained by

> 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 the United States temporarily and solely for the purpose of pursuing such a course of study . . . at an established . . . academic institution[.]

8 U.S.C. § 1101(a)(15)(F)(i).

The INA further provides that "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary of Homeland Security] may by regulations prescribe." 8 U.S.C. § 1184(a)(1).[1]

Finally, federal law identifies which noncitizens in the United States are authorized to work. It is unlawful for an employer to hire an "unauthorized alien." 8 U.S.C. § 1324a(a)(1). And the statute defines an "unauthorized alien" as one who is neither "lawfully admitted for permanent residence" nor "authorized to be so employed by this chapter or by the [Secretary of Homeland Security]." *Id*. § 1324a(h)(3).

B. The OPT Program.

Though the details have varied over the years, executive-branch programs permitting international students to accept education-related employment in the United States have existed for the better part of the last century. As a district court observed in 2015, "[f]or almost 70 years, DHS and its predecessor, the Immigration and Naturalization Service

[1] The statute refers to the Attorney General, rather than the Secretary of Homeland Security; with the transfer of immigration authority to the Department of Homeland Security in 2003, that statutory reference is now "deemed to refer to the Secretary." 6 U.S.C. §§ 557, 202; *see Wash. All. of Tech. Workers v. DHS*, 892 F.3d 332, 337 n.1 (D.C. Cir. 2018).

('INS'), have interpreted the immigration laws to allow students to engage in employment for practical training purposes." *Wash. All. of Tech. Workers v. DHS*, 156 F. Supp. 3d 123, 129 (D.D.C. 2015) (*Washtech II*); *see infra* pages 24-41.

That history dates back at least to 1947, before the enactment of the INA and the current statute authorizing the F-1 student visa. At that time, INS promulgated a regulation permitting "employment for practical training" if recommended by a foreign student's school. 12 Fed. Reg. 5,355, 5,357 (Aug. 7, 1947). In practice, this regulation allowed post-completion practical training, just like the OPT program. *See* S. Rep. No. 81-1515, at 503 (1950) ("[S]ince the issuance of the revised regulations in August 1947 . . . practical training has been authorized for 6 months *after completion of the student's regular course of study*.") (emphasis added). After the INA was enacted in 1952, requiring a new set of immigration regulations, the government issued a new practical training rule with nearly identical language. *See* 18 Fed. Reg. 3,526, 3,529 (June 19, 1953).

Additional regulations followed, all based on the conclusion that the immigration agency may authorize practical training opportunities for international students. *See, e.g.*, *Special Requirements for Admission, Extension, and Maintenance of Status*, 38 Fed. Reg. 35,425, 35,426 (Dec. 28,

1973) ("If a student requests permission to accept or continue employment in order to obtain practical training, an authorized school official must certify that the employment is recommended for that purpose and will provide the student with practical training in his field of study[.]"); *Nonimmigrant Classes; Change of Nonimmigrant Classification; Revisions in Regulations Pertaining to Nonimmigrant Students and the Schools Approved for Their Attendance*, 48 Fed. Reg. 14,575, 14,586 (Apr. 5, 1983) (allowing "[t]emporary employment for practical training," including "[a]fter completion of the course of study").

The current manifestation of this longstanding principle, optional practical training, was established by regulation in 1992, during the George H.W. Bush administration. *See Pre-Completion Interval Training; F-1 Student Work Authorization*, 57 Fed. Reg. 31,954 (July 20, 1992) (1992 Rule). Optional practical training "is a form of temporary employment available to F-1 students . . . that directly relates to a student's major area of study in the United States." JA 42 (*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, 13,040 (Mar. 11, 2016) (2016 Rule)).

In 2008, during the George W. Bush administration, the Department of Homeland Security (DHS) promulgated a regulation that provided for an OPT extension of up to 17 months for students holding a STEM degree—that is, a degree in science, technology, engineering, or mathematics. *See Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions*, 73 Fed. Reg. 18,944 (April 8, 2008) (2008 Rule). Subsequently, during the Obama administration, DHS expanded the STEM OPT extension to a maximum period of 24 months. *See* JA 42-123 (2016 Rule, 81 Fed. Reg. 13,040).

The OPT program is premised on the widespread understanding that "practical training is an accepted and important part of international post-secondary education," and "such work-based learning is a continuation of the student's program of study." JA 52-53 (81 Fed. Reg. at 13,050-13,051)). In the 2016 Rule, DHS explained:

> [T]he OPT program enriches and augments a student's educational experience by providing the ability for students to apply in professional settings the theoretical principles they learned in academic settings. By promoting the ability of students to experience first-hand the connection between theory in a course of study and practical application, including by applying abstract concepts in attempts to solve real-world problems, the OPT program enhances their educational experiences.

JA 53 (81 Fed. Reg. at 13,051).

Current DHS regulations provide that an F-1 student "may apply to USCIS for authorization for temporary employment for optional practical training directly related to the student's major area of study." 8 C.F.R. § 214.2(f)(10)(ii)(A); *see also id.* § 274a.12(c)(3) (providing that "[i]f authorized" for OPT, an F-1 student "may accept employment subject to any restrictions stated in the regulations"). Any student may be authorized for up to 12 months of OPT, either while the student is enrolled in school or "after completion of the course of study." 8 C.F.R. § 214.2(f)(10), (f)(10)(ii)(A)(3).

Additionally, as a result of the 2016 Rule, students with degrees in "a field determined by the Secretary . . . to qualify within a science, technology, engineering, or mathematics field" may be granted a 24-month extension to post-completion OPT. 8 C.F.R. § 214.2(f)(10)(ii)(C), (C)(2).

This STEM OPT extension is subject to additional procedural requirements, including that "each STEM OPT student [must] prepare and execute with their prospective employer a formal training plan that identifies learning objectives and a plan for achieving those objectives," and that the employer must "attest that (1) it has sufficient resources and trained personnel available to provide appropriate training in connection with the specified opportunity; (2) the student on a STEM OPT extension will not replace a full- or part-time, temporary or permanent U.S. worker; and (3) the opportunity helps the student attain his or her training objectives." JA 43 (81 Fed. Reg. at 13,041), *see* 8 C.F.R. § 214.2(f)(10)(ii)(C)(7), (10).

In addition to authorizing employment for training purposes, the regulations contain a corresponding extension of the duration of status—that is, the period during which a nonimmigrant may lawfully remain in the United States—for F-1 students pursuing post-completion OPT. "For a student with approved post-completion OPT, the duration of status is defined as the period beginning on the date that the student's application for OPT was properly filed . . . , including the authorized period of post-completion OPT, and ending 60 days after the OPT employment authorization expires." 8 C.F.R. § 214.2(f)(10)(ii)(D); *see also id.* § 214.2(f)(5)(i).

C. Procedural background.

1. Washtech's first attempt to judicially upend the OPT program began in 2014, and was aimed at the 2008 regulations, promulgated under President George W. Bush, that first established an OPT extension for STEM students. *See Washtech II*, 156 F. Supp. 3d at 130. That extension had been promulgated without notice and comment, and was thus ultimately set aside on procedural APA grounds, though the district court stayed its order to give DHS time to promulgate a replacement rule. *Id.* at 145-149.

Despite finding that rule procedurally improper, Judge Huvelle thoroughly evaluated the substantive legal contentions and upheld the validity of the OPT program against essentially the same argument pressed here: that "DHS exceeded its statutory authority by issuing the 2008 Rule," because the statutory F-1 definition limits entry to students currently studying at an approved school. *Washtech II*, 156 F. Supp. 3d at 137, 139. The district court granted summary judgment for the government on this claim, finding a statutory "ambiguity" as to "whether the scope of F-1 encompasses post-completion practical training related to the student's field of study," and concluding after detailed statutory and historical analysis that, "[i]n light of Congress' broad delegation of authority to DHS to regulate the duration of a nonimmigrant's stay and

Congress' acquiescence in DHS's longstanding reading of F-1, . . . the agency's interpretation is not unreasonable." *Id.* at 140, 145.

While the case was on appeal, DHS promulgated the 2016 Rule at issue here, remedying the procedural failings of the 2008 Rule. This Court therefore vacated the *Washtech II* opinion as moot, rendering it without preclusive effect but leaving its persuasive value intact. *Wash. All. of Tech. Workers v. DHS*, 650 F. App'x 13, 14 (D.C. Cir. 2016) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950)); *see Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 353-354 (D.C. Cir. 1997) (opinions vacated for mootness "remain 'on the books'" so that "future courts" can "consult [their] reasoning.").

2. Washtech promptly sued again, this time challenging the 2016 Rule and the 1992 Rule that had originally created the modern OPT program. The district court, Judge Walton, initially dismissed the complaint on standing grounds and for failure to state a claim (*Wash. All. of Tech. Workers v. DHS*, 249 F. Supp. 3d 524 (D.D.C. 2017)), but this Court reversed in part. The Court reversed as to standing; on the merits, it held that the challenge to the 1992 Rule (Count I) was time-barred, and that Counts III and IV failed to state claims under procedural and arbitrary-and-capricious theories. *Wash. All. of Tech. Workers v. DHS*, 892 F.3d 332, 342, 346-348 (D.C. Cir. 2018). However, the Court also reversed the

district court's concession-based dismissal of Washtech's statutory-authority claim (Count II), and remanded for the district court to consider whether the 2016 Rule "reopened the issue of whether the OPT program as a whole is statutorily authorized" so as to allow Count II to proceed despite the statute of limitations. *Id.* at 343-346.

3. On remand, the district court held that the 2016 Rule did reopen the statutory-authority issue. *Wash. All. of Tech. Workers v. DHS*, 395 F. Supp. 3d 1, 15 (D.D.C. 2019). Further, the district court granted permission for the National Association of Manufacturers, the Chamber of Commerce of the United States, and the Information Technology Industry Council to intervene in this action (*id.* at 15-21)—a decision not challenged here.

The case proceeded to summary judgment solely on Count II of the complaint, which asserts that the "DHS policy of allowing aliens to remain in the United States after completion of the course of study to work or be unemployed is in excess of DHS authority." D. Ct. Dkt. 1, ¶ 63.

The district court granted summary judgment to the government and Intervenors. *See generally* JA 1-38. In a detailed opinion that adopts and builds upon the reasoning from Judge Huvelle's *Washtech II* decision, the court held that the F-1 statute is ambiguous because "Congress has not directly addressed the precise question at issue, namely, whether

the scope of F-1 encompasses post-completion practical training," and that, at *Chevron* step two, "the 2016 OPT Program Rule is a reasonable interpretation of the F-1 statute." JA 23, 38 (quotation marks and citation omitted).

SUMMARY OF THE ARGUMENT

The district court correctly concluded that DHS possesses authority to authorize post-completion practical training for international students in F-1 status.

1. Contrary to Washtech's principal argument, the statutory definition of an F-1 nonimmigrant does not preclude post-completion practical training. Rather, as the district court held, the F-1 statute's requirement that the student "seek[] to enter the United States . . . solely for the purpose of pursuing a [full] course of study" "could sensibly be read as an entry requirement" (JA 23 (quoting 8 U.S.C. § 1101(a)(15)(F)(i))), leaving to DHS the task setting the requirements for maintenance of status pursuant to its express authority to "prescribe" the "conditions" governing nonimmigrants' stay in the United States (8 U.S.C. § 1184(a)(1)).

Indeed, the Executive Branch has permitted post-completion practical training for international students since 1947, and Congress has repeatedly declined to overturn that practice—even after being directly in-

formed of it, and even while reenacting the F-1 definition without relevant change. That history further supports DHS's exercise of authority here.

2. Washtech is also wrong in arguing that DHS lacks the power to authorize *any* noncitizens to work, beyond those already granted employment authorization by statute. To the contrary, DHS is empowered both generally to make regulations and specifically to set the terms and conditions of nonimmigrants' admission, and Congress has enacted into law a reference to noncitizens "authorized to be so employed . . . by the [Secretary of Homeland Security]" (8 U.S.C. § 1324a(h)(3))—a provision that squarely confirms the authority of DHS to grant work authorization to classes of noncitizens.

3. Finally, while there is no disputing that regulations must be "'reasonably related' to the purposes of the legislation" (*Doe, 1 v. Fed. Election Comm'n*, 920 F.3d 866, 871 (D.C. Cir. 2019) (quoting *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973)), that standard is easily satisfied here. Authorizing international students to engage in term-limited post-completion practical training related to the individual's field of academic study is inherently tied to the educational purposes of the F-1 student visa. Indeed, such experiential learning has long been at the core of the educational system.

ARGUMENT

I. THE OPT PROGRAM IS A LAWFUL EXERCISE OF DHS AUTHORITY.

Washtech would have this Court hold that every presidential administration since Harry Truman's has acted unlawfully by authorizing foreign students to engage in term-limited practical training after the completion of their classroom studies. If that sounds implausible, it should: DHS has ample authority to authorize noncitizen employment, it has used that authority reasonably here, and OPT is not precluded by the statutory definition of F-1 status. The program should be upheld.

One point of table-setting: The district court decided this case under the *Chevron* framework, first holding that the relevant statutes are ambiguous and then holding that OPT represents a reasonable interpretation of those statutes. JA 20-22; *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The bulk of the arguments we set out below are equally applicable at either step of *Chevron*, as they represent applications of "the 'traditional tools' of construction" that "a court must exhaust" before turning to the second *Chevron* step. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9). Whether the Court chooses to decide this case at step one or step two, therefore,

the result is the same: OPT is a lawful exercise of congressionally delegated authority.

A. The F-1 nonimmigrant definition does not preclude DHS from authorizing post-completion practical training.

Washtech's lead argument is that the OPT program is unlawful "because student visa status is limited solely to pursuing a course of study at an approved academic institution." Washtech Br. 16. That is doubly wrong: It is wrong as a matter of the plain text and context of the statute, and it is belied by nearly seventy-five years of executive practice, long recognized yet unaltered by Congress.

1. Washtech's argument fails as a textual matter.

a. Washtech contends that, pursuant to the F-1 visa definition, noncitizens must exit the country immediately upon graduation from their course of study. But the text does not support this contention. Rather, the statutory text defines an F-1 visa holder as one who, among other things, "*seeks to enter* the United States . . . solely for the purpose of pursuing [a full] course of study . . . at an established college, university, . . . or other academic institution." 8 U.S.C. § 1101(a)(15)(F). That is, the F-1 statute describes conditions that must be met at the time a stu-

dent applies for a visa and "seeks to enter" the country. *See also id.* (student must be "*qualified* to pursue a full course of study," again looking to matters as of the date of entry) (emphasis added).

The INA, moreover, explicitly empowers the Attorney General (now DHS) to "prescribe" the "conditions" via "notice-and-comment rulemaking" that govern the approved conduct and duration-of-stay of lawfully-admitted noncitizens. 8 U.S.C. § 1184(a)(1) ("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."); *see also id.* § 1103(a)(1), (a)(3) (general grant of rulemaking authority). And DHS has done so in voluminous fashion, filling 144 pages of the Code of Federal Regulations with "[s]pecial requirements for admission, extension, and maintenance of status" for the various nonimmigrant classifications. 8 C.F.R. § 214.2.

In other words—and as the district court correctly concluded—Section 1101(a)(15)(F)(i) "could sensibly be read as an *entry requirement*" (JA 23 (quoting *Washtech II*, 156 F. Supp. 3d at 139)), leaving to DHS the task of formulating, by regulation, the "conditions" for maintaining that status after entry (8 U.S.C. § 1184(a)(1)). This conclusion effectively ends the case, since "[n]o one disputes that all F-1 aliens enter the United

States as 'students' under any conceivable definition," and that their purpose at the time of entry is "solely" to study at an approved academic institution. JA 24 n.12 (quoting *Washtech II*, 156 F. Supp. 3d at 140). Indeed, applications for OPT come years after that admission to the United States, and many students neither apply for nor receive OPT authorization, meaning that the OPT decision is removed from the underlying entry criteria. *See* David J. Bier, *The Facts about Optional Practical Training (OPT) for Foreign Students* (May 20, 2020), perma.cc/BQU5-2K6M.

b. What is more, DHS *must* have authority to issue regulations to define the proper scope of the "status" conferred by an F-1 visa. 8 U.S.C. § 1184(a)(1). Washtech's contrary position—that students pursuing OPT flatly "no longer conform to the status for which they are admitted" because they "are no longer pursuing a course of study once they graduate" (Washtech Br. 16)—would lead to incredible and illogical results. It would mean, for example, that the *day after graduation*, an F-1 student would be out of status and thus not lawfully present in the United States. But DHS regulations reasonably provide a "60-day period to prepare for departure from the United States." 8 C.F.R. § 214.2(f)(5)(iv). Of course DHS has power to so regulate noncitizens present on F-1 visas; the authority of DHS does not terminate the day after graduation.

Similarly, during summer break, when an individual is not actively "pursu[ing] a full course of study" (Washtech Br. 16), Washtech apparently believes that the noncitizen is not properly within F-1 status. But DHS regulations appropriately authorize an individual to take "the annual (or summer) vacation if the student is eligible and intends to register for the next term" (8 C.F.R. § 214.2(f)(5)(iii)), rather than having to either take summer school or leave the country.

In sum, DHS must have authority to authorize F-1 students to remain in status, even when they are not presently undertaking a full course of study—otherwise, the statute would lead to absurd results. *See, e.g.*, *Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039, 1045-1046 (D.C. Cir. 2015) (courts "must … avoid statutory interpretations that bring about an anomalous result when other interpretations are available.") (quotation marks omitted); *Kaseman v. District of Columbia*, 444 F.3d 637, 642 (D.C. Cir. 2006) ("When possible, statutes should be interpreted to avoid untenable distinctions, unreasonable results, or unjust or absurd consequences.") (quotation marks omitted). And a construction that avoids that "anomalous result" is eminently "available" (*Validus Reinsurance*, 786 F.3d at 1045-1046), because Section 1184(a)(1) explicitly provides DHS with the authority to define the terms and conditions of noncitizens' admission by regulation. *See, e.g.*, JA 47 (81 Fed.

Reg. at 13,045) (identifying Section 1184(a)(1) as part of the authority for OPT); JA 61 (81 Fed. Reg. at 13,059) (same).

c. Washtech's objections to this reasoning do not stand up to scrutiny. First, reasonably interpreting the F-1 definition as setting out entry requirements would not empower DHS "to regulate out of existence all differences among non-immigrant visas [] other than what the alien has to show at the time of admission." Washtech Br. 21. To the contrary, DHS regulations that—pursuant to express statutory command—"prescribe" the "conditions" of a nonimmigrant's admission (8 U.S.C. § 1184(a)(1)) are subject to the same constraint as all other regulations: They must be "'reasonably related' to the purposes of the legislation"—here, the educational purposes of the F-1 student visa—in order to survive a challenge in court. *Doe, 1*, 920 F.3d at 871; *see also, e.g.*, *Cmty. for Creative Non-Violence (CCNV) v. Kerrigan*, 865 F.2d 382, 385 (D.C. Cir. 1989) ("To be valid, a regulation must be reasonably related to the purposes of the enabling legislation.") (quotation marks omitted).[2]

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[2] Whether this inquiry is characterized as an arbitrary-and-capricious standard or a *Chevron* step two question is perhaps academic, as the two inquiries "often . . . overlap[]." *Pharm. Res. & Mfrs. of Am. v. FTC*, 790 F.3d 198, 204 (D.C. Cir. 2015). *Compare, e.g.*, *Keating v. FERC*, 569 F.3d 427, 433 (D.C. Cir. 2009) (agency action "was not arbitrary or capricious" because agency "articulated rational reasons related to its statutory responsibility"), *with Good Fortune Shipping SA v. Commissioner*, 897 F.3d

This standard is "deferential" (*Lederman v. United States*, 89 F. Supp. 2d 29, 34 (D.D.C. 2000)), but it is "stricter . . . than the minimum rationality required of congressional statutes" (*CCNV*, 865 F.2d at 168), and would be more than sufficient to preclude the concerns raised by Washtech, such as a hypothetical regulation allowing F-1 status to last for "unlimited duration" after graduation. Washtech Br. 26-27. After a graduate reaches a certain point in his or her career, continued employment would cease to be "reasonably related" to the educational "purposes" of the F-1 statute (*Doe, 1*, 920 F.3d at 871), and would no longer be permitted.

As discussed below (*see* pages 52-57, *infra*), the OPT Rule itself easily satisfies this standard—and Washtech has never argued otherwise. But the principle serves to prevent Washtech's parade of horribles.[3]

256, 261 (D.C. Cir. 2018) ("At *Chevron* Step Two . . . [o]ur focus is thus on 'whether the agency has reasonably explained how the permissible interpretation it chose is rationally related to the goals of the statute.'") (quotation marks omitted; alteration incorporated).

[3] This framing also answers Washtech's reliance on the F-1 statute's reporting requirement for participating schools. *See* Washtech Br. 19-20. The reporting requirement reflects a congressional concern with foreign students dropping out of school—that is, ceasing to pursue the education for which they were admitted—but remaining in the country; a regulation that permitted that behavior would surely fail to be reasonably related to the purposes of F-1 under cases like *Doe 1*. By contrast, OPT permits students to continue their education through practical training

In a similar vein, the district court's opinion certainly does not "deny Congress the power to restrict activity on student visas after admission," contrary to Washtech's hyperbolic assertion. Washtech Br. 33. Of course Congress can override an agency's regulation; Congress could simply enact a statute providing: "nonimmigrants on F-1 status may *not* engage in post-graduation practical training"—and that would be the end of OPT. Indeed, Washtech's hypothetical statutory amendment (*id.*) might even have the same effect, as it uses the future tense and is therefore naturally read as forward-looking. But that is not the statute Congress wrote.

Washtech also points to the statutory requirement that DHS's regulations "insure that" a nonimmigrant "will depart from the United States" "upon failure to maintain the status under which he was admitted" (8 U.S.C. § 1184(a)(1)), accusing the district court of "selectively edit[ing] the statute to omit th[is] contradictory clause." Washtech Br. 20. But far from ignoring this provision, the district court directly addressed Washtech's contention. As the court explained, "Washtech's argument assumes the conclusion," because the entire question in this case is

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related to their chosen fields of study, and thus maintains a rational relationship to F-1's educational purposes. *See* pages 28-31, *infra*.

"whether the scope of F-1 [status] encompasses post-completion practical training related to the student's field of study." JA 27 (quotation marks omitted). In other words, "Washtech cannot answer a question about the proper scope of the F-1 visa category by pointing to an obligation to enforce that scope, whatever it may be." *Id.*

Next, Washtech musters a string-cite of cases that it says support its position—but upon inspection, none of the cases are actually relevant. The bulk of Washtech's cases (*Xu Feng*, *Igbatayo*, *Khano*, and *Olaniyan*) simply hold that a student becomes deportable when she drops below a full course of study, drops out entirely, or accepts employment that is not authorized by the government—each of which is prohibited by DHS regulations, and none of which is disputed here. *Narenji* and *Alzanki* just state that noncitizens are deportable if they fail to maintain their lawful status—which, as just noted, is question-begging. The *Longshoremen's* case appears to be entirely unrelated to the issue at hand.

As for *Elkins v. Moreno*, 435 U.S. 647 (1978)—and *Anwo v. INS*, 607 F.2d 435 (D.C. Cir. 1979), which simply applies *Elkins*—the principle at issue there is non-controversial: In exercising its authority to set the conditions governing noncitizens lawfully admitted to the United States, the government *may* determine that it will deport individuals who, following admission, lose a condition of their entry. *Elkins*, 435 U.S. at 666 ("a

nonimmigrant alien who does not maintain the conditions attached to his status *can* be deported") (emphasis added).[4] That observation does not compel the government to exercise its authority to develop regulations that in fact so narrowly restrict the conditions of an individual's lawful continued presence.[5]

Finally, Washtech takes issue with the district court's finding ambiguity in the F-1 statute's use of the word "student." Washtech Br. 21-24; *see* JA 23-24 (quoting *Washtech II*, 156 F. Supp. 3d at 140). Contrary to Washtech's straw-man argument, the ambiguity observed by the district court was not whether a "student of history" might qualify for an F-

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[4] In further stating that, "[b]y including restrictions on intent in the definition of some nonimmigrant clauses, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States was to immigrate permanently" (*Elkins*, 435 U.S. at 665), the Court underscored that the analysis is conducted at the time of admission.

[5] And even if that were not so, those cases are concerned with the requirement that certain classes of nonimmigrants, including F-1 students, maintain a foreign residence. That requirement is phrased "having a residence in a foreign country," which could suggest an ongoing requirement—and moreover is set off by commas and thus syntactically distinct from the "course of study" requirement, which applies when the noncitizen "seeks to enter the United States" (8 U.S.C. § 1101(a)(15)(F)(i)). Even if the foreign-residence requirement persists past admission, that does not mean that the course-of-study requirement does so as well.

1 visa; it was whether the statute's reference to a "student" unambiguously excludes someone who comes to the country as a university student and then completes her education through term-limited practical training in a field related to her course of study. JA 23. As to *that* question, the court found "dictionary definitions . . . unhelpful" (JA 25)—and rightly so. In short, the district court was correct to view the F-1 definition as setting out an entry requirement, not a continuing requirement of a constant attendance at an academic institution.

2. The Executive has interpreted the INA to allow post-completion practical training for more than seventy years.

The district court also properly relied on an unbroken history of administrative interpretations of the F-1 statute, which have held since 1947 that term-limited practical training does not violate F-1 status. JA 31-35 & nn.14-15; *see, e.g.*, *Altman v. SEC*, 666 F.3d 1322, 1326 (D.C. Cir. 2011) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'") (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986)).

a. The consistent administrative interpretation predates the 1952 INA. The Immigration Act of 1924 established the precursor to the F-1 student visa definition, with nearly identical language:

> [a]n immigrant who is ***a bona fide student*** at least 15 years of age and who ***seeks to enter the United States solely for the purpose of study at an accredited school***, college, academy, seminary, or university, particularly designated by him and approved by the Secretary of Labor, which shall have agreed to ***report to the Secretary of Labor the termination of attendance of each immigrant student***, and if any such institution . . . fails to make such reports promptly the approval shall be withdrawn.

Immigration Act of 1924, Pub. L. No. 68-139, § 4(e), 43 Stat. 153, 155 (emphases added).

In 1947, the immigration agency promulgated a regulation providing for practical training under this definition: "In cases where employment for practical training is required or recommended by the school, the district director may permit the student to engage in such employment for a six-month period subject to extension for not over two additional six-month periods." 12 Fed. Reg. 5,355, 5,357 (Aug. 7, 1947). This practical training was understood to take place after graduation—just like OPT. *See* S. Rep. No. 81-1515, at 503 (1950) ("[S]ince the issuance of the revised regulations in August 1947 . . . practical training has been authorized for

6 months *after completion of the student's regular course of study*.") (emphasis added).

Congress was no doubt aware of the regulation authorizing post-completion practical training when it enacted the 1952 INA. Indeed, the report just quoted was prepared by the Senate Judiciary Committee itself and presented to Congress in 1950 as "a full and complete investigation of our entire immigration system." S. Rep. No. 81-1515, at 1. And as the leading immigration law treatise explains, the 1952 INA "had its genesis in" precisely this "two-year study by the Senate Judiciary Committee." 1 Charles Gordon et al., *Immigration Law & Procedure* § 2.03[1] (2019).

With knowledge in hand of the post-completion practical training program already implemented under the 1924 Act's student visa definition, Congress reenacted a materially identical definition for the new F-1 student visa in the 1952 INA:

> 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 the United States*** temporarily and ***solely for the purpose of pursuing such a course of study at an established institution of learning*** or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to ***report to the Attorney General the termination of attendance of each nonimmigrant student***, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn[.]

Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15)(F), 66 Stat. 163, 168 (1952) (emphases added); *compare* Immigration Act of 1924, Pub. L. No. 68-139, § 4(e), 43 Stat. 153, 155 (quoted in full *supra*).[6]

Congress's reenactment of this statutory language—identical in all relevant ways to the provision the government had already interpreted as allowing post-completion practical training—is particularly strong evidence that the Congress that passed the INA intended to permit that practice. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580-

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[6] The district court, moreover, thoroughly explained that the change in terminology regarding international students—changing them from nonquota immigrants in the 1924 Act to nonimmigrants in the 1952 INA—is not substantively relevant to the issues present here. *See* JA 35 n.15.

581 (1978)); *accord, e.g.*, *Owens v. Republic of Sudan*, 864 F.3d 751, 778 (D.C. Cir. 2017) (same).

In enacting the 1952 INA, Congress thus ratified the government's interpretation that a visa category for "bona fide student[s]" who "seek[] to enter the United States solely for the purpose of study at an accredited school" (Immigration Act of 1924, § 4(e)) is amenable to post-completion practical training programs like OPT.

b. Following the 1952 INA, the immigration agencies time and again reiterated their authority to authorize practical training. *See, e.g.*, 18 Fed. Reg. 3,526, 3,529 (June 19, 1953) ("Whenever employment for practical training is required or recommended by the institution or place of study attended by the applicant, the district director or officer in charge . . . may permit such employment of the alien for a six-month period subject to extension for not over two additional six-month periods[.]"); *Special Requirements for Admission, Extension, and Maintenance of Status*, 38 Fed. Reg. 35,425, 35,426 (Dec. 28, 1973) ("If a student requests permission to accept or continue employment in order to obtain practical training, an authorized school official must certify that the employment is recommended for that purpose and will provide the student with practical training in his field of study[.]").

Starting in 1983, those regulations became yet more explicit that practical training is authorized after the student's "course of study" is completed. *See Nonimmigrant Classes; Change of Nonimmigrant Classification; Revisions in Regulations Pertaining to Nonimmigrant Students and the Schools Approved for Their Attendance*, 48 Fed. Reg. 14,575, 14,586 (Apr. 5, 1983) (allowing "[t]emporary employment for practical training" both "[a]fter completion of the course of study" and "[b]efore completion of the course of study during the student's annual vacation"); *Pre-Completion Interval Training; F-1 Student Work Authorization*, 57 Fed. Reg. 31,954, 31,956 (July 20, 1992) (establishing OPT program and providing for "temporary employment for practical training directly related to the student's major area of study," including "after completion of the course of study."); *Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS)*, 67 Fed. Reg. 76,256, 76,274 (Dec. 11, 2002) (same); 2008 Rule, 73 Fed. Reg. at 18,954; JA 119 (2016 Rule, 81 Fed. Reg. at 13,117).

Even before 1983, though, many contemporaneous Board of Immigration Appeals decisions describe students being granted permission to engage in post-completion practical training under the prior regulations. *See, e.g.*, *Matter of Alberga*, 10 I. & N. Dec. 764, 765 (B.I.A. 1964) ("Upon completion of her last course," noncitizen student "applied for permission

to engage in practical training" and "was granted permission to engage in two periods of such training."); *Matter of Wang*, 11 I. & N. Dec. 282, 283 (B.I.A. 1965) (noncitizen student "obtained a Master of Library Science Degree . . . which was followed by 18 months of practical training in Library Science[.]"); *Matter of Yau*, 13 I. & N. Dec. 75, 75 (B.I.A. 1968) (noncitizen student's "third and final period of practical training following graduation will expire August 8, 1968[.]"); *Matter of Yang*, 15 I. & N. Dec. 147, 148 (B.I.A. 1974) ("Upon completion of his course of study in electronics in January of 1971 [noncitizen student] was granted permission to engage in employment as practical training[.]"); *Matter of Gutierrez*, 15 I. & N. Dec. 727, 727-728 (B.I.A. 1976) ("Subsequent to his graduation in 1972, [noncitizen student] was allowed eighteen additional months practical training on his nonimmigrant student visa.").

Similarly, in 1975, the INS Commissioner testified that student "[e]mployment for practical training may be engaged in full time" for up to eighteen months. *Review of Immigration Problems: Hearings Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 94th Cong. 23 (1975) (testimony of INS Commissioner). Altogether, "several pieces of evidence strongly suggest" that the regulations dating back to 1947 in fact "allowed alien students to engage in full-time, post-completion employment without simultaneously

attending classes." JA 32 n.14 (quoting *Washtech II*, 156 F. Supp. 3d at 141 n.7).

c. In the face of these clear and repeated statements of administrative interpretation, "Congress has never repudiated INS or DHS's interpretation permitting foreign students to engage in post-completion practical training," even as it "amended the provisions governing nonimmigrant students on several occasions." JA 33 (quoting *Washtech II*, 156 F. Supp. 3d at 142-143 (citing Pub. L. No. 87-256, § 109(a), 75 Stat. 527, 534 (1961) (allowing an F-1 nonimmigrant's noncitizen spouse and minor children to accompany him); Immigration Act of 1990 § 221(a) (permitting F-1 nonimmigrants to engage in limited employment unrelated to their field of study); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 625, 110 Stat. 3009-546, 3009-699 (adding limitations related to F-1 nonimmigrants at public schools); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §§ 501-502, 116 Stat. 543, 560-63 (implementing monitoring requirements for foreign students); Pub. L. No. 111-306, § 1, 124 Stat.

3280, 3280 (2010) (amending F-1 with respect to language training programs)).[7]

To the contrary, the pilot program for employment *unrelated* to a student's field of study "demonstrates Congress's understanding that 'INS's regulations *already authorized* student employment related to the student's field of study, and these regulations were explicit in permitting post-completion employment.'" JA 36 (quoting *Washtech II*, 156 F. Supp. 3d at 143) (emphasis added). At the very least, "Congress has repeatedly and substantially amended the relevant statutes without disturbing [the Executive's] interpretation." *Id.* (quoting *Washtech II*, 156 F. Supp. 3d at 143).

d. Nor is there any lack of "evidence of (or reason to assume) congressional familiarity with the administrative interpretation at issue" throughout the intervening years. *Cf. Pub. Citizen, Inc. v. U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 669 (D.C. Cir. 2003) (declining to rely on congressional acquiescence in the absence of such evidence). To begin, the age of the interpretation alone undercuts any suggestion that

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[7] *See also* JA 33-34 (quoting *Washtech II*, 156 F. Supp. 3d at 142-143 (citing additional instances in which Congress enacted labor protections for domestic workers, but did nothing to prohibit OPT or other practical training programs)).

Congress was unaware of it. As the district court put it, "[c]ongressional obliviousness of such an old interpretation of such a frequently amended statute" is "unlikely." JA 36 (quoting *Washtech II*, 156 F. Supp. 3d at 143).

Moreover—and wholly apart from this commonsense judgment—Congress surely has known of DHS's interpretation for decades even apart from the enactment of the INA itself, because congressional hearing testimony has explicitly and repeatedly referenced that interpretation. As the Commissioner of the INS told a congressional subcommittee in 1975:

> There is no express provision in the law for an F-1 student to engage in employment. Nevertheless, for many years, the Service has permitted students to accept employment under special conditions which we believe to be consistent with the intent of the statute.

Review of Immigration Problems: Hearings Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary, 94th Cong. 21 (1975) (statement of Leonard F. Chapman, Jr., Comm'r, INS); *see also id.* (such conditions include "where the employment is recommended by the school in order for the student to obtain practical training in a field related to his course of study.").

Other examples abound. *See Immigration Policy: An Overview: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 15-16 (2001) (statement of Warren R. Leiden, American Immigration Lawyers Association) ("Foreign students in F-1 status are eligible for two primary types of 'practical training' work authorization" including "optional practical training . . . which can be undertaken during studies or for one year after graduation"); *Immigration Reform: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary on S. 358 and S. 448*, 101st Cong. 485-486 (1989) (statement of Frank D. Kittredge, President, National Foreign Trade Council) ("Under current INS regulations, foreign students under § 101(a)(15)(F) of the Act are appropriately given the opportunity to engage in a brief period of practical training upon completion of their university education and in furtherance of their educational goals."); *Illegal Aliens: Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary, Pt. 1*, 92d Cong. 265-266 (1971) (memorandum from Sam Bernsen, Assistant Commissioner, INS) (noting that "F-1 students . . . may, under certain circumstances be permitted to work," including "for practical training," and that "[t]he alien continues to retain his F-1 classification during the time he is authorized to engage in practical training."). And again, the Senate Judiciary Committee *itself* noted the INS's interpretation of

the statute as permitting post-completion practical training as early as 1950. S. Rep. No. 81-1515, at 503.

With all this evidence in mind, there can be no doubt that the immigration agencies' interpretation of the INA as allowing post-completion practical training was "fully brought to the attention" of Congress, whose decision not to override that interpretation thus indicates that "the legislative intent has been correctly discerned." *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 27 (D.D.C. 2015) (quoting *Bolden v. Blue Cross & Blue Shield Assoc.*, 848 F.2d 201, 208-209 (D.C. Cir. 1988)); *see Washtech II*, 156 F. Supp. 3d at 144 ("The Court finds this evidence more than sufficient to demonstrate 'congressional familiarity with the administrative interpretation at issue.'") (quoting *Pub. Citizen*, 332 F.3d at 669). By repeatedly amending the immigration laws without changing the Executive's longstanding and well known interpretation of its own authority, Congress has demonstrated that that administrative interpretation is correct. *See, e.g.*, *Schor*, 478 U.S. at 846. OPT is fully consistent with the INA.

e. In its brief, Washtech takes issue with some of these pieces of historical evidence (and others cited by the district court), and offers some history of its own. *See* Washtech Br. 36-44. But again, these objections fail to hold up upon inspection.

Perhaps most importantly, Washtech attempts to evade the 1950 Senate Report cited above—which clearly informed Congress that then-existing regulations authorized "practical training . . . for 6 months after completion of the student's regular course of study" (S. Rep. No. 81-1515, at 503 (1950))—based on a purported distinction between a "course of study" and "graduation." Washtech Br. 38.

But this objection makes no sense because the gravamen of Washtech's appeal is precisely that "DHS lacks the authority to allow aliens admitted on student visas to remain in the United States once they have *completed their course of study*." Washtech Br. 16 (emphasis added). That is, Washtech's whole argument is that the F-1 definition, by referencing a visa applicant's intention "solely" "to pursue a full course of study" (8 U.S.C. § 1101(a)(15)(F)(i)), precludes post-completion practical training because such training by definition takes place after the course of study has ended. *See* Washtech Br. 16.

The 1950 Senate Report fatally undermines that argument because it reveals that Congress was aware that "practical training" was being authorized "*after* completion of the student's regular course of study" (S. Rep. No. 81-1515, at 503 (1950) (emphasis added)), yet reenacted a materially identical student-visa definition in the 1952 INA. *See* pages 25-28, *supra*. That is, it is irrelevant that the Senate Report does not use the

word "graduation" (Washtech Br. 38) because Washtech's *own argument* does not turn on graduation as such—Washtech's position is that completion of the "course of study" is the dividing line between lawful and unlawful employment, and the report is indisputable evidence that practical training was authorized under the 1947 regulations *after* that completion. These historical facts foreclose Washtech's position.[8]

Similarly, Washtech takes issue with the district court's citation of a BIA decision that described practical training taking place after the completion of studies, calling it "obscure" and asserting that Congress would not have been aware of it. Washtech Br. 37-38 (citing *Matter of Yau*, 13 I. & N. Dec. 75 (B.I.A. 1968)); *see also id.* at 41. Setting aside that these BIA decisions are simply icing on the historical cake, given the 1950

[8] Washtech also takes issue with another quotation from that report, which described discussions about "liberaliz[ing]" the laws "to permit foreign students to take practical training *before* completing their formal studies" (S. Rep. No. 81-1515, at 505 (1950) (emphasis added)), supporting the inference that practical training *after* a student's "formal studies" was already permitted. *See* JA 32 n.14. Washtech's suggestion that this discussion is inapposite because "[t]rainee was a distinct admission category" is not only unsupported as a factual matter—the page Washtech cites states that trainees were *not* a distinct category (S. Rep. No. 81-1515, at 567)—but is plainly contradicted by the language relied on by the district court, which unmistakably discusses "foreign students" (*id.* at 505).

Senate Report and the regulations that *explicitly* authorized post-completion practical training, *Yau* is simply not the outlier that Washtech suggests. We have cited above numerous additional BIA decisions that similarly reference post-completion practical training taking place prior to 1983, and we cited those same decisions to the district court. *See* page 30, *supra* (collecting cases); D. Ct. Dkt. 72, at 12 (same).

Next, Washtech selects quotations from the 1975 congressional hearing testimony cited above, in which the INS Commissioner "emphasize[d] the word 'solely'" in the F-1 definition, positing that this discussion is inconsistent with the notion that the statute sets up entry requirements. Washtech Br. 39-40. But what the Commissioner actually said is that a student may not "*come here* with the expectation and intention of working" and that "[t]herefore, he has to show"—at the moment "he *applies for* the visa"—"that he has . . . the necessary funds and other resources to carry him through the course of instruction." Chapman testimony, *supra*, at 21 (emphasis added). These remarks, with their focus on the noncitizen's intent at the time he applies for admission, are entirely consistent with the district court's holding. And Washtech cannot dispute that Commissioner Chapman further informed Congress that "off campus employment may be authorized . . . for the student to obtain practical

training in a field related to his course of study," and that such practical training "may be engaged in full time" and "year-round." *Id.* at 21-22.[9]

Washtech also points to a 1981 statutory amendment intended to "specifically limit [F-1 visas] to academic students" (Washtech Br. 43 (quoting S. Rep. No. 96-859, at 7 (1980)), asserting that this amendment "directly contradicts the district court's claim of congressional acquiescence to any policy of permitting work on student visas after graduation." *Id.*

But the very Senate Report on which Washtech relies makes unmistakably plain that these amendments distinguished "academic students" not from *graduates*, but from "*nonacademic or vocational* students," for whom Congress "create[d] a new nonimmigrant category, subparagraph (M)." S. Rep. No. 96-859, at 7 (emphasis added). In other words, the 1981 law simply split F-1—which had previously encompassed both academic and vocational students—into two separate categories,

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[9] Washtech also cites a 1952 House Report, which quotes a letter stating that foreign "students are not permitted to stay beyond the completion of their studies" (Washtech Br. 41 (quoting H.R. Rep. 82-1365, at 40 (1952))—but such an offhand remark does not undermine the district court's conclusion. Of course *generally* foreign students may not stay beyond the completion of their studies; this case is concerned with an exception to that rule. And, as discussed above, Congress was well aware that post-completion practical training was occurring in this timeframe.

one academic and one vocational. *See also* H.R. Rep. 97-264, at 18 (1981) ("Section 2(a) . . . limit[s] the 'F' nonimmigrant student visa to students in academic institutions and language training programs, and . . . create[s] a new 'M' nonimmigrant visa classification for students in nonacademic and vocational schools."). The 1981 amendments had nothing to do with the status of students after graduation.

Finally, Washtech takes unsteady aim at the district court's ratification reasoning as a whole, asserting that because of the differences among the various post-completion practical training regulations that have existed over the past seventy-four years, "it is impossible to identify a specific policy to which Congress might have acquiesced." Washtech Br. 36. But as the district court rightly concluded, while the regulations have changed over the years, they have been entirely consistent with respect to the exact principle that dooms Washtech's claims: Students have long been permitted to engage in practical training after the completion of their course of study. JA 35-36; *compare, e.g.*, S. Rep. No. 81-1515, at 503 (1950) (describing "practical training" under the 1947 regulations "after completion of the student's regular course of study"), *with, e.g.*, 48 Fed. Reg. at 14,586 (allowing, in 1983, "[t]emporary employment for practical training," including "[a]fter completion of the course of study"), *and* 2016

Rule, 81 Fed. Reg. at 13,040 ("A student can apply to engage in OPT . . . after completing the academic program.").

In other words, the "policy to which Congress . . . ha[s] acquiesced" (Washtech Br. 36) is that the Executive may authorize post-completion practical training—and since Washtech's only argument in this lawsuit is precisely that the Executive may *not* do so, this historical evidence is fatal to its claims. Once again, the district court correctly rejected Washtech's arguments, and properly granted summary judgment to the government and Intervenors based on the text, context, and statutory history of the INA.

B. DHS has ample authority generally to authorize noncitizen employment.

As an alternative to its claim that the F-1 definitional statute precludes post-completion practical training, Washtech swings for the fences, contending that DHS is prohibited from authorizing *any* noncitizens to work, outside of those classes already authorized by the INA itself. *See generally* Washtech Br. 27-32. This argument falls flat: Congress has explicitly empowered DHS independently to authorize the employment of lawfully admitted noncitizens.[10]

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[10] Washtech is wrong that the district court "[i]nexplicably . . . does not address" this argument. Washtech Br. 28. In the district court, Washtech

1. "As usual, we start with the statutory text." *E.g. Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020). And the INA's text makes abundantly clear that DHS may authorize classes of noncitizens to hold work authorization.

The 1986 Immigration Control and Reform Act (IRCA) created a "comprehensive scheme" regulating the intersection of employment and immigration (including the employment of unauthorized individuals in the United States). *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). IRCA rendered it a federal offense for an employer to knowingly hire "an unauthorized alien (as defined in subsection (h)(3))." 8 U.S.C. § 1324a(a)(1)(A). The definition of an "unauthorized alien" is thus crucial: Employers may not hire "*unauthorized* alien[s]," meaning that they may hire any *authorized* noncitizen.

Subsection (h)(3) in turn provides that, "[a]s used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to

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couched the argument in extensive citations to *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015); the district court therefore addressed it in the same terms. *Compare* D. Ct. Dkt. 56, at 14; D. Ct. Dkt. 85, at 4, 8-10, *with* JA 27-28.

be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added).

Thus, under IRCA, there are three ways that a noncitizen may be authorized for employment and thus eligible to work: *First*, the noncitizen may be lawfully admitted for permanent residence; *second*, a statute may authorize the noncitizen's employment; or *third*, the noncitizen may be "authorized to be so employed . . . *by the* [*Secretary of Homeland Security*]." 8 U.S.C. § 1324a(h)(3) (emphasis added).

Section 1324a(h)(3) thus recognizes that the Secretary of Homeland Security has the power to authorize employment beyond the categories of noncitizens "authorized to be so employed by [the INA]"—otherwise, this final clause would be meaningless. That is the necessary result of the statute's use of the disjunctive "or." *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law* 116 (2012) ("*[A]nd* combines items while *or* creates alternatives.").

Section 1324a(h)(3) therefore provides definitive statutory evidence that DHS possesses authority to authorize noncitizens to work—even absent express congressional direction as to those particular noncitizens. On its face, Section 1324a(h)(3) empowers DHS to so act.

Even prior to IRCA, Section 1103 of Title 8, originally enacted as part of the 1952 INA, provided the Secretary of Homeland Security with

authority to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the INA]." 8 U.S.C. § 1103(a)(3). More specifically with regard to nonimmigrants like the F-1 students at issue here, Section 1184(a)(1) additionally provides that "[t]he 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." *Id*. § 1184(a)(1).

Section 1184(a) thus empowers DHS to promulgate regulations that establish the "conditions" of a lawfully admitted nonimmigrant's admission to the country—including whether he or she will be permitted to work. *See, e.g.*, Condition, Merriam-Webster Dictionary ("*plural*: attendant circumstances"), perma.cc/Y78N-5BQ2; *cf., e.g. Jenkins v. Haubert*, 179 F.3d 19, 28 (2d Cir. 1999) ("'Conditions of confinement' is not a term of art; it has a plain meaning. It quite simply encompasses all conditions under which a prisoner is confined for his term of imprisonment."). This grant of power to "prescribe" the "conditions" of a nonimmigrant's admission establishes legal authority for the OPT Rule. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018) ("Because the plain language of [the statute] is unambiguous, our inquiry begins with the statutory text, and ends there as well.") (quotation marks omitted).

2. The federal immigration agencies have understood from the start that these statutory provisions empower them to permit noncitizens to work. Indeed, in dozens of separate actions, starting even before the 1952 enactment of the INA, the Executive has issued regulations or other regulatory statements exercising its Section 1103 authority to issue work authorization.[11]

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[11] *See, e.g.*, 12 Fed. Reg. 5,355, 5,357 (Aug. 7, 1947) (before the INA, F-1 students); 8 C.F.R. § 214.2(c) (1957); *Matter of T-*, 7 I. & N. Dec. 682 (B.I.A. 1958) (discussing employment of F-1 students); INS Operating Instructions 214.2(f) at 1124 (Jan. 15, 1962) (F-1 students); INS Operating Instructions 214.2(j)(1) at 1129-1130 (Nov. 15, 1963) (spouses of J-1 students); INS Operating Instructions 214.2(a) at 1121-1122 (June 15, 1963) (non-enforcement of A-1, A-2, and A-3 spouses); *id.* at 1129 (spouses of J-1 students); INS Operating Instructions 214.2(j)(5) at 1135-1136 (Apr. 14, 1965) (J-1 students and J-2 spouses); INS Operating Instructions 214.1 at 1122.5 (Jan. 26, 1966) (F-1 students); INS Operating Instructions 214.2(e) at 1122.7 (Feb. 28, 1968); INS Operating Instructions 214.2(e) at 1122.9 (Nov. 10, 1971) (non-enforcement of E visa-holders); INS Operating Instructions 214.2(j)(5) at 1161-1162 (Jan. 17, 1973) (spouses and children of J-1 nonimmigrants); 38 Fed. Reg. 35,425 (Dec. 28, 1973) (F-1 students); *Matter of Lieu*, 15 I. & N. Dec. 786 (Acting Dist. Dir., INS 1976) (certain refugees, before Refugee Act of 1980); INS Operating Instructions 214.2(j)(5) at 1162.1 (July 5, 1978) (spouses and children of J-1 nonimmigrants); 43 Fed. Reg. 33,229 (July 31, 1978) (G-4 spouses and dependent children); 44 Fed. Reg. 43,480 (July 25, 1979) (deferred action recipients); 48 Fed. Reg. 14,575 (Apr. 5, 1983) (F-1 Students); 51 Fed. Reg. 39,385 (Oct. 28, 1986) (deferred action recipients); 52 Fed. Reg. 8,762 (Mar. 19, 1987) (deferred action recipients); *see also* 48 Interpreter Releases (1971) at 168-174, Sam Bensen, Assistant Commissioner, Adjudications, Immigration and Naturalization Service, *Lawful Work for*

In 1979, INS confirmed its understanding that Section 1103 empowered it to authorize noncitizen employment. At that time, INS published a notice of proposed rulemaking to codify in a single location its previously internal employment-authorization procedures. *Proposed Rules for Employment Authorization for Certain Aliens*, 44 Fed. Reg. 43,480 (July 25, 1979). In the preamble to the proposed rule, the agency explained that "[t]he Attorney General's authority to grant employment authorization stems from section 103(a) of the [INA] [8 U.S.C. § 1103(a),] which authorizes him to establish regulations, issue instructions, and perform any actions necessary for the implementation and administration of the Act." *Id.* at 43,480. More generally, "[t]he authority of the Attorney General to authorize employment of aliens in the United States [is] a necessary incident of his authority to administer the Act." *Id.* That was—and remains—a correct statement of the law.

Nonimmigrants (discussing A, B, D, E, G, H, I, K, L, F and J nonimmigrants and in some instances, their spouses and noting "that there is authorization for some kind of employment for all nonimmigrant classes except . . . B-2 visitors for pleasure . . . [and] 29-day transits and 10-day transits without visas"); 55 Interpreter Releases (1978) at 267-269 (describing INS procedure for J-1 and J-2 nonimmigrants to secure work authorization); *id.* at 495 (describing work authorization for A-3 or G-5 domestic servants).

The final rule was promulgated in 1981. *Employment Authorization to Aliens in the United States*, 46 Fed. Reg. 25,079 (May 5, 1981). Notably, the regulations that emerged were not limited to the employment of noncitizens specifically authorized to work by the INA. Rather, the 1981 rule authorized the employment of several categories of noncitizens outside of those expressly authorized by the statutory scheme. *Id.* at 25,081 (codifying these regulations at 8 C.F.R. § 109.1(b)); *see also* 8 C.F.R. § 274a.12 (current codification).

The immigration agencies have thus interpreted the INA as providing the authority for the government to permit employment for categories of noncitizens since the statute's enactment in 1952, and published that understanding in the Federal Register as early as 1979. Given the numerous times the INA has been amended since 1952 (and even since 1979), this history confirms the Rule's validity. *See, e.g.*, *Altman*, 666 F.3d at 1326 ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'") (quoting *Schor*, 478 U.S. at 846).

3. Moreover, as we have noted, Section 1324a(h)(3) expressly ratified the Executive's power to grant work authorization beyond the classes

of noncitizens already authorized to work by statute, putting to rest any doubt about the scope of executive authority in this area. "Where, as here, 'Congress has not just kept its silence by refusing to overturn [an] administrative construction, but has *ratified it with positive legislation*,' [the Court] cannot but deem that construction virtually conclusive." *Schor*, 478 U.S. at 846 (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381-382 (1969)) (emphasis added).

The immigration agencies themselves adopted that exact interpretation of Section 1324a immediately after it was enacted in 1986—and Congress has acquiesced in this interpretation. *See Altman*, 666 F.3d at 1326 (quoting *Schor*, 478 U.S. at 846).

Prior to Section 1324a's enactment, an anti-immigration interest group challenged the INS's 1981 employment authorization regulations on precisely the grounds invoked by Washtech here: that the Executive Branch is without authority to authorize work for noncitizens beyond those classes explicitly provided by Congress. *See Employment Authorization*, 51 Fed. Reg. 39,385, 39,388-39,389 (Oct. 28, 1986) (petition for rulemaking). After inviting further comment regarding the effect of the newly enacted Section 1324a on this analysis, the Reagan administration flatly rejected this argument:

> Assuming for the sake of argument that [Section 1103] did not vest in the Attorney General the necessary authority to promulgate [noncitizen-employment regulations], such authority is apparent in the new [Section 1324a,] which was created by the Immigration Reform and Control Act of 1986.
>
> . . .
>
> *[T]he only logical way to interpret* [Section 1324a] is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined "unauthorized alien" in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, *in addition to those who are authorized employment by statute*.

Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987) (emphases added).

Since IRCA's adoption, the immigration agencies across multiple administrations have time and again relied on Section 1324a as authority for allowing the employment of noncitizens where the statute authorizing their admission is silent on the question. Indeed, the immigration agencies have cited this provision at least twenty times when identifying classes of noncitizens authorized to work in the United States.[12] Washtech is

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[12] *See*, *e.g.*, 52 Fed. Reg. 16,216, 16,221 (May 1, 1987) ("Control of Employment of Aliens"); 53 Fed. Reg. 46,850, 46,850 (Nov. 21, 1988) (authorization "for dependents of certain foreign government and international organization officials classified as A-1, A-2 and G-4 nonimmigrants"); 55 Fed. Reg. 25,928, 25,931 (June 25, 1990) (technical and substantive

thus simply (and profoundly) wrong, as a factual matter, that "no regulation authorizing alien employment prior to 2015" relied on Section 1324a(h)(3) for authority to do so. Washtech Br. 29.

What is more, Congress has frequently amended Section 1324a's unauthorized-employment scheme since the INS announced its interpretation of that provision, and it has never objected to the Executive

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amendments to Section 274a.12); 56 Fed. Reg. 55,608, 55,616 (Oct. 29, 1991) (F-1 students); 57 Fed. Reg. 31,954, 31,956 (July 20, 1992) (same); 60 Fed. Reg. 44,260, 44,271 (Aug. 25, 1995) (Witnesses and Informants; Nonimmigrant S Classification); 60 Fed. Reg. 66,062, 66,069 (Dec. 21, 1995) (EADs under "family unity program" and voluntary departure); 63 Fed. Reg. 27,823, 27,833 (May 21, 1998) (EADs under Nicaragua Adjustment and Central American Relief Act); 64 Fed. Reg. 25,756, 25,773 (May 12, 1999) (Haitian adjustment of status); 67 Fed. Reg. 4,784, 4,803 (Jan. 31, 2002) (immediate family members of T-1 nonimmigrants); 67 Fed. Reg. 76,256, 76,280 (Dec. 11. 2002) (work authorization for F, J, and M nonimmigrants); 69 Fed. Reg. 45,555, 45,557 (July 30, 2004) (general EAD revisions); 73 Fed. Reg. 18,944, 18,956 (Apr. 8, 2008) (F-1 students); 74 Fed. Reg. 26,514, 26,515 (June 3, 2009) (same); 74 Fed. Reg. 46,938, 46,951 (Sept. 14, 2009) (E-2 investors in CNMI); 75 Fed. Reg. 47,699, 47,701 (Aug. 9, 2010) (spouses and dependents of foreign officials classified as A-1, A-2, G-1, G-3, and G-4 nonimmigrants); 75 Fed. Reg. 79,264, 79,277-79,278 (Dec. 20, 2010) (CNMI E-2 investors' spouses); 79 Fed. Reg. 26,886, 26,900-26,901 (May 12, 2014) (H-4 spouses); 80 Fed. Reg. 10,284, 10,294, 10,311-10,312 (Feb. 25, 2015) (same); 80 Fed. Reg. 63,376, 63,404 (Oct. 19, 2015) (F-1 students).

Branch's claim of authority.[13] That is, Congress has continually "re-visit[ed]" the precise statutory provisions giving rise to DHS's "longstanding administrative interpretation" that it is broadly empowered to authorize employment, and the "congressional failure to revise or repeal" that interpretation is thus "persuasive evidence that the interpretation is the one intended by Congress." *Schor*, 478 U.S. at 846; *accord, e.g.*, 2B *Sutherland Statutes & Statutory Construction* § 49:9 (7th ed.).

In short, as the leading immigration law treatise puts it, "[w]hether or not the immigration agency earlier had the implied authority to issue such work authorization, [Section 1324a], in its definition of 'unauthorized alien,' has now implicitly granted such authority to the Attorney General." 1 Charles Gordon et al., *Immigration Law & Procedure* § 7.03[2][c] (2019); *see also Ariz. DREAM Act Coal. v. Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014) ("Congress has given the Executive Branch broad discretion to determine when noncitizens may work in the United

[13] *See, e.g.*, Pub. L. No. 100-525, § 2, 102 Stat. 2609, 2609-2610 (1988); Pub. L. No. 101-649, §§ 521(a), 538(a), 104 Stat. 4978, 5053, 5056 (1990); Pub. L. No. 102-232, §§ 306(b)(2), 309(b)(11), 105 Stat. 1733, 1752, 1759 (1991); Pub. L. No. 103-416, §§ 213, 219(z)(4), 108 Stat. 4305, 4314, 4318 (1994); Pub. L. No. 104-208, §§ 379, 411-412, 110 Stat. 3009, 3009-649 to -650, 3009-666 to -668 (1996); Pub. L. No. 108-390, 118 Stat. 2242 (2004).

States.") (citing, *inter alia*, 8 U.S.C. §§ 1103 and 1324a). That principle answers Washtech's contentions.

4. Washtech makes only one serious objection to this analysis, all of which was ventilated before the district court. It asserts that Section 1324a is "a definitional provision" and "confers no authority whatsoever on DHS." Washtech Br. 28-29. But that misses the point. Section 1324a is, at minimum, an explicit confirmation that Sections 1103 and 1184—which undeniably do "confer[] authority" on DHS to promulgate regulations governing nonimmigrants' admission—permit DHS to promulgate regulations providing for employment authorization. Otherwise, the text of Section 1324a makes no sense. *See* pages 41-44, *supra*.

C. The OPT program is eminently reasonable.

As described above (*see* pages 18-24, *supra*), the 2016 OPT Rule—like all regulations—is cabined by the requirement that it must be "reasonably related to the purposes of the legislation" (*Doe, 1*, 920 F.3d at 871 (quotation marks omitted)), and this constraint answers Washtech's concerns about hypothetical regulations that might, *e.g.*, permit F-1 status to last indefinitely. Notably, Washtech has *never* in this litigation argued that the OPT program is unlawful under this kind of analysis because it is insufficiently related to the F-1 statute's educational purpose; Washtech's theory of the case has always been that *any* amount of post-

completion practical training is flatly barred by the statute. To the extent stray passages from its brief could be construed as making such an argument now (*cf.* Washtech Br. 34-36), that argument is therefore forfeited. *See, e.g.*, *Keepseagle v. Perdue*, 856 F.3d 1039, 1053 (D.C. Cir. 2017) ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal.") (quotation marks omitted).

In any event, Washtech's failure to make such an argument is understandable—because the 2016 Rule easily satisfies this standard.

DHS had before it robust evidence demonstrating that term-limited optional practical training is reasonably related to the F-1 statute's educational purpose. *See, e.g.*, JA 174 (Comment letter of 12 major university associations) ("The OPT program appropriately focuses on the critical part of an education that occurs in partnership with employers. Experiential learning is a key component of the educational experience. OPT allows students to take what they have learned in the classroom and apply 'real world' experience to enhance learning and creativity while helping fuel the innovation that occurs both on and off campus."); JA 148 (Comment letter of NAFSA: Association of International Educators) ("Learning through experience is distinct from rote or didactic learning that takes place in the classroom. Experiential learning opportunities

have become an integral part of U.S. higher education in all fields of study, and must not be reserved only for American students.").[14]

DHS therefore concluded:

> Consistent with many of the comments received from academic associations, educational institutions, and F-1 students, DHS agrees that the OPT program enriches and augments a student's educational experience by providing the ability for students to apply in professional settings the theoretical principles they learned in academic settings. By promoting the ability of students to experience firsthand the connection between theory in a course of study and practical application, including by applying abstract concepts in attempts to solve real-world problems, the OPT program enhances their educational experiences. A well-developed capacity to work with such conceptualizations in the use of advanced technology, for example, is critical in science-based professions. Practical training programs related to STEM fields also build competence in active problem solving and experimentation, critical complements to academic learning in STEM fields. As

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[14] *See also, e.g.,* JA 200 (Comment letter of Michelle Desikan, Designated School Official, Columbia University) ("I do believe experiential learning opportunities are essential to all students."); JA 166 (Comment letter of Laurel M. Garrick Duhaney, Ph.D. Associate Provost & Dean of the Graduate School State University of New York at New Paltz) ("Experiential learning opportunities have become an integral part of U.S. higher education in all fields of study, and especially the STEM fields where hands on work supplements classroom education. These opportunities build practical skills and facilitate the move from theory to practice by providing a deeper understanding of subject matter than is possible through classroom study alone. Experiential learning fosters the capacity for critical thinking and application of knowledge in complex or ambiguous situations while new graduate develop the ability to engage in lifelong learning, including learning in the workplace. This is a necessary component of a 21st century education, especially in the STEM fields.").

> many commenters attested, practical training is an important avenue for enhancing one's educational experience, particularly for STEM students.

JA 53 (81 Fed. Reg. at 13,051).

Moreover, as DHS explained, the 24-month term of the STEM OPT extension "is based on the complexity and typical duration of research, development, testing, and other projects commonly undertaken in STEM fields," which "usually require several years to complete." JA 90 (81 Fed. Reg. at 13,088). In order for OPT to serve its purpose of "provid[ing] the student an opportunity to receive work-based guided learning," and "enhanc[ing] educational objectives," the duration of the program must match up with this multi-year project cycle. *Id.*; *see also id.* ("Consistent with many comments received from higher education associations and universities, DHS believes that allowing students an additional two years to receive training in their field of study would significantly enhance the knowledge and skills such students obtained in the academic setting, benefitting the students, U.S. educational institutions, and U.S.

national interests."); JA 89-91 (81 Fed. Reg. at 13,087-13,089) (citing additional comments describing the multi-year nature of STEM project cycles).[15] Washtech has never disagreed.

What is more, DHS implemented robust safeguards to ensure that post-completion practical training is tethered directly to the education that the student received in the United States. *See* JA 43-44 (81 Fed. Reg. at 13,041-13,042) (summarizing features); JA 82-83, 85-89 (81 Fed. Reg. at 13,080-13,081, 13,083-13,087) (discussing participating employers'

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[15] *See also, e.g.*, JA 182 (Comment of the Council for Global Immigration, Society for Human Resource Management) ("[T]he extended period aligns to the period of H-3 admission, the typical training period for doctoral students, as well as to three year National Science Foundation (NSF) grants when combined with the initial 12 months of post-completion OPT."); JA 143 (similar); JA 127 (OPT student, explaining that "the normal technology development cycle is almost 3 to 5 years in my field of study. . . . [M]ost of the meaningful and significant project[s]—often involving a grant or fellowship application, management of grant money, focused research, and publication of a report—typically require[] several years to complete. . . . Students with up to 36 months of practical training can be assigned more challenging projects that better complement academic programs and career interests."); JA 133 (noting from personal experience that the "24-month extension is beneficial because it follows the natural timeline of an engineering product development cycle."); JA 140 ("The projects in my field as well as lots of STEM fields" generally "last more than 2 years."); JA 130 ("Certain projects in STEM do take several years to complete and a full project life cycle experience is necessary for STEM students, especially those at master's or higher level. For example, in the IC (integrated circuit) design industry, a server CPU project takes about 3 years.").

duty to "attest that, among other things: (1) The employer has sufficient resources and personnel available to provide appropriate training in connection with the specified opportunity; (2) the STEM OPT student will not replace a full- or part-time, temporary or permanent U.S. worker; and (3) the opportunity assists the student in attaining his or her training goals."); JA 92-100 (81 Fed. Reg. at 13,090-13,098) (discussing in detail the requirement for a "formalized Training Plan," "jointly executed by the F-1 student and the employer" and submitted to school officials for review, "to formalize the relationship between the F-1 student's on-the-job experience and the student's field of study and academic learning."); JA 65, 70-71 (81 Fed. Reg. at 13,063, 13068-13,069) (describing mandatory annual evaluations "to document [the student's] progress towards meeting specific training goals, as those goals are described in the Training Plan," so as to "ensure that the student's practical training goals are being satisfactorily met"); JA 64, 67 (81 Fed. Reg. at 13,062, 13,065) (discussing DHS's power to conduct employer site visits "to ensure that . . . students and employers are engaged in work-based learning experiences that are consistent with the student's" training plan).

In sum, the OPT program easily satisfies the requirement that regulations be "reasonably related to the purposes of the enabling legislation" (*CCNV*, 865 F.2d at 385), in addition to being entirely consistent

with the INA and supported by over seven decades of executive practice and congressional ratification. Washtech has presented no basis for striking it down.[16]

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[16] Washtech's final—rather peculiar—complaint is that the district court's passing reference to an *amicus* brief that contained anecdotes is reversible error. That argument lacks any conceivable merit.

First, Washtech does not even attempt to explain how the district court's acknowledgement of an amicus brief was prejudicial. *See, e.g.*, *Silbert-Dean v. Wash. Metro. Area Transit Auth.*, 721 F.3d 699, 703 (D.C. Cir. 2013) (prejudicial error). Nor could it: The only issue before the district court for decision was the purely legal one of whether DHS possesses the authority to promulgate the OPT Rule. In fact, the district court referenced the brief solely to note its existence (JA 2 n.1) and to reject Washtech's motion to strike (JA 3 n.2).

Second, the argument is substantively incorrect. Courts, including this one, routinely permit the filing of amicus briefs containing "anecdotal statements" or other non-record facts. JA 3 n.2 (collecting recent briefs from this Court); *accord, e.g.*, *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (listing permissible functions of amicus briefs, including "[h]ighlighting factual . . . nuance," "[e]xplaining . . . commercial context," "[p]roviding practical perspectives on the consequences of potential outcomes," and "[s]upplying empirical data."); *New Mexico Oncology and Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1175-1176 (10th Cir. 2021) (rejecting argument that amicus briefs were inappropriate because they "rely on extra-record evidence"). Such briefs are universally and non-controversially permissible because they do not purport to contain adjudicative facts—that is, facts about the parties that are submitted to the fact-finder for weighing (and therefore must comply with the rules of evidence)—but rather legislative facts about the world that appropriately inform judicial decisionmaking. *See generally* Fed. R. Evid. 201, advisory committee note (discussing the distinction between adjudicative and legislative facts).

CONCLUSION

The Court should affirm the judgment below.

Dated: June 11, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for intervenor certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B)(i) because it contains 12,925 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: June 11, 2021 /s/ *Paul W. Hughes*

CERTIFICATE OF SERVICE

I hereby certify that that on June 11, 2021, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: June 11, 2021 /s/ *Paul W. Hughes*