Oral Argument Not Yet Scheduled

No. 21-5028

United States Court of Appeals

for the

District of Columbia Circuit

Washington Alliance of Technology Workers,

Appellant,

v.

United States Department of Homeland Security, *et al.*,

Appellees.

On appeal from an order entered in the
United States District Court for the District of Columbia
No. 1:16-cv-01170-RBW
The Hon. Reggie Walton

Appellant's Opening Brief

On the Brief:
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May 5, 2021

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Washington Alliance of Technology Workers, Local 37083 of the Communication Workers of America, the AFL-CIO ("Washtech") has no shareholders.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici Curiae

The following are all the parties and *amici curiae* that appeared before the District Court:

1. Plaintiff-Appellant is Washington Alliance of Technology Workers, Local 37083 of the Communications Workers of America, AFL-CIO ("Washtech").
2. Defendant-Appellees are the U.S. Department of Homeland Security ("DHS"); Secretary of Homeland Security; U.S. Immigration and Customs Enforcement; Director of U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services; Director of U.S. Citizenship and Immigration Services
3. Intervenor Defendant-Appellees are National Association of Manufacturers, Chamber of Commerce of the United States of America, and Information Technology Industry Council
4. *Amici curiae* 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 Col-

lege, 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, Zillow Group

Rulings Under Review

Washtech seeks review of the District Court's order of January 28, 2021 (Docket 96) that was accompanied by a Memorandum Opinion issued the same day (Docket 97). The opinion and order are reproduced in the appendix.

Related Cases

This Court has previously reviewed this case in *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Security*, No. 17-5110, 892 F.3d 332 (D.C. Cir. 2018). This case is a continuation of litigation that has previously been

reviewed by this Court in *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, No. 15-5239, 650 F. App'x 13 (D.C. Cir. 2016).

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TABLE OF AUTHORITIES

Case Law:

Authorities upon which we chiefly rely are marked with asterisks. Appendix page numbers are indicated with brackets in the text ([]).

Rules:

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2); because it is a federal question under 28 U.S.C. § 1331; and because the defendant is the United States, 28 U.S.C. § 1346.

This court has jurisdiction over appeals from final decisions of a district court under 28 U.S.C. § 1291.

The final order appealed was filed on January 28, 2021. The notice of appeal was filed on January 28, 2021.

STATEMENT OF THE ISSUES

1. Whether an alien who is unemployed and has not attended school in several years is a *bona fide* student solely pursuing a course of study at an approved academic institution that will report termination of attendance.
2. Whether a district court may consider evidence that is inadmissible under the Federal Rules of Evidence and supplements the record in a review of an agency action when submitted in an amicus brief.

STATUTES AND REGULATIONS

8 U.S.C. § 1101(a)

> (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—….
>
> (F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a *bona fide* student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) [1] of this title 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, 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. § 1184

(a) Regulations

(1) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

8 U.S.C. 1324a(h)

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

GLOSSARY

DHS	U.S. Department of Homeland Security
OPT	Post-completion Optional Practical Training
STEM	Science/Technology/Engineering/Mathematics
Washtech	Washington Alliance of Technology Workers

Opinions and Regulations

To minimize confusion, this brief follows the district court's naming of opinions and regulations:

Washtech I	74 F. Supp. 3d 247 (D.D.C. 2014)
Washtech II	156 F. Supp. 3d 123 (D.D.C. 2015),
Washtech II Appeal	650 Fed. App'x 13 (D.C. Cir. 2016)
Washtech III	249 F. Supp. 3d 524 (D.D.C. 2017)
Washtech III Appeal	892 F.3d 332 (D.C. Cir. 2018)
Washtech IV	District court opinion under review
1992 OPT Program Rule	Pre-Completion Interval Training, F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992)

2008 OPT Program Rule	Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944 (Apr. 8, 2008)
2016 OPT Program 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. 13,040 (Mar. 11, 2016)

STATEMENT OF THE CASE

This case presents the seemingly simple question of whether the Department of Homeland Security ("DHS") has the authority to permit aliens in student visa status to remain in the United States for years after they have graduated and are no longer attending school so that they can provide labor to industry. It also raises the broader question of whether the Secretary of Homeland Security has free-ranging authority to authorize alien employment in the United States, as the agency has claimed in several recent regulations. The regulation at issue is 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) ("2016 OPT Program Rule")[41].

Statutory Background

Aliens are admitted into the United States as immigrants, non-immigrants, or refugees. 8 U.S.C. §§ 1101(a)(15) and 1157. The Immigration Act of 1952 authorizes DHS to admit various classes of non-immigrants *(*for example, diplomats, crewmen, visitors, and journalists). Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (codified at 8 U.S.C. § 1101(a)(15)). The common name associated with a non-immigrant visa category is derived from its subsection within § 1101(a)(15). 8 C.F.R. § 214.1(a)(2). For example, § 1101(a)(15)(B) defines B visitor visas and § 1101(a)(15)(H)(ii)(a) defines H-2A agricultural guestworker visas.

DHS is authorized to set the duration of non-immigrant admission through regulation. § 1184(a)(1). These regulations, however, must "insure that at the expiration of such time or upon [an alien's] *failure to maintain the status under which he was admitted* … such alien will depart from the United States." *Id.* (emphasis added). Aliens who do not maintain the status under which they were admitted shall be removed. 8 U.S.C. §§ 1227(a), (a)(1)(C)(i).

The F-1 student visa authorizes the temporary admission of *bona fide* students solely to pursue a full course of study at an approved academic institution that will report termination of attendance. 8 U.S.C. § 1101(a)(15)(F)(i). DHS defines a *course of study* as requiring attendance at a school. 8 C.F.R. § 214.2(f)(6). In 1981, Congress explicitly limited the course of study under student visas to those taking place at academic institutions. Pub. L No. 97-116, 95 Stat. 1611 (1981) (codified at 8 U.S.C. § 1101(a)(15)(F)(i)). The purpose of this change was to "specifically limit [F-1 visas] to academic students." S. Rep. 96-859 at 7 (1980)[Addendum 26].

The H-1B guestworker visa is the primary statutory path for admitting college-educated, non-immigrant labor. § 1101(a)(15)(H)(i)(b). To protect American workers, the H-1B program requires the employer to submit a Labor Condition Application, § 1182(n), and imposes annual quotas that limit the number of visas, § 1184(g). Industry demand for such foreign labor is so great that the annual quotas are usually reached.

E.g., Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944, 18,966 (Apr. 8, 2008) ("2008 OPT Program Rule").

The OPT Program and Litigation

No statute authorizes aliens in F-1 visa status to work. Nonimmigrant Students; Authorization of Employment for Practical Training; Petitions for Approval of Schools; Supporting Documents, 42 Fed. Reg. 26,411 (May 24, 1977). Nevertheless, DHS and its predecessors have created a plethora of student visa work programs through regulation over the years. *See e.g.*, *Immigrants Get Student Visas From Colleges But Never Attend Class*, KPIX-5, Mar. 24, 2015 (describing how aliens work while in student visa status).[1]

Currently, DHS has work programs for on-campus employment, up to 20 hours a week of off campus employment, employment with an international organization, Curricular Practical Training, pre-Completion Optional Practical Training, and post-Completion Optional Practical Training. 8 C.F.R. § 214.2(f)(10). The last of these, post-completion Optional Practical Training ("OPT"), is the only program at issue in this litigation.

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1 Available at https://web.archive.org/web/202.00919164557/http://sanfrancisco.cbslocal.com/2015/04/24/international-technological-university-san-jose-college-foreign-students/ (last visited Jan. 25, 2021)

The current OPT program was originally created in 1992 without notice and comment. Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992) ("1992 OPT Program Rule"). OPT originally authorized all aliens in student visa status to remain in the United States and work for a year after graduation. *Id.*

Since the 1990's, the use of foreign labor has become one of the most contentious issues in the computer industry as employers have used cheap, foreign workers to replace Americans. *See, e.g.*, Julia Preston, *Toys 'R' Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas*, NY Times, Sept. 29, 2015 (describing how Toys 'R' Us, Disney, and New York Life Insurance replaced American computer programmers using the H-1B visa program).[2] Historically, the primary vehicle for importing foreign computer programmers was the H-1B visa. 8 U.S.C. § 1101(a)(15)(H)(i)(b). Both the statutory H-1B visa program and the OPT program apply to the same class of workers: college graduates. 8 U.S.C. § 1184(i).

In 2007, Microsoft concocted a scheme to circumvent the H-1B quotas through regulation. 2008 OPT Program Rule, A.R. at 130–23. Microsoft's plan was for DHS to increase the duration of OPT by 17 months (from a year to 29 months) so that OPT could serve as a substitute for

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2 Available at https://web.archive.org/web/20210322091858/https://www.nytimes.com/2015/09/30/us/toys-r-us-brings-temporary-foreign-workers-to-us-to-move-jobs-overseas.html (last visited Oct. 5, 2017)

H-1B visas. *Id.* Microsoft presented its plan to the DHS secretary at a dinner party. *Id.* Thereafter, DHS worked in secret with industry lobbyists to craft regulations implementing Microsoft's scheme. The first notice the public received that DHS was considering such regulations came when DHS promulgated them without notice and comment. 73 Fed. Reg. at 18,944.

The 2008 OPT Program Rule contained two extensions to the original one-year OPT term. The first applied to all graduates and extended OPT from the time an H-1B petition was filed on behalf of the alien until a decision was made on that petition. 73 Fed. Reg. at 18,947. The second extension only applied to aliens with degrees in fields DHS listed as being STEM (science/technology/engineering/mathematics). This extension was for 17 months. There is no explanation in the record of why this duration was chosen other than this is what Microsoft told DHS to do. 2008 OPT Program Rule, AR 120–23. Combined, the two extensions could allow non-immigrants to work on student visas for up to 33 months after graduation. 73 Fed. Reg. at 18,948. As a further means to increase the foreign labor supply, DHS also allowed aliens to remain in the U.S. under the OPT program while unemployed so they could look for work. 73 Fed. Reg. at 18,950.

DHS gave no educational reason for extending the duration of OPT. 73 Fed. Reg. at 18,944–56. Instead, disagreeing with the policy judgment of Congress, DHS justified the rule on the ground that the quotas on

the H-1B visas that Congress enacted to protect American workers harmed businesses. 73 Fed. Reg. 18,950–53.

Since the 2008 OPT Program Rule expanded the work period to a length similar to that of guestworker visas, the OPT program has surpassed H-1B to become the largest guestworker program in the entire immigration system measured by workers per year. Neil Ruiz & Abby Budiman, *Number of Foreign College Students Staying and Working in the After Graduation Surges*, Pew Research Center, May 18, 2018, p. 7.[3]

The secret expansion of the OPT program was immediately challenged in the District of New Jersey by several groups of American computer programmers. *Programmers Guild v. Chertoff*, No. 08-2666, 2008 U.S. Dist. LEXIS 140215 (D.N.J. Oct. 31, 2008). The plaintiffs alleged injury from the increased number of competitors resulting from the 2008 OPT Rule. *Id.* at *3–4. The district court, however, held that only businesses can have standing resulting from increased competition, *id.* at *4, and dismissed the case for lack of standing, *id.* at *7.

On appeal, the Third Circuit affirmed the dismissal, but on other grounds, in a non-precedential opinion. *Programmers Guild, Inc. v. Chertoff*, 338 F. App'x 239 (3d Cir. 2009). The Third Circuit held the American workers did not satisfy the zone of interests test. *Id.* at 245. Contrary to its precedential opinions, the Third Circuit held that *Air Courier Con-*

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3 http://assets.pewresearch.org/wp-content/uploads/sites/2/2018/05/10110621/Pew-Research-Center_Foreign-Student-Graduate-Workers-on-OPT_2018.05.10.pdf

ference v. Am. Postal Workers Union, 498 U.S. 517 (1991) required its zone of interests analysis to look at the F-1 student visa provision in isolation and that the court could not even consider the other provisions in the same sub-subsection. *Id.* at 243 n.1; *contra UPS Worldwide Forwarding v. U.S. Postal Serv.*, 66 F.3d 621, 630 n.11 (3d Cir. 1995) ("Air Courier Conference, we note, merely held that a recodification of an entire title of the United States Code, covering hundreds of statutory provisions developed over the course of two centuries, did not constitute one 'statute,' within the meaning of the zone of interests test."). The Third Circuit concluded that the lack of an explicit provision to protect American workers within the student visa statute indicated that protecting American workers was not within its zone of interests. *Id.* at 245. The Third Circuit did not explain why a provision that does not authorize alien employment at all could be expected to "contain[] [] language conditioning entry into the United States on noninterference with domestic labor conditions." *Id.* at 245.

Washtech began this litigation in the D.C. District on March 28, 2014. Compl., *Wash. All. Tech. Workers. v. U.S. Dep't of Homeland Sec.*, No. 14-cv-529, Docket 1. Washtech's complaint alleged that the 2008 OPT Program Rule was made unlawfully without notice and comment and that DHS has no authority to allow aliens to remain in the United States on student visas and to work after they complete their course of study and are no longer attending school. *Id.*

In deciding DHS's motion to dismiss, the district court held that Washtech had standing to challenge the 2008 OPT Program Rule. *Wash. All. Tech. Workers. v. U.S. Dep't of Homeland Sec.* 74 F. Supp. 3d 247 (D.D.C. 2014) ("*Washtech I*"). On summary judgment, the district court held that the 2008 OPT Program Rule was made unlawfully without notice and comment. The district court, however, also held that the definition of the student visa in 8 U.S.C. § 1101(a)(15)(F)(i) was ambiguous in that it could be interpreted as merely setting entry requirements, allowing DHS to disregard the statutory provisions once an alien enters the country. *Wash. All. Tech. Workers. v. U.S. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 140 (D.D.C. 2015) ("*Washtech II*"). The district court then held that the OPT program was within DHS's authority. *Id.* at 145. The district court then vacated the 2008 OPT Program Rule but stayed vacatur to allow DHS to promulgate another OPT rule so that its ruling would not have any effect. *Id.* at 149.

Washtech appealed the *Washtech II* opinion to this Court. While the appeal was pending, DHS promulgated its replacement to the 2008 OPT Program 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. 13,040 (Mar. 11, 2016) ("2016 OPT Program Rule")[41]. The 2016 OPT Program rule reenacted or replaced all of the OPT provisions of the 1992 OPT Program Rule. 81 Fed. Reg. at 13,117–22[119–24].

The 2016 OPT Program Rule provided Washtech no relief whatsoever. Aliens working under the 2008 rule were allowed to continue working under the 2016 rule. 81 Fed. Reg. at 13,104[106]. Worse yet, the 2016 OPT Program Rule aggravated the injury by increasing the STEM extension from 17 months to 24 months. 81 Fed. Reg at 13,040[42].

This Court held that *Washtech II* was moot because of the new rule and vacated the decision. *Wash. All. of Tech Workers v. U.S. Dep't of Homeland Sec,*. 650 F. App'x 13 (D.C. Cir., 2018) ("*Washtech II Appeal*"). This Court's terse opinion gave no explanation of why a new rule causing the identical injury—and even aggravating the injury—could make the challenge moot. *Id.*; *contra Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (noting that replacing a statute with another that differs insignificantly should not moot a challenge to the repealed statute); *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (holding mootness requires that the "effects of the alleged violation" be "completely or irrevocably eradicated").

Washtech promptly filed a complaint against the 2016 OPT Program rule alleging that the rule was in excess of DHS authority for the very same reasons the 2008 OPT Program Rule was. Compl., *Wash. All. of Tech Workers v. U.S. Dep't of Homeland Sec.*, No. 16-cv-01170 (D.D.C. June 17, 2016), Docket 1[41]. This time, the district court dismissed the case under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

Wash. All. of Tech Workers v. U.S. Dep't of Homeland Sec. 249 F. Supp. 3d 524 (D.D.C. 2017) ("*Washtech III*"). Washtech again appealed and this Court reversed. *Wash. All. of Tech Workers v. U.S. Dep't of Homeland Sec*, 892 F.3d 332 (D.C. Cir. 2018) ("*Washtech III Appeal*").

On January 28, 2021, the district court issued an opinion on summary judgment ("*Washtech IV*"). The *Washtech IV* opinion strictly follows the reasoning of the vacated *Washtech II* opinion, with most of the text taken verbatim from the previous opinion. The district court held that, because Congress did not provide a statutory definition for the term *student*, Congress had not addressed whether the student visa statute permitted post-graduation employment and unemployment. *Washtech IV* at 23[23]. The district court's opinion did not address whether the statute's requirement that, to receive a visa, one must be a "*bona fide* student … who seeks to enter the United States temporarily and solely for the purpose of pursuing [] a course of study [at an approved academic institution]" resolved the purported ambiguity. 8 U.S.C. § 1101(a)(15)(F). Nor did the district court look at the common meaning of the word *student*.

The district court also adopted the novel holding that the statutory definition of the F-1 student visa merely set forth the conditions for entry into the United States and that DHS was free to ignore those statutory terms once the alien entered the country. *Washtech IV* at 23–24[24–25]. In support of this holding, the district court quoted from 8 U.S.C. § 1184(a)(1), which gives DHS the power to set the duration of alien

admission through regulation. *Id.* Yet the district court did not quote or mention the requirement in the very same subsection that such regulations must insure that nonimmigrants leave the country when they fail to maintain the status for which they were admitted, nor consider that aliens who do not maintain the status under which they were admitted are deportable and "shall . . . be removed." 8 U.S.C. § 1227(a), (a)(1)(C)(i). The district court also ignored the large volume of case law interpreting the student visa requirements as applying after admission. *E.g.*, *Elkins v. Moreno*, 435 U.S. 647, 666 (1978); *Anwo v. Immigration & Naturalization Serv.*, 607 F.2d 435, 437 (D.C. Cir. 1979).

The district court's opinion does not address the issue of whether the student visa statute permits aliens to remain in the United States while unemployed and looking for work.

Moving to *Chevron* step two, the district court found that transforming student visas into the largest guestworker program in the immigration system reflected a reasonable agency interpretation of the student visa statute. *Washtech IV* at 29–33[29–33]. To reach that conclusion, the district court conflated all the various student visa work programs over the years to find that OPT was a longstanding practice. *Washtech IV* at 33–35[33–35]. The district court pointed out several congressional actions related to student visas and concluded that their failure to change student visa work represented congressional ratification of the OPT program. While doing so, the district court cherry picked from such

actions and excluded every bit of legislative history that contradicted its conclusions. *Washtech IV* at 33[33]. In particular, the district court's opinion omits all statements and actions that show Congress intended student visas to be limited to academic students. *E.g.*, H.R. Rep. 101-723 at 66 (1990)[Addendum 28]; S. Rep. 96-859 at 7 (1980)[Addendum 26].

SUMMARY OF THE ARGUMENT

The district court's opinion transforms *Chevron deference* into *Chevron abdication* by completely disregarding what the F-1 statute does say while conferring on DHS unbounded authority based on what the statute does not say.

The OPT program conflicts with the statutory definition of the F-1 visa as being "solely" for aliens who are pursuing a course of study at an approved academic institution.

The district court did not attempt to reconcile the incompatible terms of the OPT program with the definition of the F-1 student visas. Instead, the district court adopted *Washtech II*'s aberrant, never-before-seen interpretation that the statutory F-1 visa definition could be interpreted as merely specifying the requirements for entry and that DHS was free to replace the statutory requirements with conflicting regulatory requirements for maintaining status after admission. *Washtech IV* at 23–24[23–24].

No other court has adopted such an interpretation; on the contrary, a string cite of authority foreclosing it could span several pages. What is

more, this interpretation conflicts with other statutory provisions, previous agency interpretation, and other regulation. The only authority the district court cited in support of this interpretation was the authorization for DHS to proscribe term of admission through regulation (8 U.S.C. § 1184(a)(1)), but the district court omitted from its quotation the conflicting requirement that such regulations must insure that aliens leave the country when they no longer maintain the status for which they were admitted. *Washtech IV* at 24[24].

After tossing aside the statutory limitations on student visas, the district court then found that the lack of a statutory bar on (or any mention of) student employment in the student visa statute means that employment can be granted after graduation. *Washtech IV* at 24[24]. In doing so, the district court ignored the basic principle that an agency's power comes from what is delegated to it. *E.g.*, *W. Minn. Mun. Power Agency v. Fed. Energy Regul. Comm'n*, 806 F.3d 588, 593 (D.C. Cir. 2015).

STANDARD OF REVIEW

The review of an agency record presents entirely questions of law. *Am. Bioscience v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001). This Court reviews questions of law *de novo*. *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004). This Court reviews objections to the admission of evidence and supplementing the administrative record for abuse of discretion. *United States v. Johnson*, 519 F.3d 478, 483 (D.C. Cir. 2008) & *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010).

ARGUMENT

Two preliminary issues should be disposed of from the outset. First, the district court states that the term *course of study* is ambiguous. *Washtech IV* at 26[26]. But DHS regulations define *a course of study*, and that definition (requiring study at a school) has never been in dispute. 8 C.F.R. § 214.2(f)(6). Furthermore, OPT explicitly takes place "[a]fter completion of the course of study." 8 C.F.R. § 214.2(f)(10)(ii)(A)(3). Thus, OPT is not part of a course of study under DHS's own regulations. The precise meaning of *course of study* in the student visa statute is thus irrelevant here; this case is entirely about employment on student visas outside of a course of study.

Second, this case has never been about whether actual students (that is, those pursuing a course of study at an academic institution) may work because OPT solely addresses alien employment on student visas outside of a course of study. DHS has distinct Curricular Practical Training and Pre-Completion Optional Practical Training programs that allow work as part of a course of study and that are not at issue in this case. *E.g.*, 8 C.F.R. § 214.2(f)(10)(i) ("a curricular practical training program that is an integral part of an established curriculum"). Consequently, even if this Court reverses, foreign students will still be able to participate in internships and similar employment. The question here is whether aliens who have graduated and are not attending school may work on student visas.

I. The OPT program cannot survive a *Chevron* step one analysis because Congress has not conferred on DHS the authority to allow aliens to remain in student visa status or work after graduation.

A court should "hold unlawful and set aside agency action, findings, and conclusions found to be … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). This Court elucidated this standard in *Motion Picture Ass'n of Am. v. Fed. Commc'ns Comm'n*:

> In *Chevron*, the Court held that, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." This is so-called "*Chevron* Step One" review. If Congress "has not directly addressed the precise question" at issue, and the agency has acted pursuant to an express or implicit delegation of authority, the agency's interpretation of the statute is entitled to deference so long as it is "reasonable" and not otherwise "arbitrary, capricious, or manifestly contrary to the statute." This is so-called "*Chevron* Step Two" review. In either situation, the agency's interpretation of the statute is not entitled to deference absent a delegation of authority from Congress to regulate in the areas at issue.
>
> *Mead* reinforces *Chevron's* command that deference to an agency's interpretation of a statute is due only when the agency acts pursuant to "delegated authority." The Court in *Mead* also makes it clear that, even if an agency has acted within its delegated authority, no *Chevron* deference is due unless the agency's action has the "force of law."

309 F.3d 796, 801 (D.C. Cir. 2002) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

The OPT program faces two hurdles to survive a *Chevron* step one analysis. First, DHS lacks the authority to allow aliens admitted on student visas to remain in the United States once they have completed their course of study. 8 U.S.C. §§ 1101(a)(15)(F)(i); 1184(a)(1). Second, DHS lacks the authority to allow aliens to engage in employment on student visas after their course of study is completed. *Id.*

A. DHS lacks authority to allow aliens to remain in the United States on student visas after they graduate because student visa status is limited solely to pursuing a course of study at an approved academic institution.

Aliens are admitted on student visas to do one thing: "solely" pursue a full course of study at an approved academic institution. § 1101(a)(15)(f)(i). Aliens are no longer pursuing a course of study once they graduate. 8 C.F.R. § 214.2(f)(5)(i); *Yadidi v. Immigration & Naturalization Serv.*, No. 92-70042, 1993 U.S. App. LEXIS 20855, at *2–3 (9th Cir. Aug. 12, 1993). Once aliens no longer conform to the status for which they are admitted, DHS regulations are required to ensure that they leave the country. 8 U.S.C. § 1184(a)(1).

But DHS regulations do not require aliens on student visas to leave the country when they graduate. 8 C.F.R. § 214.2(f)(10)(ii)(A)(3). Instead, such aliens are allowed to remain in the United States for up to 42 months to work or be unemployed so that they can supply labor to industry. 8 C.F.R. § 214.2(f)(10). The 2016 OPT Rule is in excess of DHS authority because it allows aliens to remain in the U.S. on student visas

after they no longer conform to the status for which they were admitted. 8 U.S.C. §§ 1101(a)(15)(F)(i) (defining the terms of F-1 visas); 1184(a)(1) (requiring DHS regulations ensure aliens leave the country when they do not conform to the status for which they were admitted).

The district court's opinion turns *Chevron deference* into *Chevron abdication* by manufacturing statutory gaps where there are none. Specifically, (1) the district court found that the student visa definition could be interpreted as a mere entry requirement so that its restrictions did not apply after the alien had entered the country; (2) the district court found that the term *student* is ambiguous when, in the context of the statute, it clearly has its ordinary meaning of *someone attending school*; and (3) the district court found that the lack of an explicit prohibition on OPT created a gap.

1. Section 1101(a)(15)(F)(i) cannot rationally be read as a mere entry requirement.

The obvious conflict between OPT and the student visa statute is that OPT participants are not pursuing a course of study at an approved academic institution. 8 U.S.C § 1101(a)(15)(F)(i). The district court tries to get around that problem by adopting the aberrant interpretation of *Washtech II* that § 1101(a)(15)(F)(i) just defines entry requirements and that DHS is free to ignore its statutory provisions once the alien enters the U.S. *Washtech IV* at 23–24 & n.12[23–24]. *Washtech II* and *Washtech IV* do not cite any case law in support of this interpretation—nor can they because the amount of contradicting authority is voluminous. *E.g.*, *El-*

kins, 435 U.S. at 666 ("a nonimmigrant alien who does not maintain the conditions attached to his status can be deported"); *Narenji v. Civiletti*, 481 F. Supp. 1132, 1137–38 (D.C. Cir. 1979) (noting that the agency was required to ensure aliens in student visa status leave the country when they no longer conformed to the status for which they were admitted); *Anwo*, 607 F.2d at 437 (alien could not have established residence while in student visa status because § 1101(a)(15)(F)(i) requires maintaining a foreign residence); *United States v. Alzanki*, 54 F.3d 994, 1005 (1st Cir. 1995) (alien could become deportable "'[u]pon failure to maintain the status under which she was admitted'" (quoting 8 U.S.C. § 1184(a)(1)); *Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374, 1384 (9th Cir. 1989) (restrictions on the admission of foreign labor applied regardless of whether the aliens had made an entry); *Xu Feng v. Univ. of Del.*, 833 F. App'x 970, 971 (3d Cir. 2021) (Section 1101(a)(15)(F)(i) makes maintaining a full course of study a continuing requirement of student visa status); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (§ 1101(a)(15)(F) conditions student visa status on pursuing a full course of study); *Khano v. INS*, 999 F.2d 1203, 1207 & n.2 (7th Cir. 1993) (holding that an alien admitted as a non-immigrant student becomes deportable when upon failing to conform to the conditions of § 1101(a)(15)(F)(i)); *Olaniyan v. Dist. Dir., Immigration & Naturalization Serv.*, 796 F.2d 373, 374 (10th Cir. 1986) (aliens admitted on student visas were authorized "to remain in the United States for the duration of their admission status.");

see also S. Rep. 82-1137 at 22 (1952)[Addendum 15] & H.R. Rep. 81-1365 at 60 (1952)[Addendum 21] (stating that the Immigration and Nationality Act of 1952 makes nonimmigrants deportable when they fail to maintain their status).

The district court's interpretation also conflicts with the agency's historical interpretation. For example, in *Anwo v. INS*, the government argued that Anwo could not have established a domicile in the U.S. because "an alien entering on a student visa under § 101(a)(15)(F)(i) must come 'temporarily and solely for the purpose' of education, while maintaining 'a residence in a foreign country which he has no intention of abandoning.'" No. 77-1879, 1978 U.S. App. LEXIS 7835, at *4 (D.C. Cir. Nov. 13, 1978); *see also Anwo,* 607 F.2d at 437 (later affirming the Board of Immigration Appeals's decision); *Brown v. U.S. Immigration & Naturalization Serv.*, 856 F.2d 728, 731 (5th Cir. 1988) (agreeing with this Court in *Anwo*). Thus, the government's position was that the requirements of 8 U.S.C. § 1101(a)(15)(F)(i) persisted after entry. Another example of agency interpretation is that, by regulation, every alien who applies for nonimmigrant status "must agree to abide by the terms and conditions of his or her admission." 8 C.F.R. § 214.1(a)(3)(i).

The district court's interpretation, moreover, conflicts with the very provision at issue, which requires the alien's course of study to take place at an academic institution that will report termination of attendance—a requirement that presupposes an ongoing relationship after

admission. § 1101(a)(15)(F)(i). The district court's observation that the ongoing reporting requirements are only requirements on the schools, *Washtech IV* at 26[26], is beside the point. It is nonsensical to read the statute as requiring that aliens be solely pursing a course of study at an academic institution when they enter the country on a student visa but allow them to abandon that purpose immediately after entry. Nor does it make sense to require the schools to report termination of attendance if the alien's status as a student is irrelevant after entry, as the district court would have it. *Washtech IV* at 23–24[23–24].

The only authority that the *Washtech II* and *Washtech IV* opinions cite in support of their entry requirement interpretation is 8 U.S.C. § 1184(a)(1) ("the admission to the United States of any alien as a non-immigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe.") *Washtech II*, 156 F. Supp. at 139, *Washtech IV* at 24[24]. Even here, the district court selectively edited the statute to omit the contradictory clause in § 1184(a)(1) that requires DHS regulations to insure that aliens leave the country when they do not maintain the status for which they were admitted. Rather than supporting the district court's opinions, the unedited § 1184(a)(1) directly contradicts them. The *Washtech II* and *Washtech IV* opinions also ignore §§ 1227(a) and (a)(1)(C)(i), which provide that non-immigrant aliens shall be removed if they do not maintain the status for which they were admitted.

Adopting the district court's novel interpretation of § 1101(a)(15)(F)(i) as an entry requirement would create absurdity in the entire immigration system. Under that interpretation, DHS has the ability to regulate out of existence all differences among non-immigrant visas—other than what the alien has to show at the time of admission. For example, if aliens need only be "solely" pursuing a course of study when they are admitted on a student visa, then there is no textual distinction that would prevent the requirement that tourist visas be for aliens coming "temporarily for pleasure" from being an entry requirement as well, allowing DHS to permit tourist employment after admission. *See* 8 U.S.C. §§ 1101(a)(15)(B), (F).

2. A statute is not ambiguous because Congress fails to define a common term, or because of a secondary meaning that is inapplicable in the statute.

The district court's *Chevron* analysis also finds ambiguity by tossing the precedent of this circuit to the wayside. That analysis begins by declaring "'the statute's lack of a definition for the term "student" creates ambiguity.'" *Washtech IV* at 23[23] (quoting *Washtech II*, 249 F. Supp. 3d. at 139). The district court then asserts that "[b]y failing to define this statutory language, Congress has not 'directly addressed the precise question at issue.'" *Id.* (quoting *Chevron*, 467 U.S. at 843). Under this reasoning, every *Chevron* analysis immediately moves to step two, unless Congress defines every term used.

It is, therefore, not surprising that such an approach is contrary to the precedent of this circuit, in which "the absence of a statutory definition does not render a word ambiguous." *Nat. Res. Def. Council v. Env't Prot. Agency*, 489 F.3d 1364, 1373 (D.C. Cir. 2007). "Words are to be given their ordinary meaning and should not be 'tortured' to impart ambiguity where none exists." *MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d 204, 210 (3d Cir. 2005). Furthermore, the words of the statute should be read in context to determine their meaning. *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012). And, when qualified as a "*bona fide* student … who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study … at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution…," *student* unambiguously means *someone attending school*. § 1101(a)(15)(F)(i).

Repeatedly, the district court hunts for ambiguities in the term *student* found in some contexts, and fallaciously concludes from them that the term *student* is ambiguous in all contexts, even though it clearly is not ambiguous in § 1101(a)(15)(F)(i). For example, the district court cites *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 52 (2011), in support of its interpretation that the lack of a definition of *student* makes the term ambiguous in the context of student visas. *Washtech IV* at 23[23]. In *Mayo,* the issue was whether medical residents who were employed full time by a university and who were "regularly attending

classes" were students for the purposes of exemption from payroll taxes. *Mayo Found. for Med. Educ. & Rsch. v. United States*, 503 F. Supp. 2d 1164, 1176 (D. Minn. 2007). Ambiguity flowed from the term *student* in that context because the residents' full-time employment dominated over their class attendance. *Mayo*, 568 F.3d at 679–80. That ambiguity allowed the Internal Revenue Service to classify medical residents as not being students. *Mayo*, 568 F.3d at 684 (*aff'd* 562 U.S. 44). The source of ambiguity in *Mayo* does not exist here, because the aliens in the OPT program are not attending school at all.

Similarly, the district court attempts to create ambiguity by stretching the term student beyond its ordinary meaning. See *Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 332 (2020) (departing from the ordinary meaning of a term does not create ambiguity under *Chevron*). The common and ordinary meaning of the word *student* is *someone attending school*. *E.g.*, *Marcinek v. Commonwealth*, 999 S.W.2d 721, 723 (Ky. Ct. App. 1999); *Carter v. Univ. of S.C.*, 360 S.C. 428, 431 n.2, (Ct. App. 2004).

Yet the district court asserts that the existence of a secondary meaning of the term *student* as "one who studies: an attentive and systematic observer" creates ambiguity. *Washtech IV* at 24[24]. The district court never considered whether such an alternate definition could actually apply within the context of the statute. *Id.* Instead, the mere existence of another definition created the ambiguity. *Id.*; *but see Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 418 (1992) (holding a term

was ambiguous where it had alternate definitions with "each making some sense under the statute.").

Clearly, the alternate meaning of *student* does not apply, or make any sense, in § 1101(a)(15)(F)(i). Imagine an alien who is a true *student of history*, an author of twelve books on the Civil War, who seeks admission to the United States for the purpose of systematically studying the Gettysburg battlefield. Such a *student of history* is not even eligible for a student visa for that purpose because student visas are only available to those attending school. 8 U.S.C. § 1101(a)(15)(F)(i); 8 C.F.R. § 214.2(f). The secondary meaning of student that the district court asserts creates "fundamental ambiguity" does not even apply in the context of student visas. *Washtech IV* at 25[25] (quoting *Washtech II*, 56 F. Supp. 3d at 140). Any ambiguity in the term *student* in the context of § 1101(a)(15)(F)(i) is entirely manufactured by the district court.

It is an "established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning." *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998). Yet the district court's opinion relies on a supposed shift in meaning of *student* within one statutory sub-sub-subsection. For the purposes of entry into the United States, *student* means *someone attending school*. *Washtech IV* at 23–24[23–24]. Once the alien enters, *student* takes on an alternate meaning that happens to encom-

pass providing labor to industry while not attending school. *Washtech IV* at 25[25].

3. The student visa statute's lack of a prohibition on post-graduation employment does not create a gap because an agency's authority is defined by what Congress grants it, not by what Congress withholds.

The district court declares that Congress has not directly addressed the question of "'whether the scope of F-1 encompasses post-completion practical training related to the student's field of study,'" and therefore "'Congress has not 'directly addressed the precise question at issue.'" *Washtech IV* at 23[23] (quoting *Washtech II*, 156 F. Supp. 3d at 140 and *Chevron*, 467 U.S. at 843); *Washtech IV* at 24[24] (stating that, because the statute does not bar student employment, it is ambiguous about what employment it permits). This analysis takes *Chevron* deference to exospheric heights where a statute is ambiguous if it does not explicitly list what the agency is prohibited to do. *Contra Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) ("Were 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."); *accord W. Minn. Mun. Power Agency*, 806 F.3d at 593. When the student visa statute does not authorize employment at all, Congress's silence on post-graduation employment should demonstrate that Congress has not delegated the power to DHS to permit

such employment—and not that DHS has unlimited power to grant post-graduation employment. *Cf. Nat'l Petroleum Refiners Assn. v. Fed. Trade Comm'n*, 482 F.2d 672, 674 (D.C. Cir. 1973) ("The extent of [an agency's] powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background."). The district court's interpretation is particularly troubling because Congress has explicitly limited the scope of student visa status to aliens "solely" (excluding everything else) pursuing a course of study at an academic institution. *See S. Cal. Edison Co. v. Fed. Energy Regul. Comm'n*, 195 F.3d 17, 23 (D.C. 1999) (interpreting "solely" to limit permissible uses).

The district court addresses this conflict by asserting that the statute "'could sensibly be read as an entry requirement.'" *Washtech IV* at 24 n.12[24] (quoting *Washtech II*, 156 F. Supp. 3d at 139). Yet, in all the ways shown above, there is nothing sensible about an interpretation that would allow visa holders to abandon the purpose that allowed them to enter the country while maintaining their visa status.

4. The district court's opinion permits unlimited duration of student visa status.

The Immigration and Nationality Act divides aliens into two classes: immigrants and non-immigrants. H.R. Rep. 82-1365 at 36–37 (1952)[Addendum 17–18]. The non-immigrant category "includes those aliens who seek to enter for temporary periods of stay." *Id.* Sections 1101(a)(15) & 1101(a)(15)(F)(i) specify that aliens on student visas are non-immigrants

(setting the expectation that they will eventually leave the country) and specifies what the aliens are permitted to do: "solely" pursue a course of study at a school. Sections 1184(a)(1) and 1227(a)(1)(C)(i) direct that non-immigrants leave the country when they no longer conform to the status for which they were admitted on their visa.

If the courts adopt the interpretation that § 1101(a)(15) just specifies requirements for admission in to the United States, (*Washtech IV* at 23[23]), and treat the statutory requirement that non-immigrants must leave the country when they no longer conform to the status for which they are admitted as a nullity (*Washtech IV* at 24[24]), the duration of status for a non-immigrant no longer has temporal bounds. Under the 1992 OPT Rule, aliens could remain in student visa status for up to twelve months after graduation. Under the 2008 OPT Rule, aliens could remain in the United States for up to 33 months. Under the 2016 OPT Rule, aliens can remain for up to 42 months. What stops OPT from growing even longer? Under the district court's opinion, there is no limit to the amount of time DHS can permit an alien to remain in the U.S. on student visa status and there is no limit to the amount of time DHS can permit any non-immigrant to remain in the United States on any visa without a statutory time limit.

B. DHS lacks the authority to allow aliens to work on student visas after they have completed their course of study.

The second *Chevron* step one issue with OPT is that DHS lacks the authority to allow aliens to work on student visas after they have com-

pleted their course of study. *See* 8 U.S.C. § 1101(a)(15)(F)(i). An authorization to work is distinct from an authorization to be in the United States. *Guevara v. Holder*, 649 F.3d 1086, 1091–92 (9th Cir. 2011). Even if OPT could be classified as some kind of discretionary non-enforcement of alien departure, DHS takes the affirmative step of granting employment authorizations to non-student aliens in student visa status. 8 C.F.R. § 214.2(f)(10).

The 2016 OPT Rule is one of several recent regulations that have claimed Congress has conferred on DHS independent authority to permit alien employment to any class of alien. *E.g.*, Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015) (authorizing employment for spouses of H-1B guestworkers); International Entrepreneur Rule, 82 Fed. Reg. 5,238 (Jan. 17, 2017) (authorizing admission without a visa and granting employment). These regulations assert that the definition of the term *unauthorized alien* in 8 U.S.C. § 1324a(h)(3) confers on DHS this unlimited authority to allow aliens to work through regulation. *E.g.*, 81 Fed. Reg. at 13045, 13,059[47, 61]. Inexplicably, the district court's opinion does not address DHS's own claim of authority under § 1324a for authorizing employment in the OPT program.

1. Section 1324a(h)(3) is a definitional provision that confers no authority on DHS.

The plain language of § 1324a(h)(3) confers no authority whatsoever on DHS. This provision is expressly limited in scope by the phrase "as used

in this section." *See W. Union Tel. Co. v. Fed. Commc'ns Comm'n*, 665 F.2d 1126, 1136–37 (D.C. Cir. 1981) (holding a section was "only definitional" where it began with "as used in this section" and contained only definition subsections). Yet DHS claims that this provision permits the agency to authorize aliens to remain in student visa status after they have graduated and are no longer students; to allow such non-student aliens to engage in employment; and to allow such non-students aliens to be unemployed and looking for work. 81 Fed. Reg. at 13,045, 13,059, 13,117–21[47, 61, 119–23]. It is notable that no regulation authorizing alien employment prior to 2015 ever claimed that 8 U.S.C. § 1324a(h)(3) conferred on DHS authority to define classes of aliens eligible for employment. 80 Fed. Reg. at 10,294.

Congress has the "plenary authority to prescribe rules for the admission and exclusion of aliens." *Miller v. Christopher*, 96 F.3d 1467, 1470 (1996). To find that Congress has conferred on DHS power equal to its own to grant alien employment in a term definition, limited in scope to its own section, the court "would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence." *Am. Bar Ass'n v. Fed. Trade Comm'n*, 430 F.3d 457, 469 (2005). If Congress had intended to grant DHS co-equal power to authorize

alien employment through regulation, surely it would have done so explicitly. *Cf. Food & Drug Admin. v. Brown & Williamson*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). Yet not an iota of legislative history has appeared that indicates Congress intended such a vast transfer of power in 8 U.S.C. § 1324a(h)(3).

2. Section 1324a(h)(3) could not confer on DHS unlimited authority to permit alien employment because such an interpretation results in an unconstitutional delegation of authority.

Indeed, any interpretation of § 1324a(h)(3) that is broad enough to permit OPT's work authorizations makes that provision a glaring violation of the nondelegation doctrine. That doctrine requires "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). No principle governing the grant of work authorizations by the Attorney General or his successor DHS can be discerned in § 1324a(h)(3); rather, as DHS appears to acknowledge, if § 1324a(h)(3) gives DHS the authority to authorize work for aliens in the OPT program, that is because it gives DHS general authority to authorize work for any alien, or class of aliens, as it sees fit. *See, e.g.*, 80 Fed. Reg. at 10,294 ("8 U.S.C. 1324a(h)(3)(B), recognizes that employment may be authorized by statute or by the Secretary"). Such an

interpretation makes § 1324a(h)(3) unconstitutional, and for that reason should be avoided. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2258–59 (2013).

Because the district court ultimately held that OPT was within DHS's authority, the district court's opinion implicitly endorses the proposition that § 1324a(h)(3) confers on DHS some authority to permit alien employment independent of Congress. It is not clear whether the district court has held that DHS has the authority to allow any alien to work through regulation (as the agency claims) or whether that authority excludes the employment of illegal aliens. *See Washtech II* at 27–28[28–28] (distinguishing *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) as only applying to illegal aliens). The district court's reasoning, however, provides no basis to disallow work authorization even for the latter.

3. The district court ignored the precedent of this circuit to conclude that the lack of any mention of employment in the student visa statute means that there is no limit to DHS's power to grant employment to aliens on student visas.

The district court did not address DHS's claim that 8 U.S.C. § 1324a(h)(3) confers on it unlimited authority to permit alien employment and, therefore, authority to permit alien employment outside of a course of study. 81 Fed. Reg. at 13,045, 13,059[47, 61]. Instead, the district court relied on its expansion of *Chevron* to conclude that DHS has the authority to permit student visa employment after graduation. *Washtech IV* at 24[24]. The district court noted that in 1990 Congress enacted a tem-

porary work program for student visas. *Id.* This suggests that "'pursuing [] a course of study'—does not foreclose employment.'" *Id.* (quoting *Washtech II*, 156 F. Supp. 3d at 140). From there, the district court takes the giant leap that, because "'[the student visa] does not bar *all* foreign student employment'" and "'it is not clear what employment the statute does permit,'" "'the statute's text is ambiguous as to whether such employment may extend for a period of time after F-1 students complete their studies.'" *Id.* The district court thus transforms the absence of any mention of employment under student visas into boundless agency authority to permit alien employment on student visas while disregarding the precedent of this circuit: "The absence of a grant of statutory power is not an ambiguity or silence on the question of whether Congress has granted such a power." *Nat'l Rifle Ass'n of Am., Inc. v. Reno*, 216 F.3d 122, 140 (D.C. Cir. 2000). The district court's reasoning is particularly troubling because it bases its conclusion that DHS has unlimited authority to permit work on student visas on the enactment of a 3-year *trial* student visa work program that Congress *allowed to expire*. Immigration Act of 1990, Pub. L. No. 101-649, § 221, 194 Stat. 4978, 5027. The House report describing this provision, moreover, states that "to assure compliance with the student visa, the alien is required to be in good academic standing." H.R. Rep. 101-723 at 66 (1990)[Addendum 28]. This directly contradicts the district court's interpretation that the student visa permits employment outside of a course of study. *Washtech IV* at 24[24].

II. The *Washtech II* and *Washtech IV* opinions deny Congress the power to restrict activity on student visas after admission.

The great paradox of the *Washtech II* and *Washtech IV* opinions now should be apparent: *they give Congress no power to restrict activity on student visas after the alien enters the United States*. On the one hand, if Congress does not explicitly prohibit some activity on student visas, the district court says that DHS can permit that activity as gap-filling under *Chevron*. *Washtech IV* at 23–24[23–24]. On the other hand, *Washtech IV* nullifies any restrictions Congress does impose on student visas by treating them as merely entry requirements. *Washtech IV* at 23–24, 26[23–24, 26].

Assume for argument's sake that Congress had written the F-1 visa definition as:

> [] 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 college … *who will not engage in any form of post-graduate employment*. . . .

Under the district court's opinion, such a new restriction would be as meaningless as the requirement that F-1 visa-holders be "solely" pursuing a course of study at an academic institution because, under that opinion, the student visa statute just defines entry requirements that do not persist after the alien enters the United States. *Washtech IV* at 23–24, 26[23–24, 26].

The fact of the matter is Congress *already* has directly addressed the question of whether aliens can engage in post- graduation employment

(or any other activity) by limiting student visas to those "solely" pursuing a course of study at an academic institution. 8 U.S.C. § 1101(a)(15)(F)(i).

III. The OPT program also fails at *Chevron* step two because the regulatory transformation of student visas into the largest guest worker program in the immigration system is an unreasonable interpretation of the statute.

The question at *Chevron* step two "is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 811 (D.C. Cir. 2011). The question at this stage, then, is whether transforming student visas into the largest guestworker program in the immigration system on a year-to-year basis is a permissible construction of the student visa statute. It is not.

A. The district court conflated all the various practical training programs promulgated over the years to create the illusion of a longstanding policy of post-graduate employment on student visas.

At various points in its opinion, the district court identifies changes to the nature of work on student visas, but it never puts together the entire scope of the changes. The district court notes that, in 1947, aliens could work on student visas in a training program when such work was required or recommended by their schools. *Washtech IV* at 31–32[31–32]. The district court also pointed out that, in 1985, practical training was explicitly authorized by regulation for post-graduate employment. *Washtech IV* at 32–33[32–33]. At that time, however, post-graduate

practical training was only available when "employment comparable to the proposed employment is not available to the student in the country of the student's foreign residence." Nonimmigrant Classes; Change of Nonimmigrant Classification; Revisions in Regulations Pertaining to Nonimmigrant Students and the Schools Approved for Their Attendance, 48 Fed. Reg. 14,575, 14,589 (Apr. 5, 1983). The 1992 OPT Program Rule permitted post-graduate work for all aliens on student visas. The 2008 OPT Program Rule expanded the work to provide labor to industry and circumvent the quotas on H-1B visas. Since the enactment of the Immigration and Nationality Act, other student visa work programs were created in parallel. 8 C.F.R. § 214.2(f)(10).

An outside observer would certainly conclude that a work authorization to participate in a formal training program that is required for graduation is fundamentally different from a work authorization after graduation intended to supply the labor needs of industry. *Compare* Aliens and Nationality, 18 Fed. Reg. 3,526, 3,529 (June 19, 1953) (permitting up to 18 months of work in a formal training program required or recommended by the school) *with* 73 Fed. Reg. at 18,946–46, 18,953 (authorizing work on student visas to circumvent the quotas on H-1B visas and supply labor to industry). The regulations governing the multiple student visa employment programs highlight this difference. One such program is the Curricular Practical Training program that allows aliens in student visa status "to participate in a curricular practical

training program that is an integral part of an established curriculum." 8 C.F.R. § 214.2(f)(10)(i). The Curricular Practical Training program is much closer to the practical training programs of the 1950's than the current OPT program is. *Compare* 8 C.F.R. § 214.2(f)(10)(i) (current Curricular Practical Training is "practical training that is an integral part of an established curriculum") *with* 8 C.F.R. § 214f.4(b) (1954)[4] (a training program required or recommended by the school) *and* 8 C.F.R. § 214.2(f)(10)(ii)(A)(3) (OPT) (work after graduation).

Nonetheless, the district court "disagrees" with the proposition that there have been substantial changes in student visa work programs over the decades. *Washtech IV* at 35[35]. The district court's disagreement notwithstanding, unless one conflates the OPT program with all the various work programs that preceded it and treats a training program required for graduation the same as work in industry after graduation, the district court's *Chevron* step two analysis collapses because it is impossible to identify a specific policy to which Congress might have acquiesced.

B. The district court's legislative history of practical training contains errors and makes conclusions not supported by the evidence.

The district court compiled its own legislative history in *Washtech II* that the *Washtech IV* opinion recycled to argue two points: that the practice

4 Published in Aliens and Nationality, 18 Fed. Reg. 3526, 3529 (June 19, 1953)

of allowing aliens to work after graduation had been going on since 1947, *Washtech IV* at 32 n.14[32], and to argue that Congress has been aware of this policy and endorsed it, *Washtech IV* at 33–37[33–37].

First, the district court noted that the regulations of 1943 permitted students to work out of financial necessity, but only if such work did not interfere with schoolwork. *Washtech IV* at 32 n.14[32]. The district court found that the lack of such a noninterference requirement for practical training suggested that the work took place after graduation. *Id*. This leap in reasoning ignores the fact that the normal practice at the time was not to approve practical training concurrently with classroom work. *Matter of T–*, 7 I. & N. Dec. 682, 684 (B.I.A. 1958). Furthermore, practical training could only take place when required or recommended by the school. 18 Fed. Reg. at 3,529. If practical training were required, then it must have taken place before graduation. The district court also ignores the contemporary report stating that "students are not permitted to stay beyond the completion of their studies." H.R. Rep. 82-1365 at 40 (1952)[Addendum 19].

Second, the district court cited *Matter of T–*, 7 I. & N. Dec. 682, 684 (B.I.A. 1958). But that decision only shows that practical training was not normally authorized to take place concurrently with formal classwork; not that the practical training took place after graduation. *Id*. In *Matter of T–* the applicant was attending school at the time practical training was authorized. *Id*. The district court also cited here its only source that

actually supports its position on post-graduation work, *Matter of Yau*, 13 I. & N. Dec. 75 (B.I.A. 1968). The *Yau* decision describes an alien who had received a B.S. degree from an unaccredited school after attending a series of colleges for 12 1/2 years on a student visa who was denied a preference immigrant visa. *Id*. The decision states that Yau was working after graduation on practical training in 1968. *Id*. The decision, however. gives no description of how such work was authorized. *Id*. According to Shepard's, *Yau*'s only citations have been *Washtech II* and *Washtech IV*. The district court's opinion has no explanation of how members of Congress would be aware of such an obscure agency decision.

Third, the district court cites S. Rep. No. 81-1515 at 503 (1950)[Addendum 9], stating that practical training took place after the "regular course of study." *Washtech IV* at 32 n.14, 36[32, 36]. The report does not state that practical training was taking place after graduation. S. Rep. No. 81-1515 at 503 (1950)[Addendum 9]; *see also* H.R. Rep. 82-1365 at 40 (1950)[Addendum 19] (stating foreign students were not allowed to stay after completing their studies); *Matter of T–* (stating the normal practice was not to authorize practical training concurrently with classwork). The district court also notes that the same report (at 505) contains the suggestion of liberalizing practical training so that it could take place before the completion of formal studies, implying that work was taking place post-graduation. *Washtech IV* at 32 n.14, 36[32, 36]. Here the district court is simply confused; the actual suggestion was that "laws

and regulations for trainees" should be changed—not those for students. S. Rep. No. 81-1515 at 505 (1950)[Addendum 10]. Trainee was a distinct admission category at that time. *Id.* at 526, 567[Addendum 11–12].

Fourth, the district court cites a 1961 report that described an order allowing students to remain in the U.S. for up to 18 months after obtaining their degree. *Washtech IV* at 32 n.14, 36[32, 36]. Here again the district court has mixed up its visas. The reference to "students" in the report (H.R. Rep. No. 87-721 at 15 (1961)[Addendum 23]) is to aliens on the J Exchange Visitor visas, not F-1 visas. *Id.* at 75[Addendum 24].

Fifth and finally, the district court cites *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) (statement of Hon. Leonard F. Chapman, Jr., Comm'r of *Immigration & Naturalization Serv.*) ("Chapman") as describing up to 18 months of practical training. *Washtech IV* at 32 n.14, 36[32, 36]. There is no indication in Mr. Chapman's statement, however, that work on student visas was taking place after graduation. Chapman at 23[Addendum 33]. More to the point, Mr. Chapman also stated:

> The law defines the "F" student as follows:
>
> An alien having a residence in a foreign country which he has no intention of abandoning, who is a *bona fide* student qualified to pursue a full course of study, and who seeks to enter the United States temporarily and solely for the purpose—
>
> And I emphasize the word "solely"

> —for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States.
>
> ....
>
> I emphasize the word "solely" to divert from my prepared statement for a moment or two, sir as to emphasize that the effect of the law is that the student must come here solely to pursue his education. That does not imply that he can come here with the expectation and intention of working.

Chapman at 21[Addendum 31]. Mr. Chapman's emphasis on the word *solely* provides a striking contrast with the district court's holding that DHS can ignore this restriction because the statute merely defines an entry requirement. *Washtech IV* at 24 n.12[24]. His statement that aliens should not come with the expectation of working also conflicts with Intevernors' claims that OPT is critical for them to hire workers. Decl. of Patrick Duffy, Docket 37-3. ¶ 17; Decl. of Peter Tolsdorf, Docket 37-3, ¶ 3; Decl. of Jonathan Baselice, Docket 37-3, ¶ 3.

The district court also found that the inclusion in the Immigration Act of 1990 of a trial program that allowed aliens to work in a field unrelated to their field of study demonstrated congressional awareness that aliens were allowed to work post-graduation in fields related to their study. *Washtech IV* at 36[36]. This conclusion is totally contrary to the description of the program in the House report on the bill. H.R. Rep. 101-723 at 66–67 (1990)[Addendum 28–29]. There the provision is described as an "opportunity for exposure to nonacademic areas of American life and [for] help[] in meeting expenses." *Id.* at 66. Directly

contradicting the district court's interpretation, the report notes that compliance with the student visa requires maintaining good academic standing. *Id.*

Within all the material cited by the district court, just one provides any evidence that work was taking place after graduation on student visas. *Matter of Yau*, 13 I. & N. Dec. 75 (B.I.A. 1968). Furthermore, the district court omitted contrary evidence from its opinion. H.R. Rep. 82-1365 at 40 (1952) [Addendum 18] ("students are not permitted to stay beyond the completion of their studies."). Clearly, at some point a transition took place where the administering agency started allowing aliens to work after graduation on student visas. But it is not clear from the regulations when this practice started. The first time the regulations expressly allowed post graduate practical training was in 1985 and that was limited to cases where such practical training was not available in the alien's home country. *Washtech IV* at 32–33[32–33]. The documents cited by the district court do little to show the practice of post-graduate employment was as longstanding as the district court found. *Washtech IV* at 36–37[36–37].

C. The district court's opinion makes no showing that Congress has been aware of post-graduate employment on student visas, let alone of congressional acquiescence to such a practice.

The only evidence the district court put forth that Congress had acquiesced to post-gradation employment on student visas is a single agency

immigration interpretation. *Washtech IV* at 36–37[36–37] (citing *Matter of Yau*, 13 I. & N. Dec. 75 (B.I.A. 1968)). An obscure immigration interpretation whose only citations have been in *Washtech II* and *Washtech IV* could hardly bring about congressional familiarity with post-graduate employment on student visas, especially when Congress had been explicitly provided with conflicting information. H.R. Rep. 82-1365 at 40 (1952)[Addendum 19] ("students are not permitted to stay beyond the completion of their studies.").

Having put forth nothing that shows Congress would have been aware of the policy of allowing aliens to remain in the United States for extended period of time on student visas after graduation, the district court concluded that "'Congress has strongly signaled that it finds DHS's interpretation to be reasonable.'" *Washtech IV* at 34[34] (quoting *Washtech II*, 156 F. Supp. 3d at 142–43); *but see Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983) (finding inaction significant when it was "hardly conceivable that … any Member of Congress … was not abundantly aware of what was going on."). Where, then, is the district court's signal? The district court says that the signal of approval comes from congressional inaction. *Washtech IV* at 34[34] (quoting *Washtech II*, 156 F. Supp. 3d at 142–43). On the contrary, Congress's actions demonstrate that there has been no congressional approval of post-graduation employment on student visas.

The most significant change to student visas was in 1981. Pub. L. No. 97-116, 95 Stat. 1611 (1981). That year Congress limited courses of study on student visas to those taking place at approved academic institutions. *Id.* The purpose of this change was to "specifically limit [F-1 visas] to academic students." S. Rep. 96-859 (1980)[Addendum 26]. This affirmative limitation of student visas to academic students directly contradicts the district court's claim of congressional acquiescence to any policy of permitting work on student visas after graduation. The district court's opinion deals with this enactment the same way it deals with every other piece of legislative history that contradicts its conclusions: by ignoring it.[5]

The only time Congress has authorized student visa employment was in the Immigration Act of 1990, Pub. L. No. 101-649, § 221, 104 Stat. 4,978, 5,027. That Act established a three-year trial off-campus work program that was allowed to expire. *Id.* The House report on that provision states "to assure compliance with the student visa, the alien is required to be in good academic standing." H.R. Rep. 101-723 at 66 (1990) [Addendum 28]. This statement demonstrates both congressional ignorance of post-graduate work on student visas and a disapproval of such a

5 All of the conflicting documents that Washtech points out here that were not mentioned in the district court's opinion were brought to that court's attention. *Wash All. Tech. Workers. v. U.S. Dep't of Homeland Sec.*, Pl.'s Mot. for Summ. J., Docket 56 (D.D.C. Sept. 25, 2019).

policy. The district court makes no mention of this report contradicting its conclusions.

Instead, to show congressional inaction and approval, the district court created a cherry picked list of legislative history that does not show disapproval of DHS policy of using student visas as a vehicle to supply labor to industry while omitting every congressional action that shows disapproval. *Washtech IV* at 33[33] (quoting 156 F. Supp. 3d at 142); *Washtech IV* at 32 n.14[32] (describing the documents referenced at 33 described *supra*).

This Court has warned "that Congressional failure to repudiate particular decisions 'frequently betokens unawareness, preoccupation, or paralysis' rather than conscious choice, and 'affords the most dubious foundation for drawing positive inferences." *Chisholm v. Fed. Commc'ns Comm'n*, 538 F.2d 349, 361 (D.C. Cir. 1976) (quoting *Zuber v. Allen*, 396 U.S. 168, 185–86 n.21 (1969) and *United States v. Price*, 361 U.S. 304, 310–11 (1960). Here the district court found congressional ratification flowing from the failure to act on conflicting, isolated statements spread over decades that do not even state the policy that the court found had been ratified. *Washtech IV* at 32 n.14[32].

IV. The district court considered inadmissible evidence submitted in an *amicus* brief.

Washtech raises an issue that appears to be a question of first impression: whether the federal rules of evidence apply to *amicus curiae* briefs. Washtech raised an objection in the district court to an *amicus* brief that

contained many examples of evidence inadmissible under the federal rules of evidence and attempted to supplement the record. Pl. Mot. to Strike the Br. *Amici Curiae* of Inst. of Higher Ed. and Objection to Evidence Submitted in the Br. Docket 93. The district court stated that it considered this brief in its decision. *Washtech IV* at 2 n.1[2]. Washtech objected to numerous anecdotes in the brief that were made without oath or affirmation (Fed. R. Evid. 603), were hearsay (Fed. R. Evid. 801, 802, 803 & 804), and lacked relevance because they attempted to supplement the record. Pl. Mem., Docket 93 at 3–5.

As this case is a review of an agency action, there is an additional issue: can an *amicus* brief supplement the record, even with admissible evidence? But this Circuit has already addressed that issue. "[I]n review of an agency decision the record must be limited to 'that information before the agency at the time of its decision.'" *Mail Order Ass'n v. U.S. Postal Serv.*, 2 F.3d 408, 434 (D.C. Cir. 1993); *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). Additional evidence contained in *amicus* briefs has been excluded because it supplemented the record. *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984).

Consequently the objection, as raised here, is simultaneously more specific and more general than what this Court has considered before. It is more specific in that this Court has rejected *amici* supplementing the record—including through sworn statements—in the review of an agency action. *Boswell Mem'l Hosp.*, 749 F.2d at 793. At the same time,

this issue is more general in that it raises the question of whether inadmissible evidence can be admitted in an *amicus* brief in any kind of case.

The district court asserted that this rule only applies to the parties and that *amicus* briefs are not supplementing the record. *Washtech IV* at 2 n.1[2]. The district court's interpretation is contrary to the precedent of this Court that has rejected affidavits and references to the affidavits filed by *amici* and characterized such materials as "supplementation of the record." *Boswell Mem'l Hosp.*, 749 F.2d at 793. Furthermore, once the district court admits an *amicus* brief containing evidence it, not only is it part of the record for subsequent appeals but it also becomes admissible in other cases under the public records exception. *E.g.*, *O'Neal v. Smithkline Beecham Corp.*, 551 F. Supp. 2d 993, 1003 n.12 (E.D. Cal. 2008); *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553, 572 n.23 (E.D. Pa. 2008); *Forst v. Smithkline Beecham Corp.*, 639 F. Supp. 2d 948, 957 (E.D. Wis. 2009).

Below, Washtech had cited authority where otherwise admissible evidence that had been incorporated in *amicus* briefs had been rejected as supplementing the record. Mot. Br., Docket 93 at 4–5. In response, ignoring the *a fortiori* nature of this authority, the district court asserted that Washtech had provided no examples where *inadmissible* evidence in an *amicus* brief had been rejected. *Washtech IV* at 2 n.1[2]. The district court also noted that *amicus* briefs containing anecdotes have been considered in other cases in this circuit. *Id.* Yet the district court cited no

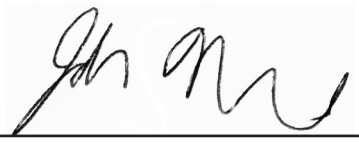
cases where an objection to such anecdotes had been raised and been overruled.

The Federal Rules of Evidence are applicable in "United States district courts" and "United States courts of appeals," without distinction among those appearing before the courts. Fed. R. Evid. 1101. Rules 603, 801, 802, 804 & 804 contain no restriction that excludes *amici* from their applicability. *E.g.* Fed. R. Evid. 802 ("Hearsay is not admissible.…"). The rules of evidence have been applied to *amicus* briefs in other circuits. *Brown v. Collier*, 929 F.3d 218, 235–36 (5th Cir. 2019) (excluding unsworn testimony in an *amicus* brief); *New York v. Microsoft Corp.*, Civil Action No. 98-1233 (CKK), 2002 U.S. Dist. LEXIS 22862 (D.D.C. Nov. 6, 2002) (refusing to admit unsworn testimony in an *amicus* brief); *Collins v. SmithKline Beecham Corp.*, 2008 Phila. Ct. Com. Pl. LEXIS 57, *9 (refusing to admit hearsay in an *amicus* brief). It makes no sense to exclude evidence submitted by a party but admit the same evidence when submitted by *amici*. To do so opens the door to coordination between parties and *amici* to obtain the admission of inadmissible evidence, and provides ammunition for judicial critics who assert political bias in the courts.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the district court.

Respectfully submitted,
Dated: May 5, 2021



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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,674 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 using 14 pt. Caslon.

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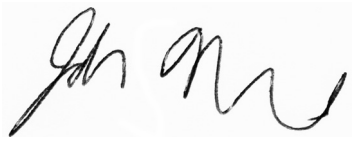
CERTIFICATE OF SERVICE

I certify that on May 5, 2021 I filed Appellant's Opening Brief with the ECF system that will provide notice and copies to the parties' counsel of record.



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