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,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA
No. 16-cv-1170
The Hon. Reggie B. Walton

BRIEF FOR THE APPELLEES

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Defendants-Appellees certify as follows:

(A) Parties and *Amici*

Washington Alliance of Technology Workers, Local 37083 of the Communications Workers of America, AFL-CIO ("Washtech") was the Plaintiff in the district court and is the Plaintiff-Appellant in this Court.

The United States Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"), U.S. Immigration and Customs Enforcement ("ICE"), DHS Office of General Counsel, the DHS Secretary, USCIS Director, and ICE Director, each in their official capacities, were Defendants in the district court and are the Defendants-Appellees in this Court.

The National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council were Intervenors-Defendants in the district court and are Intervenors-Appellees in this Court.

The *amici curiae* at the district court and before this Court are: Adelphi University, Adler University, Advanced Micro Devices, Inc., Airbnb, Inc., Alliance Of Business Immigration Lawyers, Amazon.com, Inc., American Immigration Council, American Immigration Lawyers Association, Amherst College, Apple,

Arizona State University, Asana, Augustana College, Babson College, Bard College, Bates College, Beloit College, Bennington College, Berklee College Of Music, Betterment, Bloomberg LP, Blue Fever, Boston Architectural College, Boston College, Boston University, Bowdoin College, Box, Inc., Brandeis University, Brown University, Bryn Mawr College, BSA The Software Alliance, Bucknell University, California Institute Of Technology, Carnegie Mellon University, Case Western Reserve University, Center For Immigration Studies, Claremont Graduate University, Claremont Mckenna College, Clark University, Colby College, Colgate University, College Of The Holy Cross, College Of Wooster, Colorado Business Roundtable, Columbia University, Compete America Coalition, Comptia, Contextlogic, Inc., Cornell College, Cornell University, Criteria Corp., Cummins Inc., Dartmouth College, Dell Technologies, Dickinson College, Dow Inc., Drexel University, Dropbox, Inc., Duke University, Ebay, Echostar Corporation, Elon University, Emerson College, Emory University, Ernst & Young LLP, Facebook, Franklin & Marshall College, Fwd.us, George Washington University, Georgetown University, Gettysburg College, Github, Inc., Google LLC, Guilford College, Hamilton College, Harvard University, Haverford College, Hewlett Packard Enterprise, Hofstra University, HP Inc., Illinois Institute Of Technology, Illinois Science & Technology Coalition, Inspire, Intel Corporation,

Internet Association, Johns Hopkins University, Juniper Networks, Lafayette College, Lawrence University, Linkedin, Marymount University, Massachusetts Institute Of Technology, Micron Technology, Inc., Microsoft, Middlebury College, Mills College, Mount Holyoke College, National Venture Capital Association, New American Economy, New School, New York University, Newscred, Niskanen Center, Northeastern University, Northwestern University, Oberlin College, Oglethorpe University, Ooma, Oracle America, Inc., Oregon State University, Pace University, Palo Alto University, Paul Gosar, Perfect Sense, Pharmavite LLC, Pomona College, Postmates, Princeton University, Realnetworks, Reed College, Rhode Island School Of Design, Rhodes College, Rochester Institute Of Technology, Rutgers University-Camden, Rutgers University-new Brunswick, Rutgers University-Newark, Salesforce, Sap America, Inc., Sarah Lawrence College, School Of The Art Institute Of Chicago, School of Visual Arts, Schweitzer Engineering Laboratories, Inc., Scripps College, Semiconductor Industry Association, Shiphawk, Smith College, Society For Human Resource Management, Sourcegraph, Southeastern University, Southern New Hampshire University, Stanford University, Suffolk University, Syracuse University, Technet, Technexus, Tesla, Inc., Texas A&M University System, Texas State University System, Texas Tech University System, Trax Retail, Tufts University, Twist Bioscience

Corporation, Twitter Inc., Uber Technologies, Inc., University Of Arkansas, University Of Dayton, University Of Denver, University Of Houston System, University of Miami, University of Michigan, University of New Hampshire, University of North Texas System, University of Oregon, University of Pennsylvania, University of Pittsburgh, University of Rochester, University of Southern California, University of Texas System, University of The Pacific, University of Utah, University of Washington, Utah State University, Vanderbilt University, Vmware, Inc., Wake Forest University, Warby Parker, Washington And Lee University, Washington State University, Washington University In St. Louis, Wellesley College, Western Washington University, Wheaton College, Williams College, Worcester Polytechnic Institute, Yale University, and Zillow Group.

New amici in this Court are the 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

Washtech seeks review of the district court's memorandum opinion (ECF No. 97) and order (ECF No. 96), dated January 28, 2021, which granted Defendants' and Intervenors' motions for summary judgment and denied Washtech's motion for summary judgment.

(C) Related Cases

This Court previously reviewed this case in *Wash. All. of Tech. Workers v. DHS*, No. 17-5110, 892 F.3d 332 (D.C. Cir. 2018).

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GLOSSARY OF ABBREVIATIONS

1992 OPT Rule	*Pre-Completion Interval Training, F-1 Student Work Authorization*, 57 Fed. Reg. 31,954 (July 20, 1992)
2008 OPT Rule	*Extending Period of Optional Practical Training or 2008 Rule Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions*, 73 Fed. Reg. 18,944 (Apr. 8, 2008)
2016 OPT Rule	*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. 13,039 (Mar. 11, 2016)
APA	Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*
Br.	Appellant's Brief
DHS	United States Department of Homeland Security
ECF	Electronic Case Filing docket entry for the district court
F-1 Students	Students admitted into the United States as F-1 nonimmigrants under 8 U.S.C. § 1101(a)(15)(F)(i). This classification is for foreign students pursuing a full course of study in the United States at an established institution or otherwise accredited program.
ICE	U.S. Immigration and Customs Enforcement
INA	Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*
INS	U.S. Immigration and Naturalization Service
JA	Joint Appendix

OPT	Optional Practical Training
STEM	Science, technology, engineering, and mathematics
USCIS	U.S. Citizenship and Immigration Services
Washtech	Washington Alliance of Technology Workers /TNG-CWA Local 37083 (Plaintiff-Appellant)

INTRODUCTION

This Court should affirm the district court's summary judgment in the Government's favor, rejecting Washington Alliance of Technology Workers' ("Washtech") challenge to the Department of Homeland Security's ("DHS") 2016 STEM Optional Practical Training Rule ("2016 OPT Rule") for F-1 students, *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. 13,039 (Mar. 11, 2016).

At the threshold, Washtech's claims are nonjusticiable. Washtech is an organizational plaintiff purporting to represent the interests of domestic computer programmers and it never identified any member with a current Article III injury sufficient at summary judgment, let alone any basis to conclude that any alleged injury was caused by DHS. Although the district court found to the contrary, this Court should find that Washtech lacks Article III standing, dismiss this appeal, and remand the case to the district court for dismissal.

Even if Washtech has standing, the district court correctly found that its claims failed on the merits and this Court should affirm. The Executive Branch has longstanding authority under the immigration laws to set the conditions for all nonimmigrant visas, including F-1 students. Since the 1940s, the Executive has exercised its statutory authority to permit student visa holders to supplement their

education with on-the-job practical training while in the United States. Although Congress has amended many aspects of the student visa program, it has never restricted this authority to allow foreign students to work as part of their pedagogical experience. DHS's 2016 OPT Rule is the latest in the long line of regulations providing F-1 students with post-graduation temporary work authorization through optional practical training ("OPT").

Washtech nevertheless argues that the last 13 Administrations have unlawfully allowed foreign students to pursue OPT work programs after graduation instead of requiring them to depart the country. The district court rejected this sweeping claim, holding that the 2016 OPT Rule was a lawful exercise of Congress's broad delegation of authority to the Secretary of Homeland Security to set the conditions of admission of nonimmigrant foreign students to the United States. Not only is DHS's interpretation reasonable, but Congress has ratified its longstanding construction of the term "student" as used in 8 U.S.C. § 1101(a)(15)(F)(i) by amending many aspects of the student visa program since 1952 without ever restricting the agency's ability to allow F-1 students to supplement their education with OPT.

Accordingly, the Court should affirm the district court's decision in the Government's favor.

STATEMENT OF JURISDICTION

Defendants-Appellees agree with Washtech's jurisdictional statement, but dispute Washtech's Article III standing.

COUNTERSTATEMENT OF THE ISSUES

1. Whether an associational plaintiff with members not in direct and current competition with individuals pursuing OPT still possess Article III standing to challenge the 2016 OPT Rule.

2. Whether the district court correctly concluded that, under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), DHS's promulgation of the 2016 OPT Rule was lawful.

PERTINENT STATUTES AND REGULATIONS

All applicable statutes are contained in Appellant's Brief.

STATEMENT OF THE CASE

I. Statutory And Regulatory Background.

Since 1952, Congress has authorized DHS or its predecessor, the Immigration and Naturalization Service ("INS"), to establish regulations to implement and administer the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1103(a)(3). Among the DHS Secretary's delegated duties is determining the conditions upon which designated classes of nonimmigrant aliens—foreign nationals who enter the United States for specified purposes and for temporary periods of time—may be

admitted and allowed to maintain nonimmigrant status within the United States. *See id.*; *see also* 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 [Secretary] may by regulations prescribe.").[1]

DHS has established such conditions for the many types of nonimmigrants. Relevant here, certain foreign students may come to the United States to study with "F-1" nonimmigrant status for a timeframe authorized by the Secretary. 8 U.S.C. § 1101(a)(15)(F)(i). F-1 status is available to 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." *Id.* The F-1 program aims to attract the world's brightest students and provide them the opportunity to develop knowledge and expertise in their chosen fields. Consistent with that purpose, practical training provides F-1 students with a "full course of study" by allowing a complete educational experience where they can apply theoretical knowledge from classrooms in the real world. *Special Requirements for Admission, Extension, and Maintenance of Status*, 38 Fed. Reg. 35,425–26 (Dec. 28, 1973).

[1] In 2002, Congress passed the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, abolishing the INS (which was within the Department of Justice) and transferring many of its functions to DHS. *See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

DHS and its predecessor have long permitted F-1 students to engage in OPT as part of their course of study, including after graduation. "[A]t least since 1947, federal agencies dealing with immigration have interpreted § 1101(a)(15)(F)(i) to allow a student to engage in on-the-job training to supplement his in-the-classroom training." *Programmers Guild, Inc. v. Chertoff*, 338 F. App'x 239, 244 (3d Cir. 2009). Such training is meant to enhance F-1 students' education by allowing them to develop the additional "knowledge and skills" that "occur[ ] through meaningful practical training experiences." 48 Fed. Reg. 14,575, 14,577 (Apr. 5, 1983). To account for post-graduation OPT, DHS and the INS have long defined a nonimmigrant student's duration of F-1 status in the United States as "the time during which an F-1 student is pursuing a full course of study at an educational institution approved by the [agency] for attendance by foreign students, or engaging in authorized practical training following completion of studies." *Id.* at 14,583–84; *see also* 8 C.F.R. § 214.2(f)(5)(i).

In 1947, INS authorized practical training for up to 18 months, with no specific designation of when during a course of study the training could occur. 12 Fed. Reg. 5,355–56 (Aug. 7, 1947). After the INA's enactment in 1952, *see* Pub. L. No. 82-414, § 101(a)(15)(F), 66 Stat. 163, 168 (1952), INS understood the statute as allowing for practical training after formal studies, *see Matter of T-*, 7 I. & N. Dec. 682 (BIA 1958). INS continued to permit post-graduation OPT and promulgated a

regulation in 1969 permitting students to request initial or continued employment for such training in six-month increments not to exceed 18 months. *See* 34 Fed. Reg. 18,085 (Nov. 8, 1969). Regulations promulgated in 1973 authorized identical periods of practical training. 38 Fed. Reg. 35,425–26 (Dec. 28, 1973). INS promulgated additional regulations in 1977 that permitted students engaged in certain fields to participate in practical training "[a]fter completion of a course of study or courses of study" for three month increments for each year of a student's past academic coursework. 42 Fed. Reg. 26,411, 26,413 (May 24, 1977). Similar regulations were published in 1983 allowing for practical training "after the completion of a course of study" regardless of the student's degree program. 48 Fed. Reg. 14,575, 14,578 (Apr. 5, 1983). And regulations issued in 1992 permitted practical training directly related to a student's major area of study for a period of up to 12 months after completion of a course of study. 57 Fed. Reg. 31,954, 31,956 (July 20, 1992).

During this time, Congress frequently returned to the issue of foreign students in the United States without altering the basic contours of the F classification or regulatory program and without amending its provision for post-graduation practical training. *See* Pub. L. No. 111-306, § 1, 124 Stat. 3280, 3280 (Dec. 14, 2010); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §§ 501–502, 116 Stat. 543, 560–63; Illegal Immigration Reform and Immigrant

Responsibility Act of 1996, Pub. L. No. 104-208, § 625, 110 Stat. 3009-546, 699–700; Immigration Act of 1990 § 221(a), Pub. L. No. 101-649. Congress has also frequently discussed the practical-training component within the F-1 program.[2]

In 2008, DHS issued an interim final rule, with a request for comments, that expanded the 12-month post-graduation OPT period for certain students. *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 (2008) ("2008 OPT Rule"). Specifically, the 2008 OPT Rule allowed students with Science, Technology, Engineering, and Mathematics ("STEM") degrees to apply for a 17-month OPT extension. *Id*.

The 2008 OPT Rule prompted a similar lawsuit claiming that DHS lacked statutory authority to allow OPT and that DHS unlawfully bypassed notice-and-comment procedures. *See Wash. All. of Tech. Workers v. DHS* ("*Washtech I*"), 156 F. Supp. 3d 123 (D.D.C. 2015). The district court concluded that DHS had statutory

[2] *See Immigration Policy: An Overview: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 15–16 (2001); *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. 485–86 (1989); *Immigration Reform and Control Act of 1983: Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary on H.R. 1510*, 98th Cong. 687, 695, 698 (1983); *Illegal Aliens: Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 92d Cong. 265–66 (1971).

authority to issue the 2008 OPT Rule because, in the face of the ambiguous F-1 statute, the agency had adopted a reasonable and longstanding interpretation of the statute—allowing post-graduation OPT—and Congress had acquiesced to that interpretation. *See id.* at 140–46. Nonetheless, the district court invalidated the 2008 OPT Rule for failure to comply with notice-and-comment procedures. *Id.* at 147. The court stayed vacatur to allow DHS to issue a new rule following notice and comment or take other corrective action. *Id.* at 148–49.

In March 2016, after notice and comment, DHS issued the final rule at issue here, *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 (Mar. 11, 2016). The 2016 OPT Rule provides:

> [A] qualified student may apply for an extension of OPT while in a valid period of post-[graduation] OPT .... An extension will be for 24 months for the first qualifying degree for which the student has completed all course requirements …. If a student completes all such course requirements for another qualifying degree at a higher degree level than the first, the student may apply for a second 24-month extension of OPT while in a valid period of post-[graduation] OPT .... In no event may a student be authorized for more than two lifetime STEM OPT extensions.

Id. at 13,117–18; *see also* 8 C.F.R. § 214.2(f)(10)(ii)(C). The 2016 OPT Rule thus amended the F-1 program for students with STEM degrees who are participating in 12 months of practical training to extend the practical period by 24 months. This 24-month extension replaced the 17-month extension previously available to certain

STEM students under the 2008 OPT Rule. *See* 81 Fed. Reg. 13,040 (Mar. 11, 2016). DHS explained that the rule aimed to secure the benefits of international students in the United States, account for the increased competition for international students globally, and improve the existing STEM OPT extension (the 2008 OPT Rule). *Id.* at 13,047–49. DHS devoted over 60 pages to explaining the purpose of each feature of the 2016 OPT Rule—responding to the approximately 50,500 comments. *Id.* at 13,049–109.

On May 13, 2016, this Court vacated the district court's decision on the 2008 OPT Rule as moot. *Wash. All. of Tech. Workers v. DHS*, 650 F. App'x 13 (D.C. Cir. 2016).

II. Factual And Procedural Background.

In June 2016, Washtech filed this suit challenging both the 2016 OPT Rule and an older rule from 1992, *Pre-Completion Interval Training, F-1 Student Work Authorization*, 57 Fed. Reg. 31,954 (July 20, 1992) ("1992 OPT Rule"). Washtech is a domestic technology workers' union asserting associational standing to challenge DHS's 2016 OPT Rule on behalf of its members. *See* JA 1–2. Washtech alleged that three of its members were injured by the OPT program because those members were once in competition with F-1 students for technology-sector jobs offered by U.S. employers. JA 201–22.

Washtech brought four claims. Count I claimed that the 1992 OPT Rule

exceeded the agency's statutory authority under the INA. Count II claims that the 2016 OPT Rule exceeds DHS's statutory authority. Count III claimed that the 2016 OPT Rule was unlawfully issued in violation of the Congressional Review Act, without notice and comment, and without complying with incorporation-by-reference requirements. Count IV claimed that the 2016 OPT Rule is arbitrary and capricious. *See Wash. All. of Tech. Workers v. DHS* ("*Washtech II*"), 249 F. Supp. 3d 524 (D.D.C. 2017). As noted, to support its claim for standing, Washtech relied on allegations of three of its members, who assert that they were computer programmers who had applied for computer jobs following issuance of the 2008 OPT Rule and pointing to job advertisements from technology employers soliciting OPT students, among other applicants. *See* JA 201–22.

The district court granted the government's motion to dismiss all counts of Washtech's complaint. It dismissed Count I (the challenge to the 1992 OPT Rule's statutory authority) because Washtech "fail[ed] to address the Government's argument that it lacks standing" in its opposition to the motion to dismiss, *Washtech II*, 249 F. Supp. 3d at 536, and (alternatively) because Washtech did not have standing, *id*. at 536–37. The Court dismissed Count II (the challenge to the 2016 OPT Rule's statutory authority) based on Washtech's same failure "to address the Government's arguments" that Washtech insufficiently pleaded the claim in its opposition to the motion to dismiss. *Id*. at 555. The Court dismissed Count III on the

same ground and for failure to plead a cause of action. *Id*. at 555. The Court dismissed Count IV for failure to state a claim for relief. *Id.* at 555–56.

On appeal, this Court largely affirmed, except that it reversed the dismissal of Count II and remanded with instructions that the district court consider in the first instance the question of "whether Washtech's challenge to the OPT program's statutory authority was reviewable under the reopening doctrine." *Wash. All. of Tech. Workers v. DHS* ("*Washtech III*"), 892 F.3d 332, 346 (D.C. Cir. 2018). This Court held that Washtech had made the showing required, under the competitor-standing doctrine, to establish its standing to bring Count II at the motion-to-dismiss stage, to challenge DHS's authority to promulgate the 2016 OPT Rule. *Id.* at 339. This Court reached that conclusion by presuming the truth of "Washtech's [members'] ... allegations that its members compete with F-1 student visa holders who are working in the OPT program pursuant to the DHS's regulations." *Id.* As noted, Washtech supported its allegations with declarations and U.S. employers' job postings suggesting its members were in direct competition with F-1 students. *See id.* This Court added, however, that "whether Count II"—a challenge to DHS's authority to allow OPT—"may proceed remains in question" given that, unless DHS had reopened the question of its statutory authority, "the six-year statute of limitations on such a challenge closed in 1998." *Id.* at 345. This Court remanded the case on that basis. *See id.*

On remand, the district court ruled that the 2016 OPT Rule reopened the question of DHS's statutory authority to allow for post-graduation work authorization for F-1 nonimmigrants, and thus that Count II was not barred by the statute of limitations. *Wash. All. of Tech. Workers v. DHS*, 395 F. Supp. 1 (D.D.C. 2019). The district court concluded that DHS "reconsidered its authority to implement the OPT Program, which supports that it reopened the issue" for notice-and-comment rulemaking and thus Washtech's 2016 challenge on that issue was within the six-year statute of limitations. *Id.* at 15. The district court also allowed certain organizations to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a). *Id.* at 21. Thereafter, the parties proceeded to move for summary judgment.

On summary judgment, Defendants renewed their standing objection and argued that the Secretary's promulgation of the 2016 OPT Rule was not arbitrary or capricious under *Chevron*. Relying on the affidavits of three Washtech members asserting they were computer programmers who had applied for computer jobs in the past, as well as a number of older job advertisements soliciting OPT-eligible students, the district court concluded that Washtech had demonstrated injury because the presence of the foreign students in the United States increased workforce competition despite the fact that the affidavits provided did not state that the Washtech members were still competing in that market. JA 10–18.

As to the merits, citing 8 U.S.C. §§ 1103 and 1184, the district court held that "Congress has delegated substantial authority to DHS to issue immigration regulations[,] including broad powers to enforce the INA and a narrower directive to issue rules governing nonimmigrants." JA 30 (quotations omitted). The court reasoned that *Chevron* applied because the rule was promulgated as an exercise of this delegated authority and the 2016 OPT Rule went through notice and comment rulemaking. JA 20–21.

The court then concluded that Congress had not directly addressed the precise question at issue: whether the term "student" within the INA could include an individual engaging in on-the-job education or is solely restricted to classroom education. JA 22–29. Looking to the text of section 1101(a)(15)(F)(i), other INA provisions, dictionary definitions, and legislative history, the court concluded that the term "student" was ambiguous under *Chevron* step-one, and that Congress had delegated authority to DHS to define its scope. *Id.*

The court then found *Chevron* step-two satisfied because the 2016 OPT Rule was a reasonable interpretation of DHS's authority under the INA, and because of Congress's longstanding acquiescence to that interpretation. JA 29–38. The court noted that "[s]ince at least 1947, INS and DHS have interpreted the immigration laws to allow foreign students to engage in employment for practical training purposes," and this longstanding interpretation was entitled to deference. JA 31

(quotations omitted). The court then concluded, "Congress has repeatedly and substantially amended the relevant statutes without disturbing this interpretation." JA 33 (quotations omitted). Canvassing those amendments, the court noted that Congress addressed the subject of F-1 nonimmigrants and OPT through statute and written and oral testimony on numerous occasions, such that "congressional familiarity with the administrative interpretation at issue" was indisputable. JA 37 (quotations omitted).

Washtech appealed.

SUMMARY OF THE ARGUMENT

I. Although Defendants agree with the district court's merits analysis, the district court erred in even reaching the merits. Instead, this case should have been dismissed for Washtech's lack of competitor standing at the time the parties' cross-motions for summary judgment were presented to the district court. Although Washtech and its members may have had standing at earlier phases of this litigation, it did not identify a single member demonstrating *ongoing* or *imminent* competitive injury caused by the existence of the 2016 OPT Rule at the time of summary judgment. *See Humane Soc'y of the U.S. v. Perdue*, 935 F.3d 598, 602–04 (D.C. Cir. 2019) ("[O]n summary judgment, the plaintiffs must prove injury in fact with specific facts in the record." (quotations omitted)). The absence of such evidence means no Washtech member was "a *direct* and *current* competitor whose bottom

line may be adversely affected by the challenged government action." *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014) (quotations omitted).

On this score, nothing in the record shows that Washtech members are *currently* applying for jobs in the computer programming market; indeed, the record shows the last time any member did so was years ago. The evidence thus "does nothing to establish a real and immediate threat" of future injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Without affidavits showing that they are "*direct* and *current* competitor[s]," *Mendoza*, 754 F.3d at 1013, Washtech's theory of injury amounts to nothing more than a claim "that regulatory action creates a skewed playing field," "a bare assertion of competition" this Court has recognized is insufficient to demonstrate injury in fact, *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 13 (D.C. Cir. 2006).

II. Assuming justiciability, the district court correctly rejected Washtech's sweeping challenge to DHS's longstanding authority to permit foreign students to supplement their education with on-the-job practical training. Simply put, the 2016 OPT Rule is not *ultra vires*. DHS promulgated the 2016 OPT Rule pursuant to the express statutory authority conferred by 8 U.S.C. §§ 1103(a)(3) and 1184(a), interpreting the statutory gaps as to what the undefined terms of "student" and "course of study" mean under 8 U.S.C. § 1101(a)(15)(F)(i). The agency's interpretation is within its authority under the INA, is reasonable, and consistent with

decades of prior practice. *Id.* Moreover, Congress has repeatedly and substantially amended the INA without disturbing this interpretation; neither should this Court.

The 2016 OPT Rule easily passes muster under *Chevron* because the statute is ambiguous on this point and the rule is a reasonable interpretation of the Secretary's authority under the INA. Congress has nowhere defined the terms "student" or "course of study" as used in Section 1101(a)(15)(F), and therefore Congress has not "directly addressed the precise question at issue." *Mayo Found. v. United States*, 562 U.S. 44, 52 (2011). And, it is beyond dispute that Congress has delegated broad authority to DHS, the agency charged with enforcing immigration law and issuing rules governing the admission of foreign nationals, including F-1 nonimmigrants, to the United States, as well as their employment and potential removal if their lawful status expires. *See* 8 U.S.C. §§ 1103(a)(1), 1103(a)(3), 1184(a)(1), 1324a(h)(3). Congress has thus delegated authority to DHS "to fill the statutory gap in reasonable fashion," and the Secretary's promulgation of the 2016 OPT Rule is a reasonable exercise of that authority. *Nat'l Cable & Telecomm'cns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Moreover, "when 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." *Creekstone Farms Premium Beef,*

L.L.C. v. U.S. Dep't of Agric., 539 F.3d 492, 500 (D.C. Cir. 2008). Since 1947, Congress has routinely revisited the F-1 provision and left intact DHS and then-INS's interpretation of Section 1101(a)(15)(F)(i) as permitting F-1 nonimmigrants to work as part of the OPT program. Because "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction," *CBS v. FCC*, 453 U.S. 367, 382 (1981), Congress's leaving the F-1 provision undisturbed for nearly 70 years confirms the reasonableness of DHS's construction of the F-1 provision. And irrespective of the definition of "student" or "course of study," Congress has separately delegated to the Secretary broad discretion to determine when nonimmigrants may work in the United States, unless Congress itself has expressly *prohibited* granting nonimmigrants work authorization. *See* 8 U.S.C. §§ 1103(a), 1324a(h)(3); *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014); *Perales v. Casillas*, 903 F.2d 1043, 1048–50 (5th Cir. 1990). But Congress has never explicitly legislated any prohibitions in the F-1 visa category as it has in some other contexts, and DHS therefore retains discretionary authority to authorize employment as it deems necessary to carry out its mandate under the INA. *See* 8 U.S.C. 1103(a) 1184(a), 1324a(h)(3). This Court may therefore affirm the district court's summary judgment on this basis.

STANDARDS OF REVIEW

This Court reviews standing *de novo*. *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). Moreover, the Court reviews the exclusion of evidence on summary judgment for an abuse of discretion. *See, e.g.*, *Lane v. District of Columbia*, 887 F.3d 480, 485 (D.C. Cir. 2018).

Agency interpretations of the statute it administers are reviewed under the two-step *Chevron*-framework. *See Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012). "If Congress has directly spoken to [an] issue, that is the end of the matter." *Confederated Tribes v. Jewell*, 830 F.3d 552, 558 (D.C. Cir. 2016). But if the statute is silent or ambiguous, *Chevron's* step one requires courts to "determine if the agency's interpretation is permissible, and if so, defer to it." *Id.* "This [latter] inquiry, often called *Chevron* Step Two, does not require the best interpretation, only a reasonable one." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 492 (D.C. Cir. 2016) (internal quotation marks omitted).

ARGUMENT

I. Washtech Failed To Establish Standing At Summary Judgment.

At the threshold, it should be noted that Washtech did not "[s]et forth the basis for the claim of standing" or "include arguments and evidence" in support. Circuit Rule 28(a)(7); *accord Huron v. Cobert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016) (new "claim to standing" not raised in a brief may be "forfeited"). The district court's

ruling that Washtech had shown the requisite injury-in-fact and causation from the 2016 OPT Rule was erroneous because Washtech failed to provide specific, particularized evidence demonstrating that its three identified members are still in direct and current competition for jobs with students engaged in OPT. *See Dearth v. Lynch*, 791 F.3d 32, 34 (D.C. Cir. 2015).

As an organization seeking to establish associational standing, Washtech must demonstrate that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) (quotations omitted). Washtech's associational standing hinges on its assertion that its members were competitors with F-1 students on OPT. To establish competitor standing, Washtech must show that the challenged rule will result in its members facing an "actual or imminent increase in competition." *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010). To do that, Washtech "must demonstrate that [its members are] *direct* and *current* competitor[s] whose bottom line may be adversely affected by the challenged government action." *Mendoza*, 754 F.3d at 1013.

And where, as here, competitor standing depends "on the independent actions of third parties," the case is not a "garden variety competitor standing case[ ]" and

Washtech may not just ask the Court to "acknowledge a chain of causation firmly rooted in the basic law of economics." *See New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002). Washtech must instead affirmatively demonstrate such causation. *See id.* A demonstration is needed to show injury that is concrete and "imminent," rather than just speculation. *See La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998). At summary judgment, Washtech must do this with "specific facts"—not "mere allegations." *Dearth*, 791 F.3d at 34. Given these legal principles, Washtech should have shown that its members (who generally have years of experience) are currently and directly competing for the same jobs as F-1 students who hold STEM OPT work permits (who generally seek entry-level positions) and that the challenged rule harms them. It failed to do so.

Although the district court credited Washtech's members' declarations as to *past* competitive harm, Washtech never provided sufficient evidence to show that its members are *currently* competing with F-1 students receiving OPT. Washtech presented two types of evidence to support standing—declarations from three of its members with years of experience, and entry-level job postings seeking OPT students. Neither shows a causal connection between the 2016 OPT Rule's effect on non-party F-1 students and Washtech's members so as to enable a court to conclude that those members at least want to work in the *same* occupational category *today*, that they are willing to work the *same* jobs otherwise going to students engaged in

practical training, and that they are qualified to do so. *See, e.g.*, *Mendoza*, 754 F.3d at 1012–13; *see also Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 800 (D.C. Cir. 1985) ("*Bricklayers*"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992). In short, there are no specific facts in the record showing that Washtech's members are still currently competing with F-1 students for jobs and the district court's conclusion otherwise will eliminate the requirements of direct and current economic competition for such standing.

To illustrate the problem, the district court's analysis of this issue relied on the declarations from three of Washtech's members—Douglas Blatt, Rennie Sawade, and Cesar Smith—who could purportedly bring this suit in their own right under the competitor-standing doctrine. *See* JA 13–14. But the district court could only point to how those members had previously been in the job market and faced increased competition—not that they were presently in that same job market or had any intention of re-entering it. To get around the deficiency of no "current" competition, the district court pointed to the "potential" for increased competition and relied on the argument that an increased number of foreign students would necessarily show both injury and causation. JA 14–17. But a potential for harm is inadequate for competitor standing. *See DEK Energy Co. v. FERC*, 248 F.3d 1192, 1195 (D.C. Cir. 2001) (a party must show a "substantial probability" of economic injury and has no standing where there is only "some vague probability" of increased

competition; *see also KERM, Inc. v. FCC*, 353 F.3d 57, 60 (D.C. Cir. 2004) (similar). In other words, declarations that show a potential for harm do nothing to show ongoing harm by Washtech's members to justify the declaratory relief they seek.

Washtech's declarations state that Mr. Sawade is a "Software Design Engineer" since "June 4th of 2018," a position with "decent benefits," JA 215, that Mr. Smith is currently employed as a "computer systems and networking administrator," JA 209, who last applied for a job in February 2017, JA 212, and that Mr. Blatt is a "computer programmer at Rice University" who was hired on May 26, 2017, and last applied for a job that same month, JA 203–04. These declarations' factual attestations thus rely on claims that the members were last in the job market years ago. And while they show that Washtech's members work in the computer-software industry, and that they have held jobs or previously applied for jobs in that industry, they do not connect their positions (or past job applications), to any jobs in which F-1 students on OPT are now engaged. In fact, Washtech did not provide *any* evidence showing: (1) the actual job titles of the positions open to students engaged in OPT; (2) the details of companies' vacancy announcements (*e.g.*, job locations, wages, working conditions); (3) the specific education, skills, and experience required for the open positions; (4) whether the members possessed the minimum education, skills, and experience required for the positions; or (5) whether any of the

companies that were advertising positions for which Washtech members applied actually filled the open positions with students engaged in OPT. *See* JA 201–22.

Nor do Washtech's declarations indicate its members are still seeking tech-sector positions. Instead, the declarations simply mirror the allegations Washtech made at the motion-to-dismiss stage. *Compare* JA 201–22, *with Washtech III*, 892 F.3d at 340. While these assertions may have previously given Washtech the fair inference of standing at the pleading stage, they relied on the Complaint's assertion that their members' job searches were "constant[ ]" and "continuous." *Id.* The declarations include none of this language; there is nothing to indicate they are still looking for jobs. And the Complaint's allegations are insufficient for the purposes of proving standing at summary judgment. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412–13 (2013); *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1289 (D.C. Cir. 2007). It is thus impossible to conclude that they are "*direct* and *current* competitor[s]," *Mendoza*, 754 F.3d at 1013, and the district court's conclusion to the contrary based on past conclusions or allegations of increased competition caused by the now defunct 2008 OPT Rule were wrong, *see* JA 16.

The weakness of Washtech's standing proffer is clear when compared to cases where this Court has found that a labor organization sufficiently alleged competitor standing for its members. In *Mendoza*, for example, this Court found standing at summary judgment because the challenger American free-range herders competed

directly with foreign-born herders for positions and could show that the presence of foreign labor affected wages and conditions in the market for free-range herding labor. 754 F.3d at 1012–13. This Court observed that "plaintiffs [had] attested to specific experience that qualifie[d] them to work as herders; the particular working conditions that led them to leave the industry; the specific wages and conditions they would require to accept new employment as workers; the manner in which they have kept abreast of conditions in the industry; and, at least with regard to Mendoza, a specific possible avenue for obtaining reemployment as a herder." *Id.* at 1014.

Similarly, in *Bricklayers*, this Court found standing because the union member bricklayers demonstrated that they competed directly with foreign bricklayers and provided evidence that they were "ready, willing and able" to perform the *precise* jobs foreign-born workers were performing, *i.e.*, bricklaying on the *same* projects the foreign workers were working on. 761 F.2d at 800; *see also Honeywell Int'l, Inc. v. EPA*, 374 F.3d 1363, 1368–70 (D.C. Cir. 2004) (standing established where regulation "legalize[d] the entry of a product into a market in which [plaintiff] competes").

Washtech's proffer comes nowhere near those showings. Washtech's declarations do not provide the clear and definite statements regarding present participation in the relevant labor market that were provided by the plaintiffs in *Mendoza* and *Bricklayers*. *See Mendoza*, 754 F.3d at 1014; *Bricklayers*, 761 F.2d at

800. Those declarations do not demonstrate any causal link between the 2016 OPT Rule's effect on F-1 nonimmigrants and Washtech's members that would enable the Court to conclude that they are in the same job category, that they are willing to work in the same jobs purportedly going to OPT students, or that they are qualified to do so.

Even if Washtech's members competed against students in practical training in the past, "[a] party seeking to establish standing on the basis of the competitor standing doctrine must demonstrate that it is a *direct* and *current* competitor[.]" *Mendoza*, 754 F.3d at 1013 (emphasis in original, citation omitted). None of Washtech's members' declarations indicates that they are *currently* searching for any new programmer-type job. *See* JA 201–22. On this basis alone, they failed to show that any of them are in "current" competition with foreign students engaged in OPT. *See Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998) (party must "show that he personally competes in the same arena with the same party to whom the government has bestowed the assertedly illegal benefit ... [f]or only then does the plaintiff satisfy the rule that he was personally disadvantaged").

Without such attestations, Washtech has run headlong into the same obstacle faced by the plaintiffs in *Humane Society v. Perdue*, 935 F.3d 598 (D.C. Cir. 2019). Those plaintiffs alleged that the government improperly used funds (known as "checkoffs") from assessments paid by pork producers to the National Pork Board,

who then used those funds to promote pork products. *Id.* at 600–01. The Board eventually contracted with National Pork Producers Council, a private lobbying organization, agreeing to pay the pork producers' council $3 million annually for 20 years. *Id*. Years later, a pork producer filed suit alleging that this contract impermissibly diverted checkoff funds for lobbying. *Id*.

On appeal from summary judgment for the plaintiffs, the government argued that the plaintiffs lacked standing. And much like this case, this Court had previously reversed the district court's Rule 12 dismissal for lack of standing. *See Humane Soc'y v. Vilsack*, 797 F.3d 4 (D.C. Cir. 2015). But on the appeal from summary judgment, this Court ruled that the *Humane Society* plaintiffs lacked standing because their summary-judgment declaration did not show how pork prices were at that point affected by any misuse of checkoff funds. 935 F.3d at 602–04. That "declaration nowhere assert[ed] a diminished return on investment, a reduced bottom line, or any similar economic injury.... Rather, [it] declare[d] that the misuse of checkoff funds rob[bed plaintiff] of the 'direct economic benefit of the lawful and effective promotions to which [he is] entitled as a statutory beneficiary.'" *Id.* at 602–03. But showing some concrete harm was still necessary: "courts cannot presume the missing facts necessary to establish an element of standing." *Id.* at 603 (quotations omitted). This Court therefore "remand[ed] with instructions to dismiss

the case for lack of standing." *Id.* at 603–04 (quoting *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015)). The same should be done here.

Washtech's members' declarations at summary judgment are just as deficient because they do not contain any factual nexus between themselves and the 2016 OPT Rule they are challenging. Without such facts, Washtech's members merely assert an "interest in the proper administration of the laws," which is "canonically 'nonconcrete.'" *Id.* at 604 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)). None of the declarations "explain[s] how [the members are currently] harmed by" the 2016 OPT Rule. *Id.* Hence, no "concrete injury" was shown at the summary-judgment stage and, much like *Humane Society*, the declarations simply "highlight [their] general opposition to the" 2016 OPT Rule. *Id.* That is not enough.

The district court's conclusion otherwise is akin to "taxpayer standing," universally rejected by the courts, *see, e.g.*, *United States v. Richardson*, 418 U.S. 166, 171–80 (1974), in that it would provide standing to *every* U.S worker who had applied for *any* technology job and did not get it merely because *some* companies are hiring *some* F-1 nonimmigrants on OPT. That cannot be a viable theory, as it would establish standing for any purportedly aggrieved U.S. worker, rather than, as precedent requires, for U.S. workers who are "direct and current" competitors of foreign nationals with F-1 visas. *Cf. Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013) (rejecting "boundless theory of standing," and observing that "[t]aken to its

logical conclusion, [plaintiff's] theory seems to be that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—whether a trademark, the awarding of a contract, a landlord-tenant arrangement, or so on"). In short, an aggrieved party must at some point demonstrate with specific evidence that they compete directly and currently in the relevant job category. *See, e.g.*, *Mendoza*, 754 F.3d at 1012–13; *Bricklayers*, 761 F.2d at 800. Washtech's members failed to do that at the summary-judgment stage, and therefore, Washtech lacks associational standing. This Court should thus dismiss this appeal and remand the case to the district court with instructions to dismiss for lack of standing. *See Humane Soc'y*, 935 F.3d at 603–04.

II. DHS Had Statutory Authority To Issue The 2016 OPT Rule.

If this Court concludes that Washtech has standing, then it should affirm the district court's grant of summary judgment for the Defendants because DHS did not exceed its statutory authority in issuing the 2016 OPT Rule. The 2016 OPT Rule accords with the agency's reasonable and longstanding interpretation of its statutory authority, and Congress has ratified that interpretation. Washtech's arguments to the contrary are meritless.

A. Applying Chevron*'s "Step One" to the F-1 Student Provision*

1. The district court was correct to conclude that *Chevron* deference applies here. *See, e.g.*, *Menkes v. DHS*, 637 F.3d 319, 394 (D.C. Cir. 2011). "[D]eference in

accordance with *Chevron* is warranted" when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Fox*, 684 F.3d at 76; *see also Mayo*, 562 U.S. at 57. The former prerequisite is satisfied here given that Congress delegated sweeping authority to DHS, the agency clearly charged with enforcing immigration law and issuing rules governing the admission of foreign nationals, including F-1 nonimmigrants, into the United States. *See* 8 U.S.C. §§ 1103(a)(1), 1103(a)(3), 1184(a)(1). Nor is there any dispute that the 2016 OPT Rule was promulgated as an exercise of this authority. Accordingly, the district court was correct to conclude that *Chevron* provides the appropriate framework for review. JA 20–21.

The first step of the *Chevron* framework is whether the statutory language "unambiguously" answers the question at issue. *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 471 n.4 (2001). The issue is not whether Congress legislated in the general area or its periphery, but whether the relevant provision "attend[s] to the precise question." *Mayo*, 562 U.S. at 711. If not, "Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R. Co., Inc. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990).

The statute at issue here, the INA's F-1 student provision, 8 U.S.C. § 1101(a)(15)(F)(i), leaves a gap for DHS to resolve on the question of whether an

F-1 nonimmigrant may engage in practical training as part of his educational program while holding F-1 status in the United States. Under the INA, the F-1 student provision allows DHS to provide F-1 nonimmigrant status to someone 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 statute is silent as to the meaning of the terms "student" and "course of study." And nothing else in the INA resolves the question whether an F-1 student's course of study can include a period of post-graduation practical training in the student's field of study. Thus, this is a straightforward case of DHS filling statutory gaps within the F-1 student provision to allow for practical training. *See Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 869 (D.C. Cir. 1996) (per curiam) ("[A] silent statute cannot preclude its reasonable interpretation by the agency that administers it. In view of its silence on the point at issue, we must hold the statute ambiguous." (internal citations omitted)).

In this case, the statutory language naturally lends itself to the reading that a student could be permitted to work as part of his "course of study." This is because employment as part of a student's education (a "course of study") is common. *See Matter of Ibarra*, 13 I. & N. Dec. 277, 277–78 (BIA 1986) (discussing foreign students participating in post-graduation practical training); *Matter of T-*, 7 I. & N.

Dec. at 684 (same). And it is especially so in the high-skilled technology sector where jobs like computer programmer can require "several years of work-related experience, on-the-job training, and/or vocational training." Occupational Information Network, "Computer Programmers, Job Zone 4 Definition," http://www.onetonline.org/link/summary/15-1251.00 (last visited June 11, 2021).

Regardless of the nuance with computer programmers, though, the statute's failure to speak to this specific issue leaves an ambiguity or gap for the agency to fill. Congressional silence "normally creates ambiguity. It does not resolve it." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). To be sure, the statute does require that F-1 students "seek[ ] to enter the United States temporarily and solely for the purpose of pursuing such a course of study ... at" an approved "academic institution." 8 U.S.C. § 1101(a)(15)(F)(i). But this text is best read to impose an initial requirement for admission (particularly given the textual focus on the "purpose" for which one "seek[s] to enter") rather than a continuing requirement that persists throughout the nonimmigrant's time in the United States. *Id.* So the F-1 statute does not bar the agency from permitting students to engage in post-graduation OPT.

2. Faced with this statutory gap, the 2016 OPT Rule adopted a reasonable and longstanding interpretation that the F-1 student provision allows for employment of students after graduation and during a period of practical training. As noted,

employment as a means of educating someone is not unusual, even for graduate students. And DHS enjoys significant authority to enforce the INA and a narrower directive to issue rules governing nonimmigrants. *See* 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens[.]"); *id.* § 1103(a)(3) ("[The Secretary] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the INA]."); *id.* § 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 [Secretary] may by regulations prescribe."). Given the reasonable option of providing practical training for foreign students, and in light of DHS's broad authority over nonimmigrants, the agency promulgated the 2016 OPT Rule to fill a gap in the statute, in keeping with this delegated authority.

The 2016 OPT Rule's subject matter falls directly within the INA's ambit and invokes that statute in listing its sources of authority when it adopted the rule using notice-and-comment procedures. *See* 81 Fed. Reg. 13,040, 13,045–46 & n.9 (Mar. 11, 2016). The agency's interpretation is longstanding. In fact, practical training for students has been around since before the INA. *See* 12 Fed. Reg. 5,355, 5,357 (Aug. 7, 1947) ("[i]n 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"). And after Congress passed the INA in 1952, which created the modern category of nonimmigrant students, this understanding of practical training remained in place. *See* Pub. L. No. 82-414, § 101(a)(15)(F), 66 Stat. 163, 168 (1952); 38 Fed. Reg. 35,425, 35,425–26 (Dec. 28, 1973) (allowing a foreign student to secure employment "to obtain practical training ... in his field of study," if such training "would not be available to the student in the country of his foreign residence," for a maximum of 18 months).

With this history in mind, DHS and its predecessor have allowed post-graduation practical training for decades. In 1983, for example, INS explicitly authorized post-completion practical training in the *Federal Register*. *See* 48 Fed. Reg. 14,575, 14,575–86 (Apr. 5, 1983) (allowing students to engage in practical training "[a]fter completion of the course of study"). INS also authorized other periods of post-graduation practical training in 1987 and 1990. *See* 52 Fed. Reg. 13,223, 13,225 (Apr. 22, 1987); 55 Fed. Reg. 28,767, 28,768 (July 13, 1990). And, of course, the 1992 OPT Rule permitted practical training for at least 12 months after completion of a course of study. *See* 57 Fed. Reg. 31,954, 31,956 (1992); 73 Fed. Reg. 18,944 (Apr. 8, 2008).

3. The legislative history thus indicates that Congress ratified the

longstanding agency practice of extending OPT work authorization for F-1 nonimmigrants, including those who have already graduated from an academic institution. In a 1950 Senate Report, for example, the Senate Judiciary Committee discussed an INS regulation allowing the district director to permit a student to engage in practical training for six months, with the possibility of two extensions, when such training is recommended or required by the school. *See* S. Rep. No. 81-1515, at 482 & n.43 (1950) (citing 8 C.F.R. § 125.15); *see id.* at 503 ("practical training has been authorized for 6 months after completion of the student's regular course of study"). That report, which provided the foundation for the INA enacted in 1952, was an extensive study by the Senate Judiciary Committee pursuant to a resolution directing them "to make a full and complete investigation of our entire immigration system" and to submit a report "with such recommendations for changes in the immigration and naturalization laws as [the Committee] may deem advisable." S. Res. No. 137, 80th Cong., 1st Sess. (1947), *reproduced at* S. Rep. No. 81-1515, at 803.

This history illustrates how the Senate Committee that extensively studied the immigration laws before the enactment of the INA was thus aware of the practice under the regulation of allowing practical training for six months after a student completed his course of study. Although the Committee concluded that there were problems in the administration of the foreign-student provisions in certain respects,

it did not criticize the practical-training provision and it did not recommend any statutory changes to the immigration laws concerning the admission of foreign students generally. *See id.* at 506–07 (noting that no corrective legislation was needed), 509. Congress then enacted the foreign-student provision of the INA, 8 U.S.C. § 1101(a)(15)(F), with the same basic parameters as Section 4(e) of the Immigration Act of 1924. This shows that Congress ratified the use of practical training. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). This rule applies when Congress re-enacts a provision in the face of a "consensus [as to its interpretation] so broad and unquestioned that [the Court] must presume Congress knew of and endorsed it." *Jama v. ICE*, 543 U.S. 335, 349 (2005).

There is additional evidence of congressional ratification of post-graduation OPT. In a 1975 statement to Congress on foreign students, the INS Commissioner noted that, although there "is no express provision in the law for an F-1 student to engage in employment," such students could engage in practical training full-time for up to 18 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. 21, 23 (1975) (stmt. of Hon. Leonard F. Chapman, Jr., Comm'r of INS). In 1990, practical training was further acknowledged by the House

Judiciary Committee, which characterized the ability of F-1 students to seek off-campus employment as a "minimal work program providing opportunities for both U.S. employers and students to achieve their respective goals." H.R. Rep. No. 101-723, pt. 1; *cf. also United States v. Midwest Oil Co.*, 236 U.S. 459, 473–74 (1915) ("in determining the meaning of a statute ... the long-continued practice [of the Executive], known to and acquiesced in by Congress, would raise a presumption ... of its consent or of a recognized administrative power"). And in the Immigration Act of 1990, Congress acknowledged that it was expanding upon programs authorizing employment of F-1 students and imposed additional requirements in the form of employer attestations only for F-1 students "employed in a position *unrelated* to the aliens' field of study and off-campus" for the three years following the enactment of the statutory requirement. Pub. L. No. 101-649, § 221(a) (emphasis added). Recognizing that these labor protections would not apply to the F-1 practical training program, Congress chose to leave unregulated the employment of F-1 students in practical training. *Id*.

As will be discussed in more detail below, the agency's consistent interpretation, when combined with congressional awareness of the F-1 OPT program and the lack of congressional action to change the agency's approach, confirms that the 2016 OPT Rule reflects a reasonable interpretation of the agency's authority. "[W]hen Congress revisits a statute giving rise to a long-standing

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.'" *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)).[3]

4. Faced with this history, the only other court to have resolved the precise question here—whether DHS reasonably concluded that it possesses statutory authority to permit post-graduation OPT—concluded that DHS possessed statutory authority to allow post-graduation practical training. *Washtech I*, 156 F. Supp. 3d at 143. Much like the district court in this case, *Washtech I* concluded that DHS possessed statutory authority to "permit[ ] employment for training purposes without requiring ongoing school enrollment." *Id*. The opinion also recognized that "Congress has delegated substantial authority to DHS to issue immigration regulations" and "agree[d] that the statute's lack of a definition for the term 'student' creates [an] ambiguity" for DHS to address. *Id.* at 139. The court further concluded that "DHS's interpretation of F-1 clearly date[d] back to 1983, and likely to 1947,"

[3] Over several decades, Congress has had many opportunities to clarify whether the term "student" or "course of study" included any restrictions over practical training, including when Congress amended the statute in 2010. *See* Pub. L. No. 111-306 (Dec. 14, 2010) (amending 8 U.S.C. § 1101(a)(15)(F)(i)). Congress has also repeatedly made changes to other visa programs, but none to the OPT program, *see, e.g.*, Pub. L. 105-277 (Oct. 21, 1998); Pub. L. 106-313 (Oct. 17, 2000); Pub. L. 108-447 (Dec. 8, 2004); Pub. L. 111-5 (Feb. 17, 2009).

meaning that "[c]ongressional obliviousness of such an old interpretation of such a frequently amended statute ... [w]as unlikely," especially where there was "ample evidence [to] indicate[ ] congressional awareness." *Id.* at 143.

With this "longstanding acquiescence" in mind, the *Washtech I* court concluded that allowing for post-graduation OPT was a reasonable interpretation of the INA. *Id.* at 140. That conclusion is correct given Congress's repeated election not to provide clarification on any possible restrictions of a foreign national "student" in his "course of study" while holding F-1 status. *See Doris Day Animal League v. Veneman*, 315 F.3d 297, 300 (D.C. Cir. 2003) ("While the regulation's definition of 'retail pet store' does not exactly leap from the page, there is enough play in the language of the Act to preclude us from saying that Congress has spoken to the issue with clarity…. [I]n the years since passage of the Act and the Secretary's adoption of the regulation, Congress has not altered the regulatory definition of 'retail pet store' although it has amended the act three times."); *see also Barnhart*, 535 U.S. at 220 ("Court[s] will normally accord particular deference to an agency interpretation of longstanding duration." (quotations omitted)); *Lindahl v. OPM*, 470 U.S. 768, 782 & n.15 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." (quotations omitted)).

5. Washtech's arguments against DHS's authority do not withstand scrutiny.

First, Washtech argues that the term "student" is not ambiguous, Br. 16–17, emphasizing the F-1 statute's allowance only for foreign students who are "seek[ing] to enter the United States … solely … pursuing a course of study at an approved academic institution." *Id.* at 16. (paraphrasing 8 U.S.C. § 1101(a)(15)(F)(i)); *see also id.* at 21. On this point, Washtech believes that the only allowable definition for student is "someone attending school." *Id.* at 22. This argument ignores the point—made above—that this text is appropriately read as imposing an initial-admission requirement (as reflected by the textual focus on the "purpose" for which one "seek[s] to enter") rather than a continuing requirement that persists throughout the foreign student's time of study in the United States for the purposes of his or her education. Furthermore, Section 1101(a)(15)(F) is a subparagraph of Section 1101(a)(15), which provides that "as used in this Act," "[t]he term 'immigrant' means every alien except an alien who is within one of the following classes of *nonimmigrant* aliens," including F-1 students. Washtech's singular idea that students may only be in classrooms misses the mark, as Section 1101(a)(15) must be read in conjunction with Section 1184(b)—which specifically references Section 1101(a)(15)—and provides that any foreign national seeking entry is "presumed to be an immigrant until he establishes to the satisfaction of" "immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status[.]" Washtech's own reading of Section 1101(a)(15)(F) thus yields the conclusion that

the statute defines conditions of *entry*, and does not clarify any ambiguity.

Washtech pushes back on this problem with a slippery-slope argument about tourist visas, *id.* at 20–21, and flags that foreign nationals here for temporary periods of time must depart the United States if they are deportable, *id.* at 18–19. But these arguments are meritless and irrelevant. For the former, the text of Section 1101(a)(15)(F)(i) only speaks to what is required for a foreign national to first obtain F-1 student visa classification; it does not describe what forms of study (including work study) might be valid after entering the United States. This is confirmed by how the INA does not define the parameters of a foreign student's permitted courses of study, or whether hands-on training or employment—such as a paid internship—may accompany or follow the course of study as a practical part of the student's education in the United States. *See* 8 U.S.C. § 1101(a)(15)(F)(i). And the latter argument ignores how DHS has taken measures to ensure that F-1 nonimmigrants who fall out of status or who have completed a course of study and depart after a grace period, *see* 8 C.F.R. § 214.2(f)(5)(iv); 67 Fed. Reg. 76,263, as well as a multitude of other conditions that F-1 students must satisfy in order to remain in F-1 status or become subject to removal under Section 1227(a)(1)(C)(i). However, how DHS performs these statutory duties says nothing about whether Section 1101(a)(15)(F) is ambiguous.

These arguments were thus correctly rejected by the district court because the

INA nowhere defines the terms "student" or "course of study," a fundamental indicator of statutory ambiguity. *See Mayo*, 562 U.S. at 52. While "a statute may foreclose an agency's preferred interpretation despite such textual ambiguities if its structure, legislative history, or purpose makes clear what its text leaves opaque" *Catawba Cnty. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009) (per curiam), Washtech points to nothing in any of these sources disambiguating "student" or "course of study." The INA simply does not delineate a course of study's parameters, except to limit and qualify the attendance of students at certain publicly funded institutions. Nor does it indicate whether training or employment may accompany or follow the course of study as a practical part of the student's education. 8 U.S.C. §§ 1101(a)(15)(F)(i), 1184(m).

6. Washtech also points to how the INA says that the relevant "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." 8 U.S.C. § 1101(a)(15)(F)(i); *see* Br. 19–22, 26; 33–34 (arguing that the district court's decision "den[ies] Congress the power to restrict activity on student visas after admission"). But that provision of the INA reflects congressionally-mandated reporting requirements for schools certified to enroll F-1 nonimmigrants and the consequences for those schools that fail to report that data. It does not follow that

Congress imposed a continuing academic-institution-attendance requirement on foreign students after their admission into the United States so as to bar *any* practical training that occurs after a student graduates from an academic institution. *See Am. Trucking Ass'ns*, 531 U.S. at 468 ("Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Boiled down, although Washtech views the statute's use of the term "student" as "common," Br. 21, the fact is that "nothing is ever simple with immigration law," *Padilla v. Kentucky*, 559 U.S. 356, 1489 (2010) (Alito, J., concurring). Regardless as to whether Washtech believes it alone knows what "student" may mean, it is undisputed that the INA does not define the term "student" as it relates to a permitted course of study, which will always be contextual and may encompass both classroom education and practical training. *See generally* 8 U.S.C. §§ 1101(a), (a)(15)(F). Washtech attempts to rebut this point by arguing that statutory terms may be undefined and remain unambiguous, Br. 22, but this does not mean "student" may only mean one thing when courses of study themselves vary dramatically across the country. In fact, Washtech even acknowledges that "student" can have different meanings depending on context. *See id.* at 23–24 (discussing *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 417–18 (1992) (noting how "Judicial deference to reasonable interpretations by an agency of a statute that it administers

is a dominant, well settled principle of federal law.")). That is acknowledged ambiguity that the agency is entitled to regulate.

7. Decades of agency action demonstrate that Washtech's construction is not the only plausible interpretation of what a "student" is under the statute. *See Ex parte Tsiang Hsi Tseng*, 24 F.2d 213, 214 (N.D. Cal. 1928) (holding that a student did not fail to maintain his status as a "*bona fide* student" under the Immigration Act of 1924 when he received a two-month leave from his college to work voluntarily and full-time on a newspaper, and was then forced, due to illness, to drop out of school before being readmitted the next year). This is why Congress uses the term "student" broadly within the INA, envisioning different types of training as a component of a student's education. *See* 8 U.S.C. § 1101(a)(15)(J). The multiple uses of "student" in different contexts implying different meanings depending on each context cuts against Washtech's view that "student" may only mean classroom attendance, further demonstrating ambiguity. *See White Stallion Energy Center v EPA*, 748 F.3d 1222, 1243 (D.C. Cir. 2014). Moreover, Washtech's interpretation that F-1 students cannot be authorized for employment makes no sense considering that F-1 students are explicitly exempted from several wage taxes. *See* 26 U.S.C. §§ 3121(b)(19), 3306(c)(19); 42 U.S.C. § 410(a)(19). These provisions support the argument that the F-1 provision's language and requirements for a "course of study" are not as clear as Washtech insists. And because the F-1 provision does not bar all employment,

nor define any of the terms Washtech believes to be clear despite any definition, this leaves a statutory gap "with respect to the specific issue" of OPT. *Chevron*, 467 U.S. at 843. The INA thus leaves to DHS's discretion the determination as to what conduct a nonimmigrant student must comply with after admission to maintain F-1 status because schools require flexibility in the scope and length of "courses of study." *See, e.g.*, 8 U.S.C. §§ 1103(a)(3), 1184(a), 1182(a)(9)(B)(ii).

Washtech's attempt to avoid this conclusion by arguing that the district court's straightforward application of *Chevron* would create an unbounded delegation of authority to DHS is unfounded. *See* Br. 25–27. The same is true for Washtech's argument that DHS may not allow foreign students to work as part of their courses of study because "Section 1324a(h)(3) is a definitional provision that confers no authority on DHS." *Id.* at 28. These arguments are wholly erroneous where, as here, the INA's express language leaves DHS with the discretion to decide what conduct a nonimmigrant student must comply with post-admission to maintain their F-1 status, along with the determination on the length of the student's period of authorized stay in the United States while he or she holds F-1 status. *See, e.g.*, 8 U.S.C. §§ 1103(a)(3), 1182(a)(9)(B)(ii). They also ignore the fact that working (or putting academic theory into practice) will often be a necessary part of learning a vocation, skill, or other courses of training.

8. Washtech extends its argument to once again draw the opposite conclusion

of the district court from the INA's silence regarding foreign students' ability to engage in practical training via employment. Br. 31–32. But concluding that the ambiguous term "student" may encompass on-the-job practical training immediately following graduation is a reasonable interpretation of the Secretary's longstanding authority to set the conditions of nonimmigrant visas, including setting reasonable durational limitations on F-1 status. *See* 8 U.S.C. § 1184(a)(1).

In this case, the agency has long recognized that individuals do not cease to be "students" the moment they graduate; rather, their status as students may be ongoing, as they gain real-world experience at their first jobs. *See* 43 Fed. Reg. at 14,575. Moreover, the 2016 OPT Rule is a reasonable application of the Secretary's authority to secure the economic integrity of the United States by working together with industry and academia. *See* 6 U.S.C. § 111. Washtech characterizes this as inviting unbridled Executive discretion, noting that courts should not "presume a delegation of power absent an express withholding of such power." Br. 25. But that canon is inapplicable where the statute "authoriz[es] the agency to promulgate regulations necessary to 'carry out' the statute." *Creekstone*, 539 F.3d at 500.

In sum, Congress has left a gap in the INA's F-1 provision for the agency to fill by regulation under *Chevron*'s step one. Washtech's arguments to the contrary lack merit.

B. Applying Chevron*'s "Step Two" to the F-1 Student Provision*

Because there is ambiguity on the specific issue of OPT within the INA's F-1 provision, this Court should proceed to *Chevron*'s second step. Under that analysis, the district court was correct to uphold the agency's interpretation because it is reasonable, even if courts would prefer an alternative interpretation. *See Chevron*, 467 U.S. at 844. This is because the 2016 OPT Rule adopts a reasonable and longstanding interpretation of the INA by allowing for employment of foreign students after graduation and during a period of practical training tied to their courses of study.

1. Regarding the 2016 OPT Rule's reasonableness, the district court was correct to conclude that its history demonstrated reasonableness. As noted, the Secretary has for decades interpreted the INA as delegating authority to permit F-1 nonimmigrants to work as a component of their education. Congress has revisited the F-1 nonimmigrant provisions on numerous occasions, but never *once* rebuffed the agency's interpretation. "[W]hen," as here, "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." *Creekstone*, 539 F.3d at 500.

Washtech resists acknowledging this congressional history by quibbling with the minutiae of the evidence considered by the district court. Br. 34–44. Essentially, Washtech argues that congressional acquiescence is impossible unless there was a specific acknowledgment of a specific application of an agency's interpretation or regulation within a later-enacted statute. *See id.* But Congress can be understood to ratify an agency interpretation when it reenacts a statutory provision without change and there is evidence that members of Congress were aware of the agency interpretation but did nothing to alter it. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) (upholding an IRS regulation by pointing to congressional inaction); *United States v. Rutherford*, 442 U.S. 544 (1979) (congressional hearings evidenced congressional awareness). Even assuming an absence of explicit awareness—which is demonstrably not the case here—that Congress chose to leave a pertinent interpretation "undisturbed is persuasive evidence that it is consistent with congressional intent." *Creekstone*, 539 F.3d at 500 ("agency interpretations that are of long standing come before us with a certain credential of reasonableness").

These standards are readily satisfied regardless of Washtech's attempt to spin the legislative history. *See* 8 C.F.R. § 125.15(b) (1947); 12 Fed. Reg. 5355, 5357 (Aug. 7, 1947); *Matter of T-*, 7 I. & N. Dec. at 683. "Yet, each time Congress has re-enacted [8 U.S.C.] § 1101(a)(15)(F)(i)," it did not disturb the interpretation of section 1101(a)(15)(F)(i) as permitting foreign students to work through OPT.

Programmers, 338 F. App'x at 244.

2. Before the INA, the INS interpreted the Immigration Act of 1924, which provided for the admission of "bona fide student" non-quota immigrants seeking entry "solely for the purpose of study," Pub. L. No. 68-139, § 4(e) (May 26, 1924), under conditions set *by regulation*, *id.* § 15, to allow foreign students to work as part of their post-graduation training, *see* 12 Fed. Reg. at 5,357. The INS regulation authorized "employment for practical training" where such employment was "required or recommended by the school," and permitted employment for a six-month period "subject to extension for not over two additional six-month periods" based on a "certification by the school and the training agency that the practical training cannot be accomplished in a shorter period of time." *Id*. Congress was thus plainly aware of post-completion practical training even before the INA. S. Rep. No. 81-1515, at 503 (1950) ("practical training has been authorized for 6 months after completion of the student's regular course of study"); *id.* at 482–83.

When Congress enacted the INA in 1952, it made explicit that the Attorney General (now DHS Secretary) has broad authority to establish regulations and perform any actions necessary for the INA's implementation and administration. 8 U.S.C. § 1103; *accord Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985). Congress also retained much of the language from the 1924 Act governing the admission of foreign students. *Compare* Pub. L. No. 68-139,

§ 4(e) (May 26, 1924), *with* Pub. L. No. 82-414, § 101(a)(15)(F) (June 27, 1952).

INS thus continued to allow foreign students to engage in post-graduation employment "to obtain practical training." *Matter of T-*, 7 I. & N. Dec. at 683. INS regulations provided for the employment of foreign students as long as "an authorized school official ... certif[ied] that the employment is recommended for that purpose and will provide the student with practical training in his field of study" that "would not be available to the student in the country of his foreign residence." 38 Fed. Reg. 35,425, 35,426 (Dec. 28, 1973). OPT employment was limited to 18 months in the aggregate. *Id*. And Congress continued to remain aware of the practice. *See 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, 21–28 (1975) (stating F-1 students may engage in OPT for up to 18 months).

Thus, on the eve of Congress's revision to the INA's employment authorization scheme through the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (Jan. 21, 1986), INS had interpreted the statutes governing foreign students to allow for post-graduation OPT employment for nearly forty years. *Compare* 12 Fed. Reg. at 5,357, *with* 8 C.F.R. § 214.2(f)(10)(i)(C) (1985). Although the Immigration Reform and Control Act of 1986 imposed a new employment verification system to ensure that only authorized foreign nationals

worked in the United States, *see* 8 U.S.C. § 1324a(a)–(b), Congress did not refute INS's authority to permit foreign students to work. Quite the contrary. Congress instead confirmed INS had authority to authorize foreign nationals to work, stating that the Attorney General could determine which foreign nationals are "authorized" for employment. *Id*. at § 1324a(h)(3). Moreover, Congress left intact the agency's interpretation that foreign students are authorized to work in practical training. *Id*.

Congress again left intact INS's policy of allowing foreign students to work in OPT when it enacted significant changes to the INA under the Immigration Act of 1990. *See* Pub. L. No. 101-649. Indeed, Congress explicitly acknowledged INS's regulations by *expanding* employment authorization for foreign students far beyond that permitted by INS to allow for a three-year pilot program in which students could be employed in positions "unrelated to the alien's field of study and off-campus." *Id*. at § 221(a); *see* H.R. Rep. No. 101-723, pt. 1, 1990 WL 200418, at *6746–47 ("the bill *expands* the ability of students to work" (emphasis added)). INS implemented the amendments concerning such employment by publishing a legislative rule governing the application and approval process for such employment. *See* 56 Fed. Reg. 55,608 (Oct. 29, 1991). INS also amended its regulations governing OPT to require students to obtain employment authorization before engaging in employment outside the three-year pilot program. *See* 57 Fed. Reg. 31,954, 31,954–56 (July 20, 1992). Again, INS regulations continued to allow

for the employment of students in OPT after the completion of their course of study. *Id*. (8 C.F.R. § 214.2(f)(10)(ii)(4)). There of course would have been no need for Congress to explicitly permit employment in fields *unrelated* to a course of study if employment in fields *related* to a course of study were not already permitted.

In 1996, Congress again amended the provisions governing the admission of foreign students without superseding INS's longstanding policy of allowing foreign students to engage in post-graduation employment. *See* Pub. L. No. 104-208, §§ 625, 641. And in 1998, when Congress enacted further changes to the labor certification process for H-1B specialty-occupation employment, it did not address the agency's regulation providing for the employment of foreign students in similar jobs via OPT. *See* American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, Div. C., Title IV, §§ 411-415 (Oct. 21, 1998). Although Congress identified the need to develop the technical skills of the domestic workforce, it again remained silent regarding employment of skilled foreign students through OPT. *Id*. §§ 414(c)–(d).

After the attacks of September 11, 2001, Congress strengthened the foreign-student monitoring program, again without altering agency rules governing OPT. *See* Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §§ 501–502 (May 14, 2002). INS then began implementing this program by creating the Student and Exchange Visitor Information System. *See* 67 Fed. Reg.

76,256 (Dec. 11, 2002). The Student and Exchange Visitor Information System established electronic reporting for designated school officials to assist in obtaining employment authorization for foreign students seeking OPT. *Id*. at 76,263. The INS also clarified that foreign students may apply for OPT after "one full academic year." *Id*.

Most recently, Congress re-enacted 8 U.S.C. § 1101(a)(15)(F)(i), adding language requiring students attend an "accredited" language training program, but taking no action limiting the ability of foreign students to work through OPT. *See* Pub. L. No. 111-306, 124 Stat. 3280 (2010). That Congress has done so for more than *70* years makes this case a classic example of ratification. *See Lorillard*, 434 U.S. at 580.

3. Washtech argues that Congress could not have acquiesced because the contours of OPT work authorization have changed over the years. *See* Br. 34–36. However, Defendants are not arguing that Congress ratified any specific temporal duration or sequence for OPT. DHS's position has consistently been that Congress has recognized DHS's *authority* to: (1) permit F-1 students to seek post-graduation employment as part of their American pedagogical experience, and (2) to grant them work authorization for such experiences. As the district court correctly ruled, that the specifics or duration of OPT has changed over the years does not undermine that Congress has recognized DHS's general authority to make such authorizations. JA

35.

Accordingly, for decades now Congress, despite being aware of the agency's interpretation of "student" under the F-1 visa program, has left 8 U.S.C. § 1101(a)(15)(F)(i) unaltered. The meaning of "student" in the F-1 provision is built on the foundation of a longstanding legislative understanding that a student's education may include OPT. *See Lindahl*, 470 U.S. at 782 n.15. Washtech's contention that Congress was not aware certain foreign nationals were being allowed to work after graduation and that it would not have approved the policy had it known is thus wrong. *See* Br. 38. As the foregoing history demonstrates, the Attorney General and DHS Secretary have permitted F-1 students to work through OPT since 1947, and have, at least since 1952, interpreted 8 U.S.C. § 1103 as providing authority for that interpretation. That longstanding interpretation is reasonable and thus subject to deference under *Chevron*. *See Barnhart*, 535 U.S. at 220.

4. Although Washtech disagrees with the 2016 OPT Rule as a policy matter, Washtech's complaints against the district court's conclusion as to *Chevron*'s step two must show that the agency's interpretation of the F-1 provision to allow for practical training strays so far from the paradigm that Congress intended as to render DHS's interpretation unreasonable. *See Nat'l Cable & Telecomm'cns Ass'n v. FCC*, 567 F.3d 659, 665 (D.C. Cir 2009). This it cannot do because the 2016 OPT Rule reflects the longstanding interpretation that foreign students may be employed in

their field after graduation.

Washtech's arguments against reasonableness all disregard this decades-old understanding. Apart from its dispute with the district court's consideration of amicus filings (which in any event would be harmless error in the face of the specifics discussed above), Br. 44–47, it is enough under *Chevron* that Congress has ratified DHS's general interpretation of 8 U.S.C. § 1101(a)(15)(F)(i) as permitting the employment of students during practical training. That regulatory allowance has survived intact over several decades. And Congress ratified this interpretation by amending the F-1 nonimmigrant classification without once altering the agency's understanding of OPT. This demonstrates the 2016 OPT Rule is reasonable.

CONCLUSION

This Court should dismiss Washtech's appeal for lack of standing and remand the case to the district court for dismissal. Alternatively, this Court should affirm summary judgment for the Government.

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2021, I electronically filed the foregoing with the Clerk of Court by using the appellate CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

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