Oral Argument Originally Scheduled on March 31, 2017

No. 16-5287

United States Court of Appeals

for the

District of Columbia Circuit

Save Jobs USA,

Appellant,

v.

United States Department of Homeland Security,

Appellee.

On appeal from an order entered in the
United States District Court for the District of Columbia
1:15-cv-615
The Hon. Tanya S. Chutkan

Reply Brief

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April 29, 2019

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Case Law:

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GLOSSARY

DHS	U.S. Department of Homeland Security
H-1B	H-1B visa for guestworker in speciality ocupations (*i.e.*, those requiring a college degree). 8 U.S.C. § 1101(a)(15)(H)(i)(b). Dependents of H-1B visa holders are eligible for H-4 visas.
H-4	H-4 Visa for dependents of H guestworkers: 8 U.S.C. § 1101(a)(15)(H). Allows dependents to accompany or join the principal alien.
H-4 Rule	Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214, 274a)
INA	Immigration and Nationality Act of 1952
IR	Intervenors' Response
USCIS	U.S. Citizenship and Immigration Services

SUMMARY OF THE ARGUMENT

Save Jobs USA members suffer four cognizable injuries from the U.S. Department of Homeland Security ("DHS") rule Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015) ("H-4 Rule"): the H-4 Rule increases competition against Save Jobs USA's members from H-1B workers; it increases competition against them from H-4 workers; it confers benefits on their H-1B competitors; and it deprives them of their statutory rights to protection from foreign labor.

Save Jobs USA's standing flows directly from the findings in the H-4 Rule that repeatedly and explicitly state that it provides incentives to attract and retain more H-1B workers. DHS renounces the findings of the H-4 Rule to argue Save Jobs USA lacks competitive injury from H-1B workers.

DHS's argument that Save Jobs USA lacks injury from H-4 workers asks this Court to abandon its "allows competition" standard for competitive injury, ignore the large number of H-4 workers already in the computer job market, and adopt two novel and baseless rules created by the district court, namely, that a plaintiff must show that the agency intended to cause competitive injury, and that the date of the complaint creates an evidentiary cutoff for standing.

In *Warth v. Seldin*, 422 U.S. 490, 514 (1975), the Supreme Court held that Congress may create rights through statute, and that the deprivation of such rights gives rise to standing. Congress has given Save

Jobs USA members the statutory right to have foreign labor conform to restrictions, including numerical limits. The H-4 Rule allows labor to enter Save Jobs USA members' market without conforming to those restrictions, depriving Save Jobs USA members of their statutory rights. DHS's argument that these rights are limited to the labor union context is inconsistent with *Warth*'s instruction that the deprivation of any statutory right can give rise to standing.

This Court should decide the merits question of whether the H-4 Rule is within DHS authority because the issue was fully briefed in the district court, and the district court stated how it would decide the issue, giving its reasoning. To remand an issue that has already been decided and would come right back to this Court for review *de novo* would be pointless.

Intervenors' claim that the H-4 Rule is within DHS authority is based on the proposition that Congress created a statutory framework of "dual authority" under which Congress and DHS can both authorize alien employment independently. Needless to say, no provision of law expressly creates such a system of shared, coequal power between Congress and DHS. Rather, Intervenors ask this Court to adopt the preposterous claim that this unprecedented transfer of authority to an agency comes from DHS's general authority. To the contrary, Congress does not delegate decisions of economic and political significance in such a cryptic fashion.

Even if Congress had attempted to create such a framework of dual authority in itself and DHS, such dual authority would be unconstitu-

tional under the *separation of powers* and *nondelegation doctrines*. If Congress created the scheme of dual authority claimed, it did so with no directive on how that power was to be used and with no limitations on that power. Under the nondelegation doctrine, Congress cannot delegate its authority to an agency unless Congress provides an intelligible principle to guide the executive branch, and it provided no such principle here. At the very least, to avoid this glaring constitutional problem, DHS's general authority should not be interpreted to have created this system of dual authority.

The lack of an explicit prohibition against alien employment on H-4 visas does not invoke *Chevron* deference because the measure of an agency's authority is what Congress delegates to it, not what it withholds from it. To presume agency authority from a lack of a prohibition also would be unconstitutional.

ARGUMENT

I. To argue that the H-4 Rule is within DHS authority, Intervenors adopt an unconstitutional model of government in which the executive and Congress share overlapping "dual authority" to define classes of aliens eligible for employment.

Intervenors' entire argument that the H-4 Rule is within DHS authority presumes that there is a "statutory framework" of unprecedented "dual authority" shared between Congress and DHS over alien employment. Intervenors' Response ("IR") 13–33. According to Intervenors, Congress did not merely delegate power to DHS to manage an aspect

of the immigration system. Instead, Congress retained its own power to define classes of aliens that may work, but gave DHS power to do the same independently to "respond to immediate policy needs in cases when Congress has not acted." IR 16–17. Intervenors' view of the immigration system runs afoul of the *separation of powers* that is at the heart of our system of government, in particular the *nondelegation doctrine*.

Intervenors claim that the Immigration and Nationality Act of 1952 ("INA"), Pub. L. No. 82-414, § 103, 66 Stat. 166, 173–74 (8 U.S.C. § 1103) created this system of dual authority, and allowed the executive to extend employment to any class of alien. IR 14–26. Yet § 103 makes no mention of authorizing employment, let alone places any restrictions upon it. Likewise, there is no mention in the entire Act of alien employment being authorized by regulation (and obviously there are no limitations on such regulations). INA, 66 Stat at 166–282. Under Intervenors' argument, the 1952 Act implicitly conferred on the executive unlimited authority to permit alien employment through regulations with the only limitation being the potential for Congress to enact subsequent restrictions.[1] *See* IR 38. But, of course, such enactments would be sub-

1 Intervenors claim that this power can be limited by normal administrative review. IR 37. Yet, if the agency shares "dual authority" with Congress and Congress can authorize employment to any class of aliens, the only substantive judicial review possible is whether the agency has encroached on what Congress explicitly prohibits. *See id.*; *but see La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it.").

ject to a presidential veto unless passed by supermajorities. U.S. Const., Art. I, § 7. Therefore, under Intervenors' interpretation, the executive has greater power than Congress to define employment eligibility in the immigration system. IR 37; *but see Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) ("'Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.'") (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

"The lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996); *see also Clinton v. City of N.Y.*, 524 U.S. 417, 481 (1998) (holding the statutory creation of a line-item veto was an unconstitutional delegation of power to the executive branch). Congress has defined classes of aliens eligible for employment in nearly every major immigration act. *E.g.*, INA, § 101, 66 Stat. at 166–69; Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 9, 79 Stat. 911, 917; Immigration Act of 1990, Pub. L. No. 101-649, §§ 204–21, 104 Stat. 4978, 5019–28. Clearly, defining such classes is a lawmaking function that cannot be transferred to an agency. *See Loving*, 517 U.S. at 758; *see also Loving v. Internal Revenue Serv.*, 742 F.3d 1013, 1020–21 (D.C. Cir. 2014) (finding that Congress's continued enactments regulating tax preparers indicated that it had not delegated that authority to the IRS).

Intervenors' view of the immigration system still runs into problems even if one assumes that defining classes of aliens eligible for employ-

ment is decisionmaking, rather than lawmaking. "[The Supreme Court] repeatedly [has] said that when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to act' is directed to conform.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J. concurring) ("[The nondelegation doctrine] ensures … that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."). Assuming that Congress implicitly conferred on the executive "dual authority" to define classes of aliens eligible for employment in 1952, as Intervenors claim (IR 37), it gave no guidance on how this authority was supposed to be used. INA § 103, 66 Stat at 173–74 (8 U.S.C. § 1103). Even if Congress had enacted such a blanket grant of authority, it was not through a legislative act that provides an "intelligible principle" to which the executive must conform. Any such delegation of authority would be unconstitutional under *Am. Trucking Ass'ns*, 531 U.S. at 472.

Because of these glaring constitutional problems with Intervenors' interpretation of the INA—an interpretation that is not even plausible, let alone compelling (see below)—this Court should decline to adopt it under the canon of constitutional avoidance. *See*, *a fortiori*, *Immigration*

& Naturalization Serv. v. St. Cyr, 533 U.S. 289, 299–300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems").

A. Congress has not even attempted to confer "dual authority" on DHS.

While it would be unconstitutional for Congress to confer "dual authority" upon itself and DHS, Congress has not even attempted to do so. The obvious problem with Intervenors' argument is that the lack of any explicit authorization for such unlimited authority requires "finding the proverbial elephant in the mouse hole." *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 787 F.3d 524, 537 (D.C. Cir. 2015). Congress does not delegate decisions of economic and political significance in the cryptic fashion Intervenors claim. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *Am. Bar. Ass'n v. Fed. Trade Comm'n*, 430 F.3d 457, 469 (D.C. Cir. 2005); *Loving*, 742 F.3d at 1021.

"The first step in assessing whether a statute delegates legislative power is to determine what authority the statute confers." *Am. Trucking Ass'ns*, 531 U.S. at 465. Intervenors argue that DHS's vast authority to authorize employment to classes of aliens comes from 8 U.S.C. § 1103.[2] IR 15. The

2 While Intervenors argue the 1952 INA created this "dual authority," they provide no explanation why the 2015 H-4 Rule was the very first regulation authorizing alien employment that claimed this authority existed. 80 Fed. Reg. at 10,294[12].

dichotomy between the vast scope of the authority Intervenors claim Congress transferred to the executive and the lack of any mention of delegating that authority is striking. *Compare* IR 18–26 *with* 8 U.S.C. § 1103. It is not surprising that Intervenors cite in support only case law that holds that DHS has broad authority over immigration, and cite no case holding that DHS has "dual authority" with Congress to permit employment.[3] IR 13–14.

To support their unconstitutional claim, Intervenors erroneously assert that Congress ratified DHS's "dual authority" to permit alien employment in 8 U.S.C. § 1324a(h)(3). Intervenors incorrectly contend that, "if … all work authorizations flowed directly from a pronouncement in the [Immigration and Nationality Act], there would have been no need for Congress to add 'or by the Attorney General'" to 8 U.S.C.

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3 Later, IR 35, Intervenors cite both *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 508–09 (9th Cir. 2018), and *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 426 (E.D.N.Y. 2018), as stating that DHS had the power to authorize alien employment. That question was not in contention before either court, however, as neither DHS nor the plaintiffs argued that DHS lacked such power. Similarly, IR 22, Intervenors cite *Diaz v. Immigration & Naturalization Serv.*, which addresses whether the alien plaintiffs were entitled to receive a regulatory-created work authorization. 648 F. Supp. 638, 644 (E.D. Cal. 1986). The lawfulness of the regulation was not at issue, and the court decided the case "assuming that the regulations are consistent with the statute." *Id. Texas v. United States* remains the only case where a court has addressed the 1324a question in an adversarial context outside of dicta. 809 F.3d 134, 182–84 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2015)

§ 1324a(h)(3).[4] IR 15. To the contrary, there was a crucial need for that clause. As pointed out in Save Jobs USA's opening brief, the Immigration Reform and Control Act of 1986 contains seven directives to the Attorney General to authorize alien employment. Op. Br. at 39. Had Congress omitted "or by the Attorney General" in § 1324a(h)(3), such aliens would be authorized to work but it would be unlawful to employ those aliens. Interveners convert an innocuous clause in a term definition, limited in scope to its own section and necessary to implement the other provisions of the act, into a ratification of an unconstitutional congressional delegation of unlimited "dual authority" to an agency.

Intervenors claim that two later enactments, 8 U.S.C. §§ 1226 & 1231, that prohibit DHS from granting work authorization to certain aliens are nonsensical unless DHS has "dual authority" to grant work authorizations on its own. IR 15–16. Intervenors fail to mention other provisions where Congress has granted DHS discretionary authority to grant work permits, *e.g.*, Pub. L. No. 105-100, § 202, 111 Stat. 2160, 2195 (1997), or where Congress has directed DHS to grant work permits, *e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5029. That Congress tells DHS through various enactments that it may grant work permits through regulation shows that Congress had not already given DHS dual authority to grant work permits at will. *Cf.*

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4 Intervenor's argument makes "or by the Attorney General" redundant in 8 U.S.C. § 1324a because, according to them, INA section § 103 had already authorized employment through regulation in 1952.

Loving, 742 F.3d at 1020–21. The prohibitions on granting work permits in 8 U.S.C. §§ 1226 & 1231 are simply limitations on DHS's work-authorization authority previously granted by Congress.

B. Intervenors' *Chevron* deference argument also runs afoul of the Constitution.

Consistent with their unconstitutional claim of unlimited power having been delegated to DHS, Intervenors argue that the lack of an explicit prohibition on H-4 employment in the visa's definition at 8 U.S.C. § 1101(a)(15)(H) means that "Congress has not directly spoken to the question of whether H-4 aliens should be entitled to work authorization" and thus DHS's granting of such authorizations is subject to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). IR 30. Intervenors ignore the fact that agency authority flows from that which Congress clearly delegates to it; not what Congress is silent about. *Hampton*, 276 U.S. at 409. An agency must have "acted pursuant to an express or implicit delegation of authority" in order for its actions to receive deference. *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002). "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." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*). For this reason, the lack of an explicit prohibition on H-4 employment cannot confer on DHS the power to authorize such employment.

II. Remanding the question of whether the H-4 Rule is within DHS authority would be a pointless waste of time and judicial resources because the parties fully briefed the issues, the district court has already explained how it would rule on the question, and the issue would come right back to this Court to review *de novo*.

DHS argues for a pointless remand to the district court on the merits. Resp. 35. The issues in this case are solely questions of law from an administrative record, yet it has already dragged on for over four years.

The reason for the general rule that appellate courts do not consider an issue that was not passed upon below is that it allows the parties to offer all relevant evidence. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). That has already been done. *See Am. Bioscience v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001) (observing that district courts act as appellate tribunals in APA cases, rarely taking testimony). The question of whether the H-4 Rule is within DHS authority was fully briefed before the district court, the district court stated how it would rule on the merits, and the district court explained its reasoning. *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 210 F. Supp. 3d 1, 12–13 (D.D.C. 2016)[108–10]. If this Court were to remand the case, it is absolutely certain how the district court would rule and what its reasoning would be. *Id.* Here, then, the reasons for deciding the merits now are much stronger than in *Mendoza v. Perez*, where the issue had been briefed in the district court *but not decided*, where the merits question was a question of law on an administrative record, and where the likely appeal after remand would

have resulted in a *de novo* review that would have been "a waste of judicial resources." 754 F.3d 1002, 1020 (D.C. Cir. 2014).

DHS again dangles out the prospect that its rulemaking will make this case moot. Resp. 35–36. Yet DHS has made no showing that its rulemaking will completely remove H-4 labor from the job market, as is required for mootness. *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997). Furthermore, it would be impossible for DHS to show that such a work authorization would not recur because DHS has made so many similar rules in recent years. *See* Op. Br. at 33–34; *see also Women Strike for Peace v. Hickel*, 420 F.2d 597, 604 (D.C. 1969) (describing the public interest exception to mootness for recurring issues). DHS has used broken promises to delay this case for two years. Enough is enough.[5]

III. DHS cannot show Save Jobs USA does not have standing.

Save Jobs USA's standing to challenge the H-4 Rule flows directly from the rule's statement of purpose. 80 Fed. Reg. at 10,284–85[1–2]. The H-4 Rule repeatedly states that it provides incentives to Save Jobs USA's H-1B competitors to enter and remain in the job market. The appendix contains twenty-five such statements from the administrative record that were presented to the district court. App. 50–51. In arguing that

5 Intervenors make the additional argument that the case should be remanded for evidentiary issues related to standing. IR 11. But none of the evidence at issue is necessary to establish standing under the precedent of this Court. *See* § III.B, *infra*.

Save Jobs USA lacks standing, DHS repudiates its own findings. It also asks this Court to blind itself to the presence of many H-4 workers in the computer job market; deny the plain fact that the H-4 Rule was designed to confer benefits on H-1B workers; and nullify Save Jobs USA's members' statutory right to protection from foreign labor.

A. DHS renounces its own administrative record to argue that the H-4 Rule does not increase the number of H-1B workers.

The D.C. Circuit has "repeatedly held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition." *New Eng. Pub. Commc'ns Council v. Fed. Commc'ns Comm'n*, 334 F.3d 69, 74 (D.C. Cir. 2003). Save Jobs USA's members are all computer professionals who were replaced by H-1B workers. *E.g.*, Bradley Aff. ¶ 14[86], Buchanan Aff. ¶ 15[89], Gutierrez Aff. ¶ 14[92]. Thus, they are direct competitors with H-1B workers and remain in competition with those workers in the job market. The very purpose of the H-4 Rule is to increase the number of the H-1B competitors in the job market. 80 Fed. Reg. at 10,284–85[1–2].

In arguing otherwise, DHS stakes out three absurd positions. First, DHS claims that its own findings in the H-4 Rule—that it will attract and retain more H-1B workers—are, in fact, false. App. 50–51; *see* § III, *supra*. Second, DHS argues "Save Jobs failed to establish standing … because it did not demonstrate that its members are personally harmed by the presence of H-1B workers." Resp. 25–26. In other words, accord-

ing to DHS, being replaced by H-1B workers, suffering the humiliation of having to train one's foreign H-1B replacement, and having to remain in competition with H-1B guestworkers in the job market is not a personal harm. Bradley Aff. ¶¶ 9, 14[86], Buchanan Aff. ¶¶ 15[89], Gutierrez Aff. ¶¶ 10, 14[92]. Finally, DHS asks this Court to accept the bizarre conclusion that the district court was "provided with nothing to show that the H-4 Rule would have any effect on [the] H-1B program," Resp. 24–26—an assertion belied by more than ample documentation in the appendix presented to the district court. App. 1–52; *see also* § III, *supra*.

B. DHS asks this Court to ignore the presence of many H-4 workers in the computer job market.

Save Jobs USA's second injury theory is increased competition with H-4 workers employed under the H-4 Rule. *Amici* brought to this Court's attention two recent studies on the nature of the H-4 workforce. Am. Br. 8–10. The first study found that "66% of [H-4's] work in a [Science/Technology/Engineering/Mathematics] field, mostly in computer-related, engineering, or math or statistics jobs." Ike Brannon and M. Kev in McKee, *Repealing H-4 Visa Work Authorization: A Cost-Benefit Analysis*, Mar. 4, 2019, p. 5.[6] The second study found that "by far the most common occupation [for H-4 is] software developer." Jacqueline Varas, *The Economic Value of Work Permits for H-4 Visa Holders*, Am. Action Forum

6 Available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3349786.

(Mar. 20, 2019), p. 4.[7] Before the H-4 Rule went into effect, the director of U.S. Citizenship and Immigration Services ("USCIS") admitted that many aliens who would work under the rule were of the type who seek H-1B visas.[8] Patrick Thibodeau, *U.S. to allow some H-1B worker spouses to work*, ComputerWorld, Feb. 25, 2015[55]. Save Jobs USA submitted evidence that employers were seeking to hire H-4 workers for computer jobs after the H-4 Rule went into effect. App. 56–59. Save Jobs USA also submitted evidence that there were H-4 visa holders who intended to work in computer jobs. App. 70–82. Therefore, it is an absolute certainty that a large number of aliens working under the H-4 Rule are *allowed* to compete with Save Jobs USA members in the computer job market and that many such aliens actually *do compete* in this job market. From there, it should be obvious that Save Jobs USA members suffer an injury in fact from competition with H-4 workers. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 488 n.4 (1998) (noting lack of dispute that the plaintiffs had suffered an injury in fact when an agency action had allowed a single competitor into their market.).

In arguing otherwise, DHS repeatedly flies in the face of established case law. First, it is settled law in this circuit that a party suffers injury when an agency *allows* competition against it. *E.g.*, *Fin. Planning Ass'n*

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7 Available at https://www.americanactionforum.org/research/the-economic-value-work-permits-for-h-4-visa-holders/

8 Over two-thirds of H-1B workers are in computer-related occupations. USCIS, *Characteristics of Specialty Occupation Workers*, FY 2016, May 5, 2017, p. 12.

v. Sec. and Exch. Comm'n, 482 F.3d 481, 486–87 (D.C. Cir. 2007); *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (explaining the rationale behind the competitive injury doctrine). DHS argues that the established competitive injury standard should be replaced with one that requires showing the actual entry of competitors into the market. Resp. 20. Inexplicably, DHS cites the standard for injunctive relief in *Wisc. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985), in support of this change.

Second, this Court has held repeatedly that plaintiffs do not have to show specific lost sales to establish competitive injury standing. *E.g.*, *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1499 (D.C. Cir. 1996). Yet DHS argues that Save Jobs USA needs to show specific jobs to which its members applied. Resp. 21–24; *but see Adams v. Watson*, 10 F.3d 915, 921 & n.13 (1st Cir. 1993) (collecting cases holding that plaintiffs had standing where specific instances of competition had not been shown). DHS even goes so far as to argue that Save Jobs USA must segment the computer job market by age to establish standing; but such segmentation does not exist. *See*, *e.g.*, William R. Kerr, *The Plight of the Graying Tech Worker*, MIT Sloan Management Review, Mar. 28, 2019 (describing how older technology workers are pitted against the young). As this Court explained in *Bristol-Myers Squibb*, 91 F.3d at 1499, "[c]onsumers always decide whether to purchase the product of one competitor or another." The injury-in-fact is "exposure to competition" from other mar-

ket entrants. *Id.*; *Honeywell v. Envtl. Prot. Agency*, 374 F.3d 1363, 1369–70 (D.C. Cir. 2004).

Third, DHS ignores the large number of H-4 workers already in the computer job market in claiming that "[i]t is entirely uncertain whether H-4 dependents would apply specifically for, or be qualified to perform, the information-technology jobs for which Save Jobs's [sic] members are in competition." Resp. 20; *but see* Brannon, p. 5 (finding two thirds of H-4 workers are already in technology jobs such as computers); Vargas, p. 4 (finding that, by far, the most common occupation for H-4 workers is software developer). To reach that end, DHS asks this Court to ignore the admission from the USCIS director that the agency expected that many aliens working under the H-4 rule would be of the type that normally apply for H-1B visas (who in turn are mainly computer workers). App. 55. The district court excluded that evidence by inventing a requirement to show agency *intent* to cause injury. *Save Jobs USA*, 210 F. Supp. 3d. at 9 n.1[103]. DHS does not address this new standing requirement. Instead, DHS raises, for the first time on appeal, a claim of hearsay with no explanation. Resp. 34. But such an admission by a party opponent is not hearsay. Fed. R. Evid. 801(d)(2).

Fourth, DHS seeks to exclude the evidence that employers were seeking H-4 workers for computer jobs immediately after the H-4 Rule went into effect. App. 56–59. DHS asks this Court to adopt the district court's invention of an evidentiary cutoff rule for standing at the date of

the complaint. DHS asserts that Save Jobs USA "attempts [] to avoid this Court's case law on such post-complaint materials" yet *no such case law exists*. Resp. 34. The rule that the date of the complaint creates an evidentiary cutoff for standing was an invention of the district court, and neither it nor DHS has cited any case imposing such a cutoff before. If this Court adopts this new rule, plaintiffs would no longer even be able to submit affidavits in support of standing drafted after the date of the complaint. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (allegations are sufficient for standing at the pleading stage but the summary judgment stage requires affidavits or other evidence).

More fundamentally, the district court's cutoff was arbitrary. Sometimes, after all, future facts *can* show prior facts. For example, a layer of hardened lava can show that a volcano previously erupted. Here, Save Jobs USA claimed that the entry of competitors into its members' job market, to be caused by the impending H-4 Rule, was imminent. That such entry did actually occur following the promulgation of the H-4 Rule shows that Save Jobs USA's claim of imminence was correct, even though that entry necessarily occurred after the date of the complaint.

Alternatively, DHS, for the first time on appeal, declares this evidence to be hearsay. Resp. 34. Again, DHS provides no reasoning for this claim and ignores the verbal act exception to hearsay. *Id.* The employer advertisements seeking H-4 workers were offered to show that they were made, not to assert the truthfulness of the statements in the

advertisements. That is not hearsay. Fed. R. Evid. 801(d), advisory note. Similarly, the claims of H-4 aliens that they were computer workers were offered to establish that these aliens intended to enter the computer market, not that their claims of being computer workers were truthful. App. at 70–82. Evidence offered to show state of mind is not hearsay. Fed. R. Evid. 801(c).

Finally, DHS asks this Court to reject its generalized grievance precedents. Save Jobs USA noted that, when DHS's regulation allowed competition against anyone in the entire U.S. job market, it created an injury in fact to everyone participating in that job market. Op. Br. at 16–17. DHS's claim that this injury is a "generalized grievance," Resp. 23, relies on the illogical proposition that increasing the number of people facing an allowance of more foreign competitors by a regulation actually decreases the number of people who have standing to challenge that regulation.

DHS's argument fails because a generalized grievance has two elements: "The term 'generalized grievance' does not just refer to the number of persons who are allegedly injured; it refers to the diffuse and abstract nature of the injury." *Akins v. Fed. Election Comm'n*, 101 F.3d 731, 737 (D.C. Cir. 1996), *rev'd on other grounds*, 524 U.S. 11 (1998); *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23–24 (1998) (explaining why a concrete injury shared by all voters is not a generalized grievance). "Although injuries that are shared and generalized—such as the

right to have the government act in accordance with the law—are not sufficient to support standing, 'where a harm is concrete, though widely shared, the Court has found injury in fact.'" *Seegars v. Ashcroft*, 396 F.3d 1248, 1253 (D.C. Cir. 2005) (internal citations omitted) (quoting *Akins*, 524 U.S. at 24 (1998)). The injury of increased competition is a concrete injury. *E.g.*, *Mendoza*, 754 F.3d at 1011. Therefore, increased competition injury cannot become a generalized grievance just because it affects a large number of people. *Akins*, 101 F.3d at 737. Furthermore, in *Akins*, the Supreme Court held the plaintiffs had suffered an injury in fact even though the entire voting population shared the injury. 524 U.S. at 23–25. When one considers students, retirees, and members of the military, the size of the population that had standing in *Akins* is certainly larger than the population of job market participants.

C. DHS rejects its own findings in arguing that Save Jobs USA was not injured by benefits conferred on its members' H-1B competitors.

An agency action providing benefits to a competitor is an injury in fact. *Sea-Land Services v. Dole*, 723 F.2d 975, 977 (D.C. Cir. 1983). The very purpose of the H-4 Rule is to provide incentives to encourage H-1B workers to remain in competition with Save Jobs USA members. App. 50–51. Arguing against this injury, DHS again claims that its own findings in the H-4 Rule are wrong. *See* § III, *supra*. DHS describes these benefits as "speculative" and claims that "Save Jobs presented no evidence that H-1B workers who might otherwise leave the country are

staying because of the H-4 Rule." Resp. 26, 28. In fact, it is the administrative record that shows that the H-4 Rule is conferring these benefits, and this evidence was presented to the district court.[9] App. 50–51; *see also* § III, *supra*.

In its argument, DHS makes an error of law by asserting that the workers in question are part of the domestic labor pool and not alien competitors. Resp. 27. In reality, H-1B and H-4 guestworkers are explicitly *non-immigrant aliens* under the law. 8 U.S.C. § 1101(a)(15). An application for permanent residence does not make an alien a domestic worker as DHS claims. *See*, *e.g.*, 8 U.S.C. § 1182(n)(4)(E) (defining *United States Worker*). If that were the case, aliens abroad who have made a petition for permanent residence that has not been granted would be part of the domestic labor pool as well. Furthermore, few of the H-4 workers will ever become permanent residents. The immigration system allows many more people to apply for permanent residency visas than there are visas available. The current 600,000 permanent residency backlog for India would take a half century to work through—and it is still growing. USCIS, *Count of Approved Petitions as of April 20, 2018*.[10]

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9 Adding to the standing absurdity, Intervenors argue that H-1B workers would not leave the country absent the H-4 Rule. IR 9–10. Meanwhile *Amici* argue that H-1B workers *will leave* the country without the rule. Am. Br. 8.

10 Available at https://www.uscis.gov/sites/default/files/files/nativedocuments/Count_of_Approved_I-140_I-360_and_I-526_Petitions_as_of_April_20_2018_with_a_Priority_Date_On_or_After_May_2018.PDF

The H-4 Rule simply provides an incentive for more aliens to persist in non-immigrant status, bound to their sponsoring employer, during an increasingly futile wait for a green card.

D. The deprivation of any statutory right can confer standing.

"Congress may create a statutory right . . . the alleged deprivation of which can confer standing." *Warth*, 422 U.S. at 514. Congress has granted Save Jobs USA members the statutory right to have aliens conform to certain requirements before competing in the job market with them. *E.g.*, 8 U.S.C. §§ 1101(a)(15), 1182(n), 1184(g). Allowing aliens to work on H-4 visas deprives Save Jobs USA of these labor protections. DHS calls this a "merit's question." Resp. 29. In fact it is not. For example, in *Zivotofsky v. Sec'y of State*, this Court, following *Warth*, held that Congress had created a statutory right to have Jerusalem, Israel, listed as plaintiff's birthplace and the violation of that right gave rise to standing. 444 F.3d 614, 619 (D.C. 2006). Even so, plaintiff did not prevail on the merits due to separation of powers issues. *Zivotofsky v. Sec'y of State*, 725 F.3d 197, 226 (D.C. Cir. 2013) (*aff'd Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015)).

There is a clear distinction between the standing and merits issues here, as well. The H-4 visa lacks worker protections because it does not authorize work. Save Jobs USA's standing flows from DHS's bypassing statutory labor protections by allowing, through regulation, work on a visa without labor protections. The merits question is whether DHS can permit work on H-4 visas when there is the lack of a statutory au-

thorization (or as DHS argues, the lack of a statutory prohibition, *see* 80 Fed. Reg. at 10,295[13]) for such work and whether the rule conflicts with other statutes. While there is some overlapping statutory authority, these questions are still distinct.

DHS then tries to narrow the scope of this type of injury in fact to labor protections governing unions. Resp. 30. DHS notes that Save Jobs USA cited *Bhd. of Locomotive Engineers v. United States*, 101 F.3d 718 (D.C. Cir. 1996), which addressed the deprivation of statutory labor relations provisions in the union context. Resp. 30. This application of the principle in *Warth* is certainly relevant to the deprivation of statutory labor protections in the immigration context. However, DHS never explains why statutory protections for workers are limited to the labor union context. Furthermore, confining injuries-in-fact founded on violations of statutory rights to that context would ignore the Supreme Court's teaching that the deprivation of any statutory right can confer standing. *Warth*, 422 U.S. at 514.

DHS goes on to give a lengthy description of why the labor protections Save Jobs USA cited do not apply to H-4 aliens (and thus their deprivation cannot confer standing). Resp. 31–33. But the lack of H-4 labor protections is the crux of the injury. There are no labor protections in the H-4 visa because the H-4 visa does not authorize work. 8 U.S.C. § 1101(a)(15)(H). Under the statutory scheme, H-4 visa holders could get guestworker visas in their own right but they would have to comply

with the labor protections associated with them. To compete in Save Jobs USA members' market, such aliens would usually get an H-1B visa and have to comply with the labor protections in 8 U.S.C. §§ 1182(n), 1184(g). Because aliens are allowed to work on H-4 visas through regulation, where there are no labor protections, Save Jobs USA members are deprived of the statutory labor protections in the employment visa system—an injury in fact under *Warth*, 422 U.S. at 514. The H-4 rule is just one of a growing number of administrative actions that bypass labor protections in the immigration system by authorizing employment on visas without labor protections (or without visas at all). *See* Op. Br. at 46–48.

The positions of DHS and Intervenors (and the district court), then, present a painful and unfounded irony. American workers are to see the scope of injury-in-fact contracted to exclude the denial of a right created by statute. *Save Jobs USA*, 210 F. Supp. 3d at 10–11[105–06]. Meanwhile, foreign guestworkers are to see the scope of injury-in-fact expanded to include a right solely created by regulation—not by statute. Notably, Intervenors cite no case law where standing has been expanded this way before.[11] IR 12–13.

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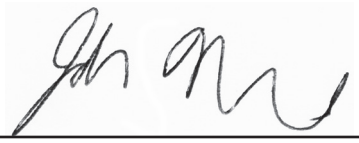
11 Intervenors admit that without a legally protected interest, they would not have standing to challenge a rescission of the H-4 Rule. IR 12–13. They indeed lack such standing. In addition to their lack of a legally protected interest, *see* Op. Br. at 49–50, they could not possibly satisfy the requirement to show that H-4 employment is within the zone of interests of 8 U.S.C. § 1101(a)(15)(H). *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

CONCLUSION

This Court should hold both that Save Jobs USA has standing to bring this action and that the H-4 Rule is in excess of the authority that Congress has delegated to DHS.

Respectfully submitted,
Dated: April 29, 2019



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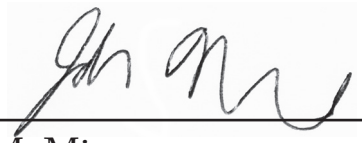
CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,381 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 April 29, 2019, I filed Appellant's Reply Brief with the Clerk of the Court using the CM/ECF system that will provide notice and copies to the Appellee's attorneys of record.

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