ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5028

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington Alliance of Technology Workers (Washtech),
Appellant,

v.

U.S. Department of Homeland Security, et al.,
Appellees.

On Petition for Review of an
Order of the U.S. District Court for the District of Columbia

MEMORANDUM BY AMICI CURIAE LANDMARK LEGAL FOUNDATION, CENTER FOR IMMIGRATION STUDIES, CONGRESSMAN PAUL GOSAR, CONGRESSMAN LOUIE GOHMERT, CONGRESSMAN MO BROOKS, CONGRESSMAN MADISON CAWTHORN, JOE KENT, PROGRAMMER'S GUILD, AMERICAN ENGINEERING ASSOCIATION, INC. AND U.S. TECH WORKERS IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties and Amici. All parties and intervenors appearing in this Court appear in the Brief for Appellant.

B. Ruling Under Review. An accurate reference to the order at issue appears in the Brief for Appellant

C. Related Cases. An accurate statement about related cases appears in the Brief for Appellant.

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BREIFING

All parties have consented to the filing of this brief.[1] Landmark filed its notice of its intent to participate in this case as amicus curiae on April 19, 2021.

Pursuant to Circuit Rule 29(d), Amici certify that a separate brief is necessary to provide the perspective of constitutional organizations that believe separation of powers is necessary to ensure preservation of liberty. A separate brief is necessary to provide the perspective of members of Congress who enact laws affecting alien workers. This brief also provides the perspective of individuals and trade organizations who are affected by the regulation in question.

COPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1 and D.C. Cir. Rules 27(a)(4) and 28(a)(1)(A), Amici Curiae submit the following corporate disclosure statement:

Amici Curiae are individuals, members of Congress or non-profit organizations. They have no parent corporations and do not issue stock.

/s/ Richard P. Hutchison

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. See Fed. R. App. P. 29(c)(5).

GLOSSARY

AEA	American Engineering Association
CIS	Center for Immigration Studies
DHS	U.S. Department of Homeland Security
FICA	Federal Insurance Contribution Act
INA	Immigration Nationality Act
Landmark	Landmark Legal Foundation
OPT	Post-completion Optional Practical Training
STEM	Science/Technology/Engineering/ Mathematics
Washtech	Washington Alliance of Technology Workers

STATUTES AND REGULATIONS

Pertinent materials are contained in Appellant's brief.

INTEREST OF AMICUS CURIAE

Landmark Legal Foundation (Landmark) is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities.

The Center for Immigration Studies (CIS) is a 34-year-old, independent, nonprofit, nonpartisan research organization that has been recognized by the Internal Revenue Service as a tax-exempt educational organization. The mission of CIS is to provide to immigration policymakers, the academic community, news media and concerned citizens with reliable information about the social, economic, environmental, security and fiscal consequences of all kinds of international migration, temporary and permanent, legal and illegal. On more than 130 occasions, CIS has been invited by Congressional Committees to provide expert testimony on a wide variety of immigration policy matters, including those pertaining to foreign worker programs.

CIS has a continuing interest preventing the labor markets from being flooded with workers, displacing U.S. workers, needlessly loosening the labor

supply-demand equation, and lowering wages for legal, permanent U.S. residents, which the outcome of this case will influence.

Congressman Paul A. Gosar represents Arizona's fourth congressional district. Congressman Gosar is a constitutional conservative and the sponsor of H.R. 3564 Fairness for High-Skilled Americans Act which would eliminate the unauthorized Optional Practical Training (OPT) Program:

> Section 274A(h) of the Immigration and Nationality Act (8 U.S.C. 1324a) is amended by adding at the end the following: "(4) EMPLOYMENT AUTHORIZATION FOR ALIENS NO LONGER ENGAGED IN FULL-TIME STUDY IN THE UNITED STATES.—Notwithstanding any other provision of law, no alien present in the United States as a nonimmigrant under section 101(a)(15)(F)(i) may be provided employment authorization in the United States pursuant to the Optional Practical Training Program, or any such successor program, without an express Act of Congress authorizing such a program."

Congressmen Louie Gohmert, Mo Brooks and Madison Cawthorn represent Texas's First Congressional district, Alabama's Fifth Congressional district and North Carolina's Eleventh Congressional district respectively. Congressmen Gohmert and Brooks are cosponsors of H.R. 3564. These individuals have an interest in asserting the proper process for work authorization for aliens, and a significant interest in protecting American workers, including his own constituents, and lawful permanent residents from employment discrimination, which has become rampant due to the uncapped expansion of the OPT Program. OPT

recipients and their employers are excused from paying payroll taxes, which incentivizes employers to discriminate against U.S. citizens when hiring.

Joseph Kent is a candidate for Congress for Washington's Third Congressional district. Mr. Kent believes the political leadership in this country shut down manufacturing and energy jobs with bad trade deals and environmental regulations, and when workers asked how they were supposed to support their families, politicians like President Obama told them to "learn to code." And when they did learn new programming and IT skills, our globalist corporations bought and paid for politicians who opened the flood gates to foreign high-skill low-wage labor to take those jobs away. Mr. Kent believes that by illegally expanding the OPT program, DHS is complicit in driving down the wages of American tech workers and urges the courts to recognize this and to take action to end the Biden DHS's betrayal of American tech workers.

The Programmers Guild advances the interests of technical and professional workers in information technology (IT) fields. Members of the Programmers Guild have witnessed first-hand the impact of OPT and related temp worker visas on family, friends, and qualified US worker job applicants over the past two decades. The Programmers Guild has proposed reforms that would better protect US workers. OPT displaces new graduates from getting a good first job upon

graduation and provides a tool for employers to avoid hiring older workers for their entry-level positions.

American Engineering Association (AEA) is dedicated to the enhancement of the engineering profession and U.S. engineering capabilities. AEA is a nonprofit association with members in virtually every high-tech center and industry in the United States. AEA members are from all engineering disciplines including aerospace, chemical, civil, computer, electrical and electronics, industrial, IT, mechanical, power and software to list a few. AEA is the only engineering association dedicated exclusively to professional needs and concerns of the U.S. Engineering Community.

Founded in 2018, U.S. Tech Workers provides inspiration, leadership and resources to displaced tech workers every single day. Our goal is to combat the impacts of outsourcing American jobs. We do this by uncovering relevant facts related to what fuels the offshore pipeline of workers. Then we use this information to influence policy reform. We educate the general public and elected officials about how the continuous flow of workers from abroad impacts American jobs, the economy and national security. As well, we promote policies that favor investing in our country and our workforce.

INTRODUCTION AND SUMMARY OF ARGUMENT

When agencies violate constitutional separation of powers principles, the judiciary should exercise their Article III authority by engaging in a substantive review of agency actions. U.S. Const. art. III, § 1. Deference should be afforded only when congressional delegation of authority is clear and agency actions should be found improper when they exceed the authority conferred by Congress. Silence should not be interpreted as ambiguity and should not automatically trigger judicial deference.

This case is about whether the Department of Homeland Security (DHS) can circumvent the limits the Immigration Nationality Act (INA) places on alien workers by improperly interpreting the terms "bona fide student" and "solely pursuing a course of study" to establish and operate a program affecting hundreds of thousands of workers. Under the INA and to qualify as eligible to enter and remain in the country under the F-1 visa program, aliens must meet certain requirements. First the alien must have no intention of abandoning their home country. Next, the individual must be a "bona fide student" that is "qualified to pursue a full course of study." And third, the individual must seek "to enter the United States temporarily and solely for the purpose of pursuing such as course of study… …at an established college, university, seminary…" 8 U.S.C. §1101(a)(15)(F)(i).

The statute does not define "bona fide student." It does not define "solely pursuing a course of study." Nor does it authorize DHS to create new categories of aliens who are eligible to work and remain in the United States. Whether DHS has the authority to unilaterally broaden theses terms meaning beyond what is reasonable to create new classes of legal aliens lies at the heart of this dispute. The lower court ruled that the Supreme Court's ruling in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council Inc.* obligates it to defer to DHS's interpretation of these terms. It also concluded that *Chevron* required deference to DHS's assertions of authority and therefore compelled it to allow DHS to operate a program that allows a new class of aliens to remain in the country. *Wash. All. of Tech. Workers v. U.S. Dept. of Homeland Sec.*, 2021 U.S. Dist. LEXIS 21587, *34 (D.D.C. 2021).

DHS considers aliens who have completed their studies at colleges and universities and participate in the Post-Completion Optional Practical Training program ("OPT Program") as "bona fide students" who are "solely pursuing a course of study." Under the OPT Program, individuals who have graduated from college or university with any type of degree can work for up to one year after graduation. 8 C.F.R. § 214.2(f)(10). Those aliens with degrees designated as STEM (science, technology, engineering, or math) are therefore authorized to remain in the United States for up to another 24 months (after they complete their studies). 8 C.F.R. § 214.2(f)(10)(ii)(C). What's more, aliens can also remain in

the country while seeking employment or when waiting for their application for an H1-B visa to process. 8 C.F.R. §§ 214.2(f)(10)(ii)(E), 214.2(f)(5)(vi). All told, some of these individuals can remain in the United States for up to three years post-graduation.

DHS's OPT Program functions as an end run around clear limits Congress has set on the number of technology workers admissible through the H1-B visa program. 8 U.S.C. § 1184(g). It creates a new class aliens who are eligible for employment within the United States. Congress has "plenary authority to prescribe rules for the admission and exclusion of aliens" and specifically sets the number of H1-B visa holders. *Miller v. Christopher*, 96 F.3d 1467, 1470 (D.C. Cir. 1996). In other words, Congress has spoken on the issue of numbers of these types of guestworkers allowed in the United States and Congress can determine who enters and remains in the country. DHS, an administrative agency with no political accountability, however, has managed to circumvent these limits through creative and improper interpretation of terminology from the section of the INA involving the F-1 visa program. DHS's interpretation allows hundreds of thousands of aliens to remain in the country with no connection to a university or institute of higher learning. These aliens are no longer "bona fide students" nor are they "solely pursuing a course of study." Yet they remain present because DHS has substituted its own policy preference for that of Congress.

Unilaterally expanding the number of individuals permitted to remain in the United States post-graduation and in contravention to the clear language of the statute, runs contrary to congressional intent. Congress has expressly set the number of guestworkers permitted in the United States. And DHS's OPT program expands the number not by dozens or hundreds but by hundreds of thousands. Amicus Center for Immigration Studies, through Freedom of Information Act Requests, has estimated the approximate number of OPT holders at a given time to be as high as 300,000 in previous years. Congress has designated the classes of aliens who may enter and work in the United States and provided clear language as to who is to be permitted to remain in the country under the F-1 visa program.

Furthermore, aliens who *are* eligible to work under other visa programs are not *only* regulated by DHS. INA requires that the hiring of a foreign worker will not adversely affect the wages and working conditions of U.S. workers comparably employed. The Department of Labor is the agency responsible for compliance with this part of the law, and it does so through regulations requiring that the wages offered to a foreign worker must be the prevailing wage rate for the occupational classification in the area of employment. The Department of Labor is unable to do this with OPT. Its problems in protecting American workers are even further exacerbated by the fact that the OPT program contains within it a subsidy to employers who hire OPT holders. The Internal Revenue Service does not collect

any payroll taxes from OPT workers for "students." Employers who do not therefore pay either the employee or the employer portion of the tax required by the Federal Insurance Contribution Act (FICA), get a direct subsidy at the expense of the Social Security, Medicare, and Federal Unemployment Trust Funds. In addition, the Department of Commerce has no way of conducting background investigations as it must do under the law, for aliens hired for sensitive positions. By adopting an interpretation that is clearly at odds with the law, DHS has created a host of other problems for other agencies' fulfillment of their own statutory obligations.

DHS's interpretation of operative terms in the INA, therefore, should not be entitled to deference under *Chevron*. Instead, the lower court should have undertaken an analysis of whether DHS's actions are permissible, rejected DHS's arguments and ruled the current operation of the OPT program (as it applies to individuals no longer enrolled or attending institutions of higher learning) conflicts with the law.

Amici curiae, therefore, asks this Court to reverse the findings of the lower court.

ARGUMENT

A. The clear meanings of "bona fide student" and "solely pursuing a course of study" forecloses *Chevron* deference.

DHS circumvents the clear numeric limitations placed on guestworkers by Congress through the H1-B visa program by using the F-1 visa programs as a supplement for guest workers. It does this by interpreting the clear statutory terms "bona fide student" and "solely pursuing a course of study" in the broadest possible sense. Under DHS's interpretation, aliens who have graduated from college, are working, or are unemployed, are *still* considered students and are legally permitted to remain in the country. 8 C.F.R. §§ 214 (f)(10)(ii)(A)(3) & (E). In fact, they are no longer students nor are they "solely pursuing a course of study."

The clear meaning of these terms forecloses *Chevron* deference. Under the *Chevron* framework, a court first looks to whether the text of the operative statute is ambiguous. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). Courts are to uphold an agency's "reasonable resolution of an ambiguity in a statute the agency administers." *Michigan v. EPA*, 576 U.S. 743, 751(2015) (citing *Chevron* at 842-43). There are recognized limits to this deference as "agencies must operate within the bounds of reasonable interpretation." *Util. Air Regul. Group v. EPA*, 573 U.S. 302, 321 (2014). Additionally, while "*Chevron* allows agencies to choose among competing reasonable interpretations of a statue; it does not license interpretative gerrymanders under which an agency keeps parts

of a statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 576 U.S. at 754.

DHS argues and the lower court agreed that the lack of definition for the term "bona fide student" creates an ambiguity and therefore entitles DHS to deference under *Chevron*. The lower court finds, "[b]y failing to define this statutory language, Congress has not 'directly addressed the precise question at issue,' namely, 'whether the scope of f-1 encompasses post-completion practical training related to the student's field of study…" *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 2021 U.S. Dist. LEXIS 21587, *35 (internal citations omitted). According to the lower court, the lack of statutory definition created an ambiguity and therefore should triggered deference to DHS's interpretation. *Id.* at *34.

Thus, the lack of definition obligates a court to accept DHS's definition that "bona fide student" means an individual *no longer enrolled in college or a university*. And it means that "solely for the course of study" means that individuals who are n*o longer engaged in a course of study can remain in the country*.

Despite findings by the lower court and DHS's assertions, "bona fide student" and "solely pursuing a course of study" are not ambiguous terms. They

are directly connected to a recitation of institutions where an alien is to pursue his/her course of studies at:

> an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student…

8 U.S.C. 1101(a)(15)(F)(i). "Students" are therefore limited to those enrolled at an institution of higher learning. Once the individual is no longer enrolled, he or she stops being a "bona fide student" pursuing a "course of study."

Further, DHS's own regulations define "full course of study." 8 C.F.R. § 214.2(f)(6). For undergraduates, it means "study at a college or university certified by a school official to consist of at least 12 semester or quarter hours of instruction per academic term…" 8 C.F.R. 214.2(f)(6)(B). For post-graduates, it means "study at a college or university, or undergraduate or postgraduate study at a conservatory or religious seminary, certified by a DSO [Designated School Official] as a full course of study." 8 C.F.R. § 214(f)(6)(A).

OPT takes place "after completion of the course of study…" 8 C.F.R. §§ 214.2(f)(10)(ii)(A)(3) & (f)(5)(ii). It cannot thus encompass aliens who are in the country "solely pursuing a course of study."

B. The INA's silence on whether DHS may establish new categories of aliens eligible for employment in the United States does not equate to an "ambiguity" and thus trigger *Chevron* deference.

The lower court appears to conclude that silence in the student visa statute on work creates an ambiguity that DHS may resolve with what it considers a "reasonable" regulation. *Washtech*, 2021 U.S. Dist. LEXIS at *41-*43. Silence, according to the lower court, therefore, triggers step two of the Chevron analysis when a court will defer to an agency's interpretation of a statute provided that interpretation is "based on a permissible construction of the statute." *Chevron* at 843. The lower court, however, failed to determine whether Congress has first delegated authority to DHS to permit non-student aliens to engage in employment. Acting without such a delegation violates separation of power doctrines and should not be sanctioned by this Court.

Before granting *Chevron* deference, a court must decide "whether Congress – the branch vested with lawmaking authority under the Constitution – has in fact delegated to the agency lawmaking power over the ambiguity at issue." *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (Roberts C.J., dissenting). Indeed, "an agency literally has no power to act… unless and until Congress confers power upon it." *Id.* (*quoting La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). And "[a] court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference." *City of Arlington v. FCC*, 569 U.S. 290,

312(2013) (Roberts, C.J., dissenting). Thus, "[a]n agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency." *Id.*

"Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power… is both flatly unfaithful to the principles of administrative law… and refuted by precedent." *Ry. Lab. Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994). Further, "[w]ere courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.* Finally, "as a matter of basic separation of powers and administrative law" an agency "may only take action that Congress has authorized." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017).

Silence should not be interpreted as ambiguity; such a principle allows agencies to legislate without an express delegation of authority from Congress. It compels courts to defer to agencies rather than using their Article III authority to interpret the law.

In short, the lack of a delegation to establish new classes of alien workers does not entitle DHS to deference "beyond the meaning that the statute can bear[.]" *MCI Telecommunications Corp. American Telephone and Telegraphy Co.*, 512

U.S. 218, 229 (1994). And interpreting 8 U.S.C. § 1101(a)(15)(F)(i) in a manner that gives it the power to authorize alien employment independent of Congress runs counter to the INA's "primary purpose" of "restricting immigration to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984).

C. The Court should not be compelled by *Chevron* to defer to DHS's interpretation.

There are limits to an agency's authority. And courts must take it upon themselves to determine whether an agency has exceeded that authority. Recently, several U.S. Supreme Court justices have questioned *Chevron's* applicability. These opinions make clear that agencies should not longer receive the kind of reflexive deference they once enjoyed – particularly in matters involving so many individuals.

Chevron "compels judges to abdicate the judicial power without constitutional sanction." *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (cert. denied) (Thomas J., dissenting). This conflicts with the role of judges as envisioned by the Framers. And "the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 119 (2015) (Thomas J., concurring). The Framers knew that legal texts could be

ambiguous, and they envisioned judges having the power "to resolve these ambiguities over time." *Id.*

Deferring to an agency's interpretation of a statute "raises serious separation-of-powers questions." *Michigan v. EPA*, 576 U.S. at 761 (Thomas, J., concurring). Deference "precludes judges from exercising [independent] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute in favor of an agency's construction.'" *Id.* (citing *Nat'l Cable & Telecomms. Assn v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)). Again, agencies "enjoy only 'the executive power.'" *Baldwin v. United States*, 140 S. Ct. at 691.

Thus, when DHS promulgated a regulation conflicting with the express limitations placed on resident aliens affecting hundreds of thousands of workers, it improperly exercised those legislative powers vested in Congress. Art. I., § 1. This "apparent abdication" by judges and usurpation by government agencies "is not a harmless transfer of power." *Baldwin v. United States*, 140 S. Ct. at 691. Rather, it violates the carefully constructed constitutional balance of power between the three separate, co-equal branches. When agencies such as DHS employ broad interpretations of statutory language that radically expand the scope of programs as constructed by Congress, they operate free from the restrictions that constrain the other branches. Unlike Congress, DHS officials are not subject to

political accountability nor is their power checked by a separate, co-equal body (as the House checks the power of the Senate and vice versa). *Dep't of Transportation v. Association of Am. Railroads*, 575 U.S. 43, 74 (2015) (Thomas, J. concurring).

Deference under *Chevron* undercuts the duty of judges to check the actions of the Executive Branch. This important principle, exists only when judges exercise their authority under Article III "to apply the law in cases or controversies properly before it." *Baldwin v. United States*, 140 S. Ct. at 692.

Again, DHS's interpretation circumvents the limitations placed by Congress on aliens permitted to work and remain in the country under the H1-B visa program. DHS has not interpreted a law; it has made new law by creating a new class of aliens who are permitted to work in the United States and by increasing the numbers (by orders of magnitude) of foreign workers who remain in the country and compete with American workers in the technology marketplace.

Justice Thomas is not alone in his doubts about the continued applicability of *Chevron*. Then Judge Gorsuch noted that the decision empowered agencies to engage in legislative actions and courts have failed to fulfill "their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring). *Chevron* also violates the principle that "an agency literally has no power to act… unless and

until Congress confers power upon it." *Id.* (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

When agencies are emboldened to craft new laws by "reasonably" interpreting their administrative rules, and courts abdicate their responsibility by deferring to an agency's interpretation, what recourse exists for citizens who seek fair and impartial adjudication? Courts stand as a bulwark against tyranny. When courts allowed agencies' actions to go "unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative." *Gutierrez-Brizuela v. Lynch*, 834 F.3d at 1152 (Gorsuch, J., concurring). In the administrative law jurisprudence of today, "courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them." *Id.* at 1153.

Chief Justice Roberts has also expressed serious doubts about the continued applicability of *Chevron*. "It would be a bit much to describe the result 'as the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington,* 569 U.S. at 315 (Roberts C.J., dissenting) (citing *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)).

Chevron abets the accumulation of all powers, legislative, executive, and judiciary into the hands of the administrative state. In the words of the Chief Justice, "[t]he accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government." *Id.* at 313. This accumulation poses a danger to liberty and runs contrary to the principle of separation of powers.

Courts should not be compelled to follow *Chevron's* dictates by abdicating their Article III powers through deference to administrative agencies.

D. Congress – not DHS – should make laws affecting the status of F-1 students.

DHS should not be allowed to complete an end run around the limits in the INA through creative interpretation of statutory language. Courts should not pass the buck by absolving Congress of its duty to legislate by deferring to the purported authority of administrative agencies. Congress – the body most directly accountable to the people – should not be permitted to throw up its hands by allowing DHS to step into a power vacuum and promulgate regulations with no mooring in statutory language and no express grant of authority from Congress affecting hundreds of thousands of workers.

Between 1998 and 2004, Congress expanded the number of college educated foreign workers by expanding the H1-B program. See Omnibus Consolidated and

Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 411, 112 Stat. 2681, 2681-642 (1998), American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, § 102, 114 Stat. 1251, and Consolidated Appropriations Act, 2005, Pub. L. No 108-447, § 421, 118 Stat. 2809, 3356 (2004). Congress has not expanded this number since then. But the amount of college educated foreign workers has spiked. Why? Because of DHS's abuse of the F-1 visa statutory language.

As noted previously, Congress has "plenary authority to prescribe rules for the admission and exclusion of aliens." It has spoken by: (1) setting clear limits on the numbers of workers permitted under the H1-B visa programs; (2) using clear terms for designating the category of aliens who are eligible to remain in the country under the F-1 visa program; and (3) declining to delegate its legislative authority to create new categories of workers to DHS or any other administrative agency.

Until Congress amends the INA to include postgraduate workers under the F-1 visa program, DHS's operation of the OPT Program will violate the law. Amicus curiae therefore asks the Court to reverse the lower court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LENGTH AND TYPEFACE REQUIREMENTS

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 5652 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

Dated: May 12, 2021

/s/ _____
Richard P. Hutchison

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 12, 2021

/s/ _____
Richard P. Hutchison