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,

Appellants,

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

Replacement Opening Brief

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January 16, 2019

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Save Jobs USA is not a corporation.

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 Save Jobs USA.
2. Defendant-Appellee is the U.S. Department of Homeland Security ("DHS").

Rulings Under Review

Save Jobs USA seeks review of an order by the United States District Court for the District of Columbia of September. 27, 2016 in Case No. 1:15-cv-615, (the Hon. Tanya S. Chutkan) that was accompanied by a Memorandum Opinion issued the same day. The citation to that opinion is *Save Jobs USA v. U.S. Dep't of Homeland Security*, 105 F. Supp. 3d 108 (D.D.C. 2016). The opinion is reproduced at Appendix [95] and the order is reproduced at Appendix [111].

Related Cases

The central question in this case is whether the definition of the term *unauthorized alien* in 8 U.S.C. § 1324a(h)(3) confers on the Department of Homeland Security unlimited authority to grant employment to aliens. This court has heard *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 892 F.3d 332 (D.C. Cir. 2018) which addresses

employment on student visas. After remand, that case continues in the D.C. District Court as No. 16-1170. The Deferred Action for Childhood Arrivals programs also claims 8 U.S.C. § 1324a(h)(3) as the source of authority for permitting employment by illegal aliens and is the subject of litigation across the country. *NAACP v. Trump*, 321 F. Supp. 3d 143 (D.D.C. 2018) continues in the District of Columbia district court as No. 17-1907 and No. 17-2325. The Ninth Circuit has heard *Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) (mentioning 1324a(H)(3) in dicta). That case continues in Northern District of California as No. C 17-05211, No. C 17-05235, No. C 17-05329, C 17-05380 WHA, and No. C 17-05813. In the Eastern District of New York, *Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018) continues as No. 16-CV-4756 and No. 17-CV-5228. In the Southern District of Text, *Texas v. United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2018) (citing 8 U.S.C. § 1324a(h)(3)) continues as No. 1:18-CV-00068.

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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 September 27, 2016. The notice of appeal was filed on September 28, 2016.

STATEMENT OF THE ISSUES

1. Whether the U.S. Department of Homeland Security has unlimited authority to admit aliens into the American job market through regulation.
2. Whether an agency action that allows increased economic competition against a plaintiff creates an injury in fact.
3. Whether an agency action that deprives a plaintiff of statutory protections creates an injury in fact.
4. Whether an agency action that is designed to provide an incentive to a plaintiff's economic competitors to remain in the market creates an injury in fact.
5. Whether a plaintiff must show an agency intend to cause increased competition to establish injury for standing.
6. Whether the filing of the complaint creates an evidentiary cutoff date for standing.

STATUTES AND REGULATIONS

Statutes at issue are reproduced in an addendum at the end of the document. The regulation at issue is reproduced at Appendix [1].

GLOSSARY

APA	Administrative Procedure Act
B visa	B visitor visa: 8 U.S.C. § 1101(a)(15)(B)
CPT	Curricular Practical Training. A work authorization created by regulation for student visas.
DACA	Deferred Action for Childhood Arrivals
DAPA	Deferred Action for Parents of Americans and Lawful Permanent Residents
DHS	U.S. Department of Homeland Security
E visa/E nonimmigrant	Treaty visa: 8 U.S.C. § 1101(a)(15)(E)
EAD	Employment Authorization Document
EB-2	Employment Based permanent residency visa, second priority (Green Card)
EB-3	Employment Based permanent residency visa, third priority (Green Card)
F-1	F-1 student visa: 8 U.S.C. § 1101(a)(15)(F)
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-2	Former H-2 guestworker visa created in the Immigration and Nationality Act of 1952 and replaced in the Immigration Act of 1990. The former H-1 and H-2 visas were precursors to the current H-1B visa.

H4	Same as H-4
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
INS	Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act of 1986
IT	Information Technology
L visa/L nonimmigrant	Intra-company transfer visa: 8 U.S.C. § 1101(a)(15)(L)
LPR	Lawful Permanent Resident (Green Card Holder)
OPT	Optional Practical Training. A work authorization created by regulation for student visas.
OPT Rule	Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040 (Mar. 11, 2016)

STATEMENT OF THE CASE

This case presents yet another administrative action by the Department of Homeland Security ("DHS") intended to establish that the agency has unlimited authority to admit aliens into the United States labor market through regulation. Here, that claim of unlimited authority appears in the context of a DHS regulation permitting some aliens in H-4 visa status who are spouses of guestworkers holding H-1B visas to work in the United States. Nearly all of the media focus on this employment initiative has been directed towards the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs. *Texas v. United States*, 809 F.3d 134, 146–48 (5th Cir. 2015), *aff'd by an equally divided court,* 136 S. Ct. 2271 (2015). As the instant case illustrates, this claim of sweeping agency authority has widespread ramifications outside the debate over illegal aliens, and threatens to eviscerate the entire system of labor protections for American workers in the immigration system.

Plaintiff-Appellant, Save Jobs USA's members represent the roadkill of our broken immigration system. They are all American computer programmers who were longtime employees of Southern California Edison. Aff. of D. Stephen Bradley ("Bradly Aff.") ¶¶ 5–12[85–86], Aff. of Brian Buchanan ("Buchanan Aff.") ¶¶ 6–13[89–90] and Aff. of July Gutierrez ("Gutierrez Aff.")

¶¶ 5–11[91–92]. In a well-publicized action, Southern California Edison replaced 540 American computer programmers with low paid programmers from India imported on H-1B guestworker visas. *E.g.*, Patrick Thibodeau, *Southern California Edison IT workers 'beyond furious' over H-1B replacements*, ComputerWorld, Feb. 4, 2015[1]; Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, N.Y. Times, June 3, 2015[2]. Some of these displaced Americans founded Save Jobs USA to address the damage that competition with foreign labor is causing American workers. *E.g.*, Bradley Aff. ¶ 14, Buchanan Aff. ¶ 15, Gutierrez Aff. ¶ 14.

The regulations at issue were specifically designed to increase the supply of foreign labor in the United States. Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214, 274a) ("H-4 Rule")[1–30]. The H-4 Rule adds more foreign labor both directly, by authorizing an estimated 179,600 aliens in H-4 status to work, and indirectly, by inducing aliens in H-1B status, who would otherwise leave, to remain in the labor market. *Id.;* 80 Fed. Reg. at 10,309[27].

Because there is no statutory authorization for aliens to work in

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1 Available at https://www.computerworld.com/article/2879083/it-outsourcing/southern-california-edison-it-workers-beyond-furious-over-h-1b-replacements.html (last visited Dec. 18, 2018)

2 Available at https://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html (last visited Dec. 28, 2018)

H-4 status, the central issue in this case is whether DHS has the authority to permit such work through regulation.

Statutory History

Protections for American workers have long been an integral part of immigration statutes. The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 ("INA") provided for the

> exclusion of aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor if the Secretary of Labor has determined that there are sufficient available workers in the locality of the aliens' destination who are able, willing, and qualified to perform such skilled or unskilled labor and that the employment of such aliens will not adversely affect the wages and working conditions of workers in the United States similarly employed.

S. Rep. No. 82-1137 (1952) at 11; *see also* H.R. Rep. No. 82-1365, at 50–51 (1952) (identical text). That provision applied to all aliens with certain exceptions. *Id.* The Immigration and Nationality Act of 1965 strengthened the labor protections of the INA by requiring the Secretary of Labor to certify that foreign labor would not adversely affect American workers prior to admission. Pub. L. No. 89-236, § 9, 79 Stat. 911, 817; *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 799–800 (D.C. Cir. 1985) ("*Bricklayers I*").

In 1970, Pub. L. No. 91-225, 84 Stat. 116 created the H-4 visa at issue here. That Act authorized spouses of H category visa holders (H-1, H-2, H-3) to accompany or join the principal alien in the United States. 8 U.S.C. § 1101(a)(15)(H). There has never been a

statutory authorization for aliens to work while in H-4 status, nor any provision that prevents an H-4 visa holder from applying for guestworker status through the statutory alien employment process in his own right.

By enacting the Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 101, 100 Stat. 3445 ("IRCA") (creating the new section 274a of the INA codified at 8 U.S.C. § 1324a), Congress, for the first time, criminalized and imposed civil sanctions for the act of hiring an alien who is not authorized to work in the United States. This section also created the definition of the term *unauthorized alien* (limited in scope to its own section) that DHS now claims as a source of unlimited authority to allow aliens to work in the United States. 8 U.S.C. § 1324a(h)(3).

The Immigration Act of 1990 made major changes to the immigration system. Pub. L. No. 101-649, 104 Stat. 4978. Section 104 of the Act (104 Stat. 5010) reorganized the H visa category and created the H-1B visa for college-educated labor, making the H-1B program the statutory path for alien labor to compete with the members of Save Jobs USA. 8 U.S.C. § 1101(a)(H)(i)(b). The H-1B program contains both limits on the numbers of alien competitors and restrictions on their employment. 8 U.S.C. §§ 1182(n), 1184(g). The 1990 Act left the H-4 visa unmodified.

In 2002, Congress enacted Pub. L. No. 107-124, 115 Stat. 2402,

authorizing spouses of guestworkers in the E category (treaty visas) to be employed, and Pub. L. No. 107-125, 115 Stat. 2403, authorizing spouses of guestworkers in the L category (intra-company transfers) to work. At that time, Congress recognized that it had not extended work authorizations to all guestworkers' spouses. *See* 147 Cong. Rec. H5357 (daily ed. Sept. 5, 2001) (Congressman Wexler stating, "I hope that this bill is the beginning of an understanding that we should allow spouses in other nonimmigrant classifications who accompany their husband or wife to the United States to be able to obtain work authorization."). Since then, several bills have been introduced that included provisions to authorize aliens on H-4 visas to work but none has been enacted. *E.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Congress, § 4102 (2013).

Regulatory History

The H-4 Rule was published on February 25, 2015, and went into effect May 26, 2015. 80 Fed. Reg at 10,284. The H-4 Rule is the very first in a series of proposed and final regulations in which the agency cited the definition of the term *unauthorized alien* in 8 U.S.C. § 1324a(h)(3) as the source of unlimited authority to permit alien employment through regulation. 80 Fed. Reg. at 10,285[3], 10,294–95[12–13]. The H-4 Rule grants employment to certain spouses of H-1B workers who intend to seek permanent resi-

dency. *Id.* While the H-4 Rule is currently limited to this subset of H-1B spouses, "DHS may consider expanding H-4 employment eligibility in the future." 80 Fed. Reg. at 10,289[7]. Unlike their H-1B spouses, aliens working under the H-4 Rule can work anywhere, in any field, and the H-4 Rule contains no protections for American workers. *Compare* 80 Fed. Reg. at 10,294[12] *with* 8 U.S.C. § 1011(a)(15)(H)(i)(b), 1182(n), and 1184(g) (applying restrictions and labor protections to H-1B workers).

Litigation History

The complaint in this action was filed on April 23, 2015, concurrently with a motion for preliminary injunction. Compl., Docket 1[31] and Mot. for Prelim. Inj., Docket 2. The district court denied the motion for preliminary injunction on May 24, 2015. *Save Jobs USA v. United States Dep't of Homeland Sec.*, 105 F. Supp. 3d 108 (D.D.C. 2015).

On September 11, 2015, Save Jobs USA moved for summary judgment and on October 2, 2015, DHS cross-moved for summary judgment. On September 27, 2016, the district court issued its opinion and order. Docket 36 & 37. *Save Jobs USA v. United States Dep't of Homeland Sec.*, 210 F. Supp. 3d 1 (D.D.C. 2016) ("*Save Jobs USA*") (Reproduced at Appendix [95]).

On various grounds discussed below, the district court held that Save Jobs USA lacked standing to bring its case. *Id.* at 10–11[106].

The district court also reached an alternative holding on the merits, concluding that extending employment to aliens in H-4 status was within DHS authority. *Id.* at 16.

Save Jobs USA made this timely appeal. Oral argument was originally scheduled for March 31, 2017. Order, Jan. 10, 2017. On February 2, 2017, DHS moved (unopposed) to place the case in abeyance for 60 days so that the incoming administration could study the issues in the case. This Court granted that motion. Order, Feb. 10, 2017.

On April 3, DHS moved to hold the case in abeyance for six more months so that it could propose a rule rescinding the H-4 Rule. The same day, Save Jobs USA opposed this motion, and made a motion of its own to reschedule briefing and oral argument. This court denied Save Jobs USA's motion, granted DHS's motion, and placed the case in abeyance until September 27, 2017. Order, June 23, 2017.

On September 20, 2017, Save Jobs USA made its second motion to reschedule briefing and oral argument, and DHS moved to continue holding the case in abeyance. This Court denied Save Jobs USA's motion and granted DHS's motion, ordering the case to be held in abeyance until January 2, 2018.

On December 22, 2017, DHS made yet another motion to continue holding the case in abeyance, and Save Jobs USA made its

third motion to reschedule briefing and oral argument. This Court denied Save Jobs USA's motion and granted DHS's motion. Order, Feb. 21, 2018. This Court made the period of abeyance indefinite, but noted that DHS had stated it intended to issue a notice of proposed rulemaking in February 2018. *Id.*

With no proposed rule yet published, on September 11, 2018, Save Jobs USA made its fourth motion to reschedule briefing. On September 27, 2016, Save Jobs USA made a motion to remove the case from abeyance. This Court granted both motions, allowing Save Jobs USA to file a opening brief and setting a briefing schedule and the clerk placed the case back on the calendar. Order, Dec. 17, 2018.

SUMMARY OF THE ARGUMENT

The H-4 Rule clearly allows aliens to compete with Save Jobs USA members in their job market because it allows 179,600 aliens to work in any job in the United States—an injury in fact to all participants in the national labor market. Indeed, evidence the district court admitted showed that many of the aliens the H-4 Rule allowed to compete in the United States job market were in the same field as that of Save Jobs USA members, the technology field. The district court arbitrarily abandoned this circuit's competitive injury in fact standard under which plaintiffs suffer an injury in fact when an agency action *allows* increased competition with them. Instead, relying on the standard for injunctive relief, the district court re-

quired a showing the agency *intended* to create competition.

Save Jobs USA proffered additional evidence showing that aliens in the technology field were both in the United States and authorized to work under the H-4 Rule at the time the complaint was filed, and also that, shortly after the complaint was filed, technology employers were seeking such aliens out, and at least one such alien was performing such work. The district court wrongly excluded this evidence on the ground that that it was dated after the complaint. Leaving aside that this evidence showed that aliens in the technology field were here and authorized to work under the H-4 Rule before the complaint was filed, the occurrences soon after unmistakably showed the imminence of the competitive injury pled.

The H-4 Rule also creates economic injury to Save Jobs USA members by inducing their H-1B competitors who, in the absence of the rule allowing their spouses to work, would leave the country, instead to remain in the job market. The district court held that this greater number of foreign H-1B competitors in the job market caused by the H-4 Rule was not an increase in competition because those aliens were already in the job market. Their greater number of H-1B workers clearly was an injury, however, because it was an increase in competition over what otherwise would have existed absent the H-4 Rule.

In defending various unilateral administrative actions granting

employment to aliens since 2012, DHS has begun to claim that its general authority to administer the immigration system under 8 U.S.C. § 1103(a) and the definition of the term *unauthorized alien* in § 1324a(h)(3) confer unlimited authority on the agency to admit aliens into the American labor market through regulation, even in the absence of a specific statutory authorization for such employment. DHS has applied this claim to aliens lawfully present but whose visa status does not confer authority to work, to illegal aliens, and to aliens invited to enter the country through parole. The district court's holding that the elephant of such expansive authority hides in the mouseholes of 8 U.S.C. §§ 1103(a) and 1324a(h)(3) is inconsistent with the terms of those provisions; with past judicial interpretation of the scope of DHS authority to authorize alien employment; with the rejection by the United States Court of Appeals for the Fifth Circuit of this very same claim of authority; and with the structure of the INA. If confirmed by this Court, that holding would permit the executive to supplant the statutory scheme for admitting alien labor with a regulatory scheme and eviscerate the statutory protections for American workers.

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). "[O]n appeal [the Court] review[s] not the judgment of the district court but the agency's action directly, giving 'no particular deference' to the district court's view of the law." *Oceana v. Locke*, 670 F.3d 1238, 1240 (D.C. Cir. 2011) (quoting *Nat. Res. Def. Council v. Daley*, 209 F.3d 747, 752 (D.C. Cir. 2000)). A district court's standing determinations are also reviewed *de novo*. *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016).

ARGUMENT

I. The H-4 Rule causes multiple injuries in fact to Save Jobs USA members.

A party invoking a court's jurisdiction has the burden of demonstrating that it satisfies the irreducible constitutional minimum of standing: (1) an injury in fact that is concrete and particularized as well as actual or imminent; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision. *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014). The injury in fact "need not be large or intense." *Action All. of Senior Citizens v. Heckler*, 789 F.2d 931, 937 (D.C. Cir. 1986). It is settled law that government action that causes widespread economic injury is still an injury in fact that gives rise to standing. *See Sierra Club v. Morton*, 405 U.S. 727, 733–34 (1972) (clarifying that widely shared economic and noneconomic injures are both still injuries in fact). "[T]he causation requirement for constitutional standing

is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise" even if "actual injury depends on action by non-governmental third parties." *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 92–93 (D.C. Cir. 2005) (collecting cases).

Save Jobs USA suffers competitive injury from two sources of foreign labor under the H-4 Rule. First, the very purpose of the H-4 Rule is to attract aliens to accept employment in H-1B status and to induce such aliens (who would otherwise leave the country) to remain in the U.S. job market by providing the benefit of spousal employment. 80 Fed. Reg. at 10,284 (stating that a goal of the H-4 Rule is to "attract" H-1B workers); 10,292 ("A primary purpose of this rule is to help U.S. businesses retain [] H-1B non-immigrants"); 10,284, 10,285, 10,286, 10,287, 10,290. In other words, the H-4 Rule is designed to attract and retain more of the same foreign labor that was used to replace Save Jobs USA members. Bradley Aff. ¶ 14, Buchanan Aff. ¶ 15, Gutierrez Aff. ¶ 14. The second source of foreign labor is aliens working on H-4 visas. *See* 80 Fed. Reg. at 10,284.

A. The H-4 Rule injures Save Jobs USA members because it allows competition with foreign workers in H-4 status.

The Court has repeatedly held that an agency action that allows competitors to enter a plaintiff's market causes an injury in fact. *E.g.*, *Fin. Planning Ass'n v. Sec. and Exch. Comm'n*, 482 F.3d 481,

486–87 (D.C. Cir. 2007) (stating the D.C. Circuit has "repeatedly recognized" that parties suffer constitutional injury in fact when agencies allow increased competition against them); *New Eng. Pub. Commc'ns Council v. Fed. Commc'ns Comm'n*, 334 F.3d 69, 74 (D.C. Cir. 2003) (stating 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."); *La. Energy & Power Auth. v. Fed. Energy Regulatory Comm'n*, 141 F.3d 364, 367 (D.C. Cir. 1998) (stating the D.C. Circuit has "repeatedly [] held" the same). This Court recently affirmed that American citizens have standing to challenge regulations that increase the amount of foreign labor in competition with them in *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332 (D.C. Cir. 2018) ("*Washtech*"). In *Washtech*, appellants had challenged another regulation that permits a class of aliens to work, with the government's claimed source of authority (8 U.S.C. § 1324a(h)(3)) being the same as for the H-4 Rule. *Id.* at 338. In *Washtech*, this Court held once again that "exposure to increased competition" was an injury in fact. *Id.* at 341.

This Court has repeatedly stated that a plaintiff need not show what happens once a competitor is allowed into their market to establish injury-in-fact. In *Bristol-Myers Squibb v. Shalala*, the plaintiff challenged the allowance of a competitor's generic drug on the

market. 91 F.3d 1493, 1499 (D.C. Cir. 1996). The agency argued "the plaintiff's quarrel, if it exists, is with the pharmacists who dispense generics. . . ." *Id.* This Court rejected that argument, stating that "[t]his reasoning is inconsistent with the competitor standing doctrine. Consumers always decide whether to purchase the product of one competitor or another. The injury claimed here is not lost sales, *per se*, ... Rather the injury claimed is exposure to competition as a result of the [agency action allowing the competitor's product into the market]." *Id.* at 1499; *see also Shays*, 414 F.3d at 92–93. (describing how agency actions that allow conduct harming a plaintiff are an injury in fact). Plaintiffs "sufficiently establish their constitutional standing by showing that the challenged action authorizes allegedly illegal transactions that *have the clear and immediate potential to compete* with [them]. . . . They need not wait for specific, allegedly illegal transactions to hurt them competitively." *Associated Gas Distribs. v. Fed. Energy Regulatory Comm'n*, 899 F.2d 1250, 1259 (D.C. Cir. 1990) (emphasis added); *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 n.4 (1998) (stating "it is not disputed that respondents have suffered an injury-in-fact" when the agency *allowed* a single competitor into their market); *La. Energy*, 141 F.3d at 367 (stating plaintiffs establish standing by showing "allegedly illegal transactions that have the clear and immediate *po-*

tential to compete with [their] own sales.") (emphasis added).[3] The traceability requirement is satisfied when agency allows competitors into plaintiff's market and redressability satisfied when vacating the regulations will remove those competitors. *Honeywell Int'l, Inc. v. Envtl. Prot. Agency*, 374 F.3d 1363, 1369–70 (D.C. Cir. 2004).

The district court itself stated that standard:

> Under the competitor standing doctrine, a plaintiff suffers an injury-in-fact when a regulatory change increases her exposure to economic competition. *See Mendoza v. Perez*, 754 F.3d 1002, 1011, 410 U.S. App. D.C. 210 (D.C. Cir. 2014). A party who may be injured by increased competition need not wait until she has been actually injured before bringing suit. *Sherley v. Sebelius*, 610 F.3d 69, 72, 391 U.S. App. D.C. 258 (D.C. Cir. 2010). However, Plaintiff must show that the H-4 Rule has "the clear and immediate potential" to cause H-4 visa holders to compete with its members. *See La. Energy and Power Auth. v. FERC*, 141 F.3d 364, 367, 329 U.S. App. D.C. 400, 329 U.S. App. D.C. 401 (D.C. Cir. 1998). To demonstrate this clear and immediate potential for injury, Plaintiff must demonstrate that its members are "direct and current" competitors, *Mendoza*, 754 F.3d at 1013, or that there is an "actual or imminent increase in competition," *Sherley*, 610 F.3d at 73.

Save Jobs USA, 210 F. Supp. 3d at 8. However, the district court then added to this correct statement of the competitive injury standard vague, additional standing requirements that it gleaned from the standard for injunctive relief. *Id.* (citing *Wis. Gas. Co. v. Fed. En-*

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3 Save Jobs USA presented additional evidence that employers were actively seeking aliens in H-4 status for computer jobs that the district court struck from the record. *Save Jobs USA*, 210 F. Supp. 3d. at 7[99]. This is another issue on appeal. *See infra,* § II.

ergy Regulatory Comm'n, 758 F.2d 669, 674 (D.C. Cir. 1985)).

Nonetheless, Save Jobs USA had showed an imminent increase in competition with facts that the district court itself found; not with speculation. DHS estimated that 179,600 aliens could be added to the job market under the H-4 Rule in the first year alone and 55,000 every year thereafter. 80 Fed. Reg. at 10,285[3]. DHS refused to put any limitation in the H-4 Rule on where and in which occupations H-4 aliens may work. 80 Fed. Reg. at 10,294[12]. As the district court stated, the H-4 Rule "will *allow* [aliens] to seek employment in any job in the *entire* U.S. labor market." *Save Jobs USA*, 210 F. Supp. 3d. at 8[102] (emphasis added); *see id.* at 11–12[105–06] ("In sum, the H-4 Rule enables a subset of H-4 visa holders to apply for EADs [Employment Authorization Documents], which *permit* them to apply for and secure paid employment in *any job* in the U.S. labor market.") (emphasis added). As the district court recognized, there is no question that the H-4 Rule authorizes 179,600 aliens to enter any segment of the American job market in the first year and 55,000 every year thereafter. *Id.* at 5[102], 10–11[105–06], 80 Fed. Reg. at 10,285[3] and 10,303[21]. Because the H-4 Rule allows aliens to compete in the "entire U.S. labor market," the district court's opinion describes an injury in fact to anyone in the United States labor market from the H-4

Rule.[4] *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1331 (D.C. Cir. 1986) ("[A]n injury shared by a large number of people is nonetheless an injury."); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23–24 (1998) (explaining that a concrete injury shared by all voters is not a generalized grievance because it is not abstract).

Furthermore, not only are aliens authorized under the H-4 Rule *allowed* to compete for any job in the American job market, many of them were in the same field as that of Save Jobs USA members, the technology field, when the complaint was filed. *See Save Jobs USA*, 210 F. Supp. 3d. at 9 n.1[103] ("Leon Rodriguez, director of the U.S. Citizenship and Immigration Service, [stated] that H-4 visa holders 'are in many cases, in their own right, high-skilled workers of the type that frequently seek H-1Bs.'"). The district court brushed off this fact, stating that it, "fails to establish that DHS *intended* H-4 visa holders to apply for tech jobs. . . ." *Id.* (emphasis added). When it comes to establishing standing, showing agency intent to cause injury has never been required before.

Save Jobs USA also proffered evidence that technology workers authorized to work under the H-4 Rule, soon after the complaint

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4 Save Jobs USA members also suffer competitive injury from non-immigrant guestworkers holding H-1B visas that is not shared with the entire U.S. workforce that results from the H-4 Rule. *See* § I.B–C *infra*.

was filed, were sought by technology companies, and were holding technology jobs. The district court wrongly excluded this evidence of imminent competition because it was dated after the complaint was filed (see *infra,* § II). However, this evidence showed that aliens authorized to work by the H-4 Rule were in the technology field in the United States before the complaint was filed. Docket 26-1 at A-11–A-39[55–82]; *See also* Decl. of Anujkumar Dhamija ¶¶ 5–6; (stating that he is authorized under the H-4 Rule to work in information technology, and has worked in information technology in the United States since 2010). As shown *infra,* § II, technology employers were seeking to hire aliens working under the H-4 Rule a mere week after the rule went into effect and five weeks after the complaint was filed. As such, the excluded evidence proved the promulgation of the H-4 Rule created an imminent increase in competition to Save Jobs USA members.

B. The H-4 Rule injures Save Jobs USA members because it increases the number of their H-1B competitors.

Having each been replaced by H-1B workers, Save Jobs USA members are indisputably competitors with H-1B workers. Bradley Aff. ¶¶ 5–12[85]; Buchanan Aff. ¶¶ 6–13[89–90]; Gutierrez Aff. ¶¶ 5–11[91–92]. Save Jobs USA also alleged injury because the H-4 Rule would also increase the number of their H-1B competitors. Compl. ¶ 23[35]. As explained above, the rules for establishing competitive injury are well defined in the D.C. Circuit. "[T]he

basic requirement common to all our cases is that the complainant show an actual or imminent increase in competition, which increase we recognize will almost certainly cause an injury in fact." *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010).

Save Jobs USA's injury here is then obvious. The entire purpose of the H-4 Rule was to increase the number of H-1B workers by providing an incentive to such workers (who would otherwise leave) to remain in the United States job market. *E.g.*, 80 Fed. Reg. at 10,285[3] (stating "the change will ameliorate certain disincentives that currently lead H-1B nonimmigrants to abandon efforts to remain in the United States").[5] The district court, however, found that Save Jobs USA members did not have an injury in fact, stating that plaintiffs "fail to demonstrate an *increase* in competition from H-1B visa holders; instead, it appears the H-4 Rule might simply contribute to keeping H-1B visa holders applying for LPT [*sic* LPR?] status in the U.S." *Save Jobs USA*, 210 F. Supp. 3d. at 9[103] (emphasis added).

This is a distinction without a difference. But for the H-4 Rule, large numbers of aliens in H-1B status would leave the country and the job market. 80 Fed. Reg. at 10,285[3]. By providing an incentive for aliens to remain in the job market, the H-4 Rule creates more alien competitors with Save Jobs USA's members than there

5 The appendix, Docket 26-1 at A-7–A-8[50–51] identifies 25 similar statements from the H-4 Rule.

would be without the rule. *Id.* That is an injury in fact. *See Sherley*, 610 F.3d at 73.

C. The H-4 Rule injures Save Jobs USA members because it confers benefits on their H-1B competitors that are designed to induce them from leaving the American labor market.

The primary purpose of the H-4 Rule is to induce aliens in H-1B status (who would otherwise leave the job market) to remain in the United States by providing the "incentives" of spousal employment. *E.g.*, 80 Fed. Reg. at 10,285[3] The complaint alleges that conferring this benefit on Save Jobs USA competitors is an injury in fact. Compl. ¶ 23[35]; *see Sea-Land Serv. v. Dole*, 723 F.2d 975, 977–78 (D.C. Cir. 1983) (stating injury requirement satisfied where the challenged action benefits a competitor).

The district court dismissed this injury, stating "[p]laintiff offers no support for its position that the goal of relieving economic uncertainty and personal anxiety in H-1B workers' families amounts to an injury to Plaintiff's members." *Save Jobs USA*, 210 F. Supp. 3d. at 10[105]. That statement misses the injury entirely. The injury is not that Save Jobs USA's competitors have greater happiness, but rather that DHS is conferring an incentive (spousal employment) on those competitors so that more of them will remain in competition with Save Jobs USA members. H-4 Rule, 80 Fed. Reg. at 10,285[3]. Conferring that benefit to induce competition with Save Jobs USA

members is an injury in fact. *See Sea-Land Serv.*, 723 F.2d at 977–78 (holding injury requirement satisfied where challenged action benefits competitor who is in direct competition with plaintiff).

D. The H-4 Rule injures Save Jobs USA members because it deprives them of statutory protections that rightfully should be applied before allowing aliens to compete with them.

The last injury pled by Save Jobs USA is deprivation of statutory protections. "Even where the prospect of job loss is uncertain, [the D.C. Circuit has] repeatedly held that the loss of labor-protective arrangements may by itself afford a basis for standing." *Bhd. of Locomotive Eng'rs v. United States*, 101 F.3d 718, 724 (D.C. Cir. 1996); *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 852–55 (D.C. Cir. 2006); *see also Bristol-Myers*, 91 F.3d at 1497 ("[W]here [] a statutory provision reflects a legislative purpose to protect a competitive interest, the protected competitor has standing to require compliance with that provision"). Indeed, this is just a labor-specific variant of the bedrock rule that "Congress may create a statutory right . . . the alleged deprivation of which can confer standing." *Warth v. Seldin*, 422 U.S. 490, 514 (1975).

Congress created the H-1B program to govern the admission of college-educated labor. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) and 1184(i). Under the statutory scheme for admitting foreign labor, the H-1B

visa is the normal path[6] for aliens to work in the same computer-related fields as Save Jobs USA members. Spouses of H-1B holders can apply personally for an H-1B visa to work in computer-related occupations in their own right, provided that they comply with the provisions designed to protect domestic labor. *E.g.*, 8 U.S.C. §§ 1182(n) and 1184(g). In contrast, the H-4 Rule allows aliens to work in any occupation (including computer related fields) without complying with any labor protections at all. When nonimmigrants are allowed to work in computer fields without complying with the statutory labor protections that should rightly be applied to such labor (*e.g.*, 8 U.S.C. §§ 1182(n) and 1184(g)), Save Jobs USA members are injured by the deprivation of those protections. *See, e.g.*, *Bristol-Myers*, 91 F.3d at 1497.

In rejecting this injury, the district court never mentioned the labor protections Save Jobs USA members are deprived of under the H-4 Rule. *Save Jobs USA*, 210 F. Supp. 3d. at 10–11[105–06]. Instead, the district court dismissed this injury with the statement that "[w]hile Plaintiffs may be correct in speculating that H-4 visa holders will seek tech jobs in competition with its members, there is

6 In some situations aliens can work in computer occupations under other visas, such as L (intra-company transfer). 8 U.S.C. § 1101(a)(15)(L). However, H-1B is the most common and the only one likely to apply here to aliens who wish to work in computer occupations.

simply no evidence before the court to show that that will happen."[7] *Id.*[106]. Even that inapposite point conflicts with a previous statement by the district court. *Id.* at 9 n.1[103] ("Leon Rodriguez, director of the U.S. Citizenship and Immigration Service, [stated] that H-4 visa holders 'are in many cases, in their own right, high-skilled workers of the type that frequently seek H-1Bs.'").

Also, the district court simply ignored that a plaintiff suffers a cognizable injury in fact when the injury is "imminent." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). On the date the Complaint was filed (April 23, 2015. Compl., Docket 1[31]), it was certain that starting on May 26, 2015, DHS was going to allow aliens in H-4 status to work in computer programming occupations without complying with the labor protections that should rightly be applied under the statutory scheme for admitting foreign labor. See H-4 Rule, 80 Fed. Reg. at 10,284[2]. This was not a matter of speculation: it was an absolute certainty that this injury would occur within a matter of weeks after the Complaint was filed. *Id.*

7 Save Jobs USA had in fact submitted evidence to the court that made this very showing, but the court struck that evidence. *See* section II, *infra*.

II. The district court erred by holding the date of the complaint creates evidentiary cut-off for standing and striking evidence that aliens working under the H-4 Rule was in competition with Save Jobs USA members within days of the rule going into effect.

Save Jobs USA submitted evidence that aliens were working in their specific job market under the H-4 Rule very soon after the complaint was filed. Specifically, Docket 26-1 at A-13[56] (downloaded June 4, 2015) and A-14 (June 3, 2015) are job advertisements for computer programmers from Tata. Both advertisements state that Tata will take foreign workers with EADs (Employment Authorization Documents) as granted under the H-4 Rule. Tata is the company that supplied the foreign workers that replaced Save Jobs USA members at Southern California Edison. Bradley Aff. ¶ 7[86]; Buchanan Aff. ¶ 8[89]; Gutierrez Aff. ¶·8[92]. Docket 26-1 A-15[58] (May 27, 2015), A-17 (June 3, 2015), A-20[63] (May 27, 2015) and A-25[69] (Aug. 21, 2015) are computer job advertisements in which the employer was specifically seeking aliens granted EADs under the H-4 Rule. *E.g.*, A-25[69] ("We are particularly interested in professionals who have extensive IT experience and may be on a dependent visa like H4 or on OPT/CPT."). Docket 26-1 at A-18[61] (June 3, 2015) and A-24[68] (June 3, 2015) are advertisements for computer jobs located in Southern California seeking foreign workers with EADs. These advertisements show that within days of the H-4 Rule going into effect, employers were specifically seeking

computer workers authorized under the H-4 Rule or accepting such workers. While it should have only been necessary to show that the H-4 Rule would *allow* competition with Save Jobs USA members, these advertisements clearly establish, when the complaint was filed, that these aliens, soon would be (and are now) in competition with Save Jobs USA members.

Even further, Docket 26-1 at A-29–A-39[72–82] is a web page advocating H-4 employment.[8] This web page describes aliens in H-4 status and shows that many of them are computer workers. *Id.* The text in the appendix reflects its state as of August 20, 2015 . *Id.* The Wayback Machine Internet archive, however, shows that this web page has existed since at least 2014.[9] The Waybach Machine's October 9, 2014 snapshot made months before the Complaint was filed, *id.*, is substantially the same as the version downloaded on August 20, 2015, Docket 26-1 at A-29–A-39[72–82], and shows that many of these H-4 workers are computer professionals who would likely work in competition with Save Jobs USA members, and did so long before the Complaint was filed.

The district court, however, struck this evidence of imminent injury because it was dated after the complaint. *Save Jobs USA*,

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8 Available at http://h4-visa-a-curse.blogspot.com/p/view-stories.html (last visited Dec. 19, 2018)

9 Available at http://web.archive.org/web/20141009120318/http://h4-visa-a-curse.blogspot.com/p/view-stories.html (last visited Dec. 19, 2018)

210 F. Supp. 3d. at 6[98]. Yet there is no precedent that the date of the complaint creates an evidentiary cutoff for standing. On this point, the district court relied solely on an Eighth Circuit opinion, *Tracie Park v. Forest Serv. of the U.S.*, 205 F.3d 1034, 1037–38 (8th Cir. 2000). *Save Jobs USA*, 210 F. Supp. 3d. at 6[98]. However, the district court completely misinterpreted *Tracie*. *See Id. Tracie* did not establish an evidentiary cutoff for standing but rather held that subsequent events after the complaint could not establish standing that had been lacking at the time of the complaint. *See Scahill v. District of Columbia*, __ F.3d __, No. 17-7151, 2018 U.S. App. LEXIS 34544, at *12 (D.C. Cir. Dec. 7, 2018) (explaining and rejecting the reasoning of *Tracie*). The evidence stricken by the district court established that the entry of foreign workers into Save Jobs USA's market was imminent at the date of the complaint because it actually happened a few weeks later—not that subsequent events had remedied a standing defect that had existed at the date of the complaint, as in *Tracie*. The district court never explained how evidence that aliens in H-4 status were in the computer job market and employers were specifically seeking to hire such aliens days after the H-4 Rule went into effect did not conclusively show that the pled competitive injuries were imminent at the date of the complaint.

In summary, the district court's finding that Save Jobs USA lacks standing requires applying a heightened competitive injury standard

that goes beyond showing the agency action allows competition with the plaintiff, requiring a showing that the agency intended to create competition with the plaintiff, and excluding all evidence dated after the complaint.

III. The court should decide now whether the H-4 Rule is within DHS authority.

While the district court stated that it "makes no final determination on the merits of Plaintiff's APA claim," it also stated that it "would likely conclude that DHS's interpretation of its authority under the INA is not unreasonable, and the H-4 Rule is a valid exercise of this rulemaking authority." *Save Jobs USA*, 210 F. Supp. 3d. at 13[110]. This statement of how the district court would "likely" rule on the merits constitutes an alternative holding in these circumstances. The district court explained its reasoning at length. *Id.* at 12–13. Also, the question of whether the H-4 Rule is within DHS authority is entirely a question of law, reviewable *de novo*, and the parties briefed the issue below. In light of these circumstances, and the long delay in this case already, this Court may and should decide the question now. *Wildearth Guardians v. Jewell*, 738 F.3d 298, 308 n.4 (D.C. Cir. 2013); *Mendoza v. Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014).

IV. The H-4 Rule is in excess of DHS authority because Congress has not provided for DHS to admit alien labor outside the statutory scheme of the INA.

Under the Administrative Procedure Act ("APA"), a court should "hold unlawful and set aside agency action" that is "in excess of statutory [] authority." 5 U.S.C. § 706(2). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

DHS's claim of authority is novel and this case thus presents the District of Columbia Circuit with a question of first impression:[10] Does DHS's general authority to promulgate regulations in 8 U.S.C. § 1103(a), and the definition of the term *unauthorized alien* in § 1324a(h)(3), confer on DHS unlimited authority to admit aliens into the United States labor market?

This question is of major importance because of the zealousness DHS has exhibited since divining this authority. *E.g.*, H-4 Rule[2];

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10 This very same question has been before the court twice before in the decade-long litigation over the alien employment on student visas. *Washtech*, 892 F.3d at 332; *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 650 F. App'x 13 (D.C. Cir. 2016). Both times the court declined to address the question and the litigation continues in the District of Columbia District, making it likely the question will come before the court for the third time in that case. It is also likely to appear in *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018).

International Entrepreneur Rule, 81 Fed. Reg. at 60,131; OPT Rule, 81 Fed. Reg. at 13044–45; Enhancing Opportunities for H-1B1, CW-1, and E-3 Nonimmigrants and EB-1 Immigrants, 81 Fed. Reg. 2,068, 2068–69 (Jan. 15, 2016) (codified at 8 C.F.R. §§ 204, 214, 248, and 274a).

To date, the Fifth Circuit is the only court of appeals to address this question directly, holding that 8 U.S.C. §§ 1103(a) and 1324a(h)(3) *do not* confer such authority on DHS. *Texas*, 809 F.3d at 182–83; *accord Guevara v. Holder*, 649 F.3d 1086 (9th Cir. 2011) (holding that there was "nothing in the statute [8 U.S.C. § 1324a] or administrative regulation to provide for more" than "merely allow[ing] an employer to legally hire an alien (whether admitted or not) while his [adjustment of status] application is pending."); *but see Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec.*, 908 F.3d 476, 490 (9th Cir. 2018) (describing 1324a(h)(3) as "empowering the Executive Branch to authorize the employment of noncitizens").

The Fifth Circuit observed that § 1324a(h)(3) is a definitional provision, limited in scope to its own section, and that "'Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'" *Id.* (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)); *accord Loving v. Internal Revenue*

Serv., 742 F.3d 1013, 1021 (D.C. Cir. 2014) (stating "courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies"). The Fifth Circuit also observed that the general authority to promulgate regulations in 8 U.S.C. § 1103(a) "cannot reasonably be construed as assigning 'decisions of vast economic and political significance.'" *Id.* (quoting *Util. Air Regulatory Grp. v. Envtl. Prot. Agency*, 134 S. Ct. 2427, 2444 (2014)). Nonetheless, the district court came to the opposite conclusion, holding that these provisions do authorize DHS to extend alien employment at will. *Save Jobs USA*, 210 F. Supp. 3d. at 12–13[108].

The H-4 visa authorizes dependents of H guestworkers to "accompany" or to "join" them in the United States. 8 U.S.C. § 1101(a)(15)(H); Pub. L. No. 91-225, 84 Stat. 116 (1970). There is no statutory provision authorizing such aliens to work in the United States. In the H-4 Rule, DHS unilaterally took the action of authorizing certain spouses of H-1B guestworkers to work in the United States. 80 Fed. Reg. at 10,284[2]. DHS also indicated that it would consider expanding this work authorization in the future. *Id.* at 10,289[7]. DHS estimated that 179,600 aliens are eligible for employment under the H-4 Rule in the first year, and 55,000 aliens per year every year thereafter. *Id.* at 10,296[14]. Lacking a provision authorizing employment in H-4 status, DHS instead claimed the

authority for the H-4 Rule came from its general authority to promulgate regulations (6 U.S.C. § 112 and 8 U.S.C. § 1103(a)) and the definition of the term unauthorized alien (8 U.S.C. § 1324a(h)(3)). *Id.* at 10,285[3], 10,294–95[12–13]. DHS stated in the H-4 Rule:

> The fact that Congress has directed the Secretary to authorize employment to specific classes of aliens (such as the spouses of E and L nonimmigrants) does not mean that the Secretary is precluded from extending employment authorization to other classes of aliens by regulation as contemplated by section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B).

80 Fed. Reg. at 10,295[3]. Yet precedent of this circuit directly contradicts DHS's claim of authority. *E.g.*, *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*) (collecting cases and stating that courts cannot presume a delegation of power to an agency from an absence of an express withholding of that power).

A. The exclusion of aliens in H-4 status from the labor market was a conscious decision by Congress.

Congress has authorized spouses of principal aliens in certain nonimmigrant visa classifications to work. In 2002, Congress authorized DHS to grant employment authorization to spouses of E visa treaty aliens, Pub. L. No. 107-124, 115 Stat. 2402, and to spouses of L visa intra-company transfer workers, Pub. L. No. 107-125, 115 Stat. 2403. In the debate on these bills, Congressman Wexler expressed the view "I hope that this bill is the beginning of an understanding

that we should allow spouses in other nonimmigrant classifications who accompany their husband or wife to the United States to be able to obtain work authorization." 147 Cong. Rec. H5357 (daily ed. Sept. 5, 2001). Since then, several bills have been introduced that included provisions to authorize aliens on H-4 visas to work, but Congress has rejected them all. *E.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act, § 4102, S.744, 113th Congress. The lack of a statutory authorization for aliens to work in H-4 status is, therefore, not an oversight but rather the result of deliberate action by Congress.

B. DHS's claim of unlimited authority to admit aliens into the American labor market through regulation is a recent invention that has produced a frenzy of administrative actions.

Under the various provisions of the INA, Congress authorizes alien employment in three ways. First, there are provisions that authorize alien employment in conjunction with the alien's visa status. *E.g.*, 8 U.S.C. § 1101(a)(15)(H)(i)(B) (H-1B visa category guestworkers). Second, there are provisions that give DHS the discretion to extend employment to specified categories of aliens through regulation. *E.g.*, 8 U.S.C. § 1105a (giving DHS the discretion to authorize employment for battered spouses of nonimmigrants). Finally, there are provisions that direct DHS to extend employment to certain aliens whose visa status does not otherwise confer the ability to work. *E.g.*, 8 U.S.C.

§ 1255a(b)(3)(B) (directing the agency to authorize employment to illegal aliens whose status is being adjusted to lawful permanent resident).

Since DHS has asserted that the definitional provision 8 U.S.C. § 1324a(h)(3) confers on the agency unlimited authority to admit any alien into the American job market through regulation (including admitting aliens into the country) without having a specific authorization from Congress, there has been a frenzy of proposed and final regulations promulgated under this newfound authority. *E.g.*, H-4 Rule; International Entrepreneur Rule (extending parole to aliens the agency classifies as entrepreneurs and allowing them to work in the United States); and OPT Rule (authorizing aliens in student visa status to remain in the U.S. for up to 42 months and work). The most controversial new work authorization initiatives relying on 8 U.S.C. § 1324a(h)(3) are the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs that the agency created without regulation and classified as a "policy statement." *Texas*, 809 F.3d at 171. The H-4 Rule, however, was the very first regulation published in the Federal Register that claimed 8 U.S.C. § 1324a(h)(3) as a source of authority for granting alien employment.

In fact, this claim of unlimited authority to grant alien employ-

ment is so new that DHS has not yet developed a consistent theory of where it is found in the statutes. In *Texas*, the government argued in the Fifth Circuit that 8 U.S.C. § 1324a(h)(3) was the source of its authority to grant employment to any class of aliens it chooses. No. 15-40238 and Br. for Appellants, ECF No. 00512986669 at 8–9 (5th Cir. Mar. 3, 2015), Reply Br. for Appellants, ECF No. 00513047024 at 13 & 22–23 (5th Cir. May 18, 2015). When the state respondents argued in the Supreme Court that § 1324a(h)(3) could not grant DHS the authority to define classes of aliens to work, the government had a brand new story: "[R]espondents focus on the wrong provision. Section 1324a(h)(3) did not create the Secretary's authority to authorize work; that authority already existed in Section 1103(a). . . ." *United States v. Texas*, No. 15-674, Br. for the Pet'rs at 63 (U.S. Mar. 1, 2016).[11]

Nonetheless, the H-4 Rule claims that § 1324a(h)(3) is its source of authority to permit alien employment through regulation. 80 Fed. Reg. at 10,285, 10,294, 10295. Even here, DHS's interpretation of § 1324a(h)(3) is an evolving work in progress. When DHS proposed the H-4 Rule at issue, it described § 1324a(h)(3) as a provision that

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11 In *Texas*, the government's Pet. for Writ of Cert. at 13, 22–23, & 27 (U.S. Nov. 20, 2015) had also asserted § 1324a(h)(3) is the source of its authority to allow any alien to work and made no mention of § 1103(a) for that proposition. In reply on the petition, the government raised for the first time the claim that § 1103(a) conferred the authority to allow any alien to work. Reply Br. for Pet'rs at 10 (U.S. Jan. 15, 2016).

"refers to the Secretary's authority to authorize employment of non-citizens in the United States," without identifying the source of that authority. Employment Authorization for Certain H-4 Dependent Spouses, 79 Fed. Reg. 26,886, 26,887 (proposed May 12, 2014). In the final version of the H-4 Rule, DHS reinterpreted § 1324a(h)(3) as the actual source of power for the DHS Secretary "to extend employment to noncitizens in the United States" at will. 80 Fed. Reg. at 10,295[3].

Over the years, a number of court opinions have addressed whether the executive has authority under the INA to grant classes of aliens employment. *E.g., Bricklayers I*; *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985) ("*Bricklayers II*"); *Bustos v. Mitchell*, 481 F.2d 479 (D.C. Cir. 1973) *aff'd in part rev. in part*, 419 U.S. 65, 79 (1974); *Amalgamated Meat Cutters & Butcher Workmen v. Rogers*, 186 F. Supp. 114 (D.D.C. 1960); *Gooch v. Clark*, 433 F.2d 74, 76 (9th Cir. 1970); *Rios v. Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981). However, such opinions have always addressed whether the grant of employment in question fell within the terms of specific statutory provisions granting the agency authority to extend employment. *E.g.*, *Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374, 1384 (9th Cir. Wash. 1989) (holding crane operators were not crewmembers authorized to work under 8 U.S.C. § 1101(a)(15)(D)); *Saxbe v. Bustos*, 419 U.S. 65, 79 (1974)

(holding commuters from Mexico and Canada were authorized to work as permanent residents under 8 U.S.C. § 1101 (a)(27)(B)). No court opinion prior to 2014 even suggested that §§ 1103(a) and 1324a(h)(3) conferred on DHS authority to extend employment to aliens independent of specific provisions authorizing DHS to do so. Given the number of opinions addressing the scope of agency authority to admit foreign labor into the job market and the fact that that §§ 1103(a) and 1324a(h)(3) were never even mentioned until 2014, it is implausible that these provisions confer on DHS the authority it now claims.

C. Congress never conferred unlimited agency authority to admit aliens into the American labor market through regulation.

Under the Constitution, Congress has control over immigration. U.S. Const. Art. I § 8; *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)); *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 940–41 (1983) ("The plenary authority of Congress over aliens under U.S. Const. art. I, § 8, cl. 4, is not open to question."). Yet in the H-4 Rule and other recent administrative actions, DHS claims that Congress ceded to it complete authority to admit aliens into the American job market, whether or not such aliens are in a lawful sta-

tus or authorized to work. *E.g.*, H-4 Rule, 80 Fed. Reg. at 10,284[2]; *Texas*, 787 F.3d at 743–46 (enjoining DHS from granting unauthorized aliens work permits). DHS even claims that this authority is so comprehensive that it includes admission into the United States to perform work that is solely authorized by agency policy. *See, e.g.*, International Entrepreneur Rule (admitting aliens into the country without visas under parole and allowing them to enter the job market through regulation). 81 Fed. Reg. at 60,130.

The Supreme Court has repeatedly made clear that Congress does not alter the fundamental details of a regulatory scheme through ancillary provisions. *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). So has this circuit: "'Congress does not, one might say, hide elephants in mouseholes.'" *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 54 (D.C. Cir. 2016) (quoting *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1947 (2016)).

Furthermore, "[i]t is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress." *Am. Library Ass'n v. Fed. Commc'ns Comm'n*, 406 F.3d 689, 691 (D.C. Cir. 2005). "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.*, 29 F.3d at 671. *DHS turns this principle on*

its head. H-4 Rule, 80 Fed. Reg. at 10,295[13] ("The fact that Congress has directed the Secretary to authorize employment to specific classes of aliens . . . does not mean that the Secretary is precluded from extending employment authorization to other classes of aliens by regulation").

1. Section 1324a(h)(3) cannot confer unlimited agency authority to admit aliens into the American labor market because it is a definitional provision limited in scope to its own section.

Section 1324a(h)(3) was enacted as part of IRCA § 101, 100 Stat. 3368. That section for the first time criminalized and imposed civil sanctions on employers for hiring an alien who is not authorized to work in the United States (*i.e.*, an *unauthorized alien*). *Id*. at 100 Stat. 3360–74. Section 101(h)(3) of the Act (8 U.S.C. § 1324a(h)(3)) provides:

> (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.

8 U.S.C. § 1324a(h)(3). This provision is merely a definition and does not authorize DHS to do anything. *Texas*, 787 F.3d at 760, n.84, n.85 & n.86 (5th Cir. 2015); *see also W. Union Tel. Co. v. Fed. Commc'n Comm'n*, 665 F.2d 1126, 1136–37 (D.C. Cir. 1981) (holding a section was "only definition" where it began with "as used in this

section" and contained only definition subsections).

DHS grasps the slender reed of the clause "or by the Attorney General" to avoid falling off a cliff.[12] This phrase clearly refers to the many situations where Congress has granted DHS discretionary authority to permit alien employment, or directed DHS to grant certain aliens employment that is not conferred by an alien's visa classification. In fact, IRCA contains seven such provisions. Pub. L. No. 99–603, § 101, 100 Stat. 3359, 3368, § 201 ("Legalization") 100 Stat. 3397, 3399 (two), § 301 ("Lawful Residence for Certain Special Agriculture Workers") 100 Stat. 3418, 3421 (two), 3428. Had Congress omitted the phrase "or by the Attorney General" in § 1324a(h)(3)(B), it would have created the absurd situation where aliens would be authorized to work under IRCA but where § 101 of the same Act would have made hiring these aliens unlawful.

Subsequently, Congress enacted the Violence Against Women and Department of Justice Reauthorization Act of 2005 that provided DHS with the authority that it "may" grant Violence Against Women Act petitioners work authorization. Pub. L. No. 109-162, § 814, 119 Stat. 2960, 3059 (2006). The same section also provided that DHS "may authorize" battered spouses, including those who happen to be H-4 visa holders, "to engage in employment." *Id.* Sim-

12 The same "or by the" Attorney General or Secretary of Homeland Security language occurs in other definitions also limited in scope. *E.g.*, 8 U.S.C. §§ 1182(n)(4)(E) and (t)(4)(D).

ilarly, the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, § 908, 112 Stat. 2681, 2681-539, provided that the Attorney General (now DHS Secretary), "may" extend employment to certain Haitian nationals. Under the agency's new interpretation of § 1324a(h)(3), DHS already had the power to grant these discretionary work authorizations. That claim of authority compels the impermissible conclusion that all Congress did by enacting these provisions was to create useless surplusage. *See Platt v. Union P. R. Co.*, 99 U.S. 48, 59 (1879) (explaining that in statutory construction, "no words are to be treated as surplusage or as repetition.").

The idea that Congress gave DHS power equal to its own to authorize alien employment through a definitional provision limited in scope to its own section is not sustainable. *See Gonzales*, 546 U.S. at 267.

2. Section 1103(a) cannot confer on DHS unlimited authority to permit aliens to work in the United States because it provides the general authority of the agency to promulgate regulations necessary to carry out its authority under other provisions.

Section 112 of Title 6 of the U.S. Code defines the functions of the Secretary of Homeland Security and section 1103 of Title 8 charges the Secretary with administering the provisions of the INA. Such general authorizations do not grant the DHS Secretary unlimited authority to act as he sees fit with respect to all aspects of immigration policy. *See Motion Picture Ass'n of Am. v. Fed. Commc'ns Comm'm*, 309 F.3d 796, 798–99, 802–03 (D.C. Cir. 2002) (finding the general

authority of the Federal Communications Commission to regulate television did not grant it unlimited authority to act as it sees fit with respect to all aspects of television transmissions). "Statutory interpretations by agencies are 'not entitled to deference absent a delegation of authority from Congress to regulate in the areas at issue.'" *Port Auth. of N.Y. & N.J. v. U.S. Dep't of Transp.*, 479 F.3d 21, 27 (D.C. Cir. 2007) (quoting *Motion Picture Ass'n*, 309 F.3d at 801). Indeed, Congress has recognized this limited authority by making regulatory actions taken by the Secretary explicitly reviewable under the APA. 6 U.S.C. § 112(e).

Under § 1103(a)(3), DHS is authorized to promulgate regulations "necessary for carrying out his authority under the provisions of this chapter." While DHS refers to § 1103(a)(3) as allowing it to make regulations, the H-4 Rule did not identify any specific provision of law that necessitated promulgation of the H-4 Rule. *Cf. Helicopter Ass'n Int'l v. Fed. Aviation Admin.*, 722 F.3d 430, 433–34 (D.C. Cir. 2013) (holding a rule for noise abatement fell within the FAA's general rulemaking authority when the purpose of a rule was to implement its specific authority "to protect individuals and property on the ground"). In fact, DHS could not have shown the H-4 Rule was necessary to carry out its authority because aliens in H-4 status had not been permitted to work for 45 years without inhibiting the agency (or its predecessors) from carrying out its authority.

3. The district court's determination that §§ 1103(a) and 1324a(h)(3) confer on DHS independent authority to admit classes of aliens into the labor market is inconsistent with prior judicial interpretation of the INA.

The district court was the very first to hold that DHS's general authority under 8 U.S.C § 1103(a) and the definition of the term *unauthorized alien* in § 1324a(h)(3) confer authority to permit aliens to work in the United States outside the specific grants of authority to do so. *Save Jobs USA*, 210 F. Supp. 3d. at 12–13[108]; *contra Texas*, 809 F.3d at 182–83.

Before *Texas*, no earlier opinion that considered the scope of agency authority to permit aliens to work had ever addressed the question of whether 8 U.S.C. §§ 1103(a) and 1324a(h)(3) conferred such authority. In *Int'l Longshoremen*, the Ninth Circuit held the INS exceeded its authority by permitting crane operators to work under D crewmember visas. 891 F.2d at 1384.[13] In *Bricklayers II*, the Northern District of California held the INS exceeded its authority by authorizing alien bricklayers to work while in B visitor visa status. 616 F. Supp. 1387, 1398–401 (N.D. Cal. 1985). Both of these opinions, setting aside agency regulations permitting aliens to work, conflict with the DHS claim (and the district court's holding) of agency authority to permit work by any alien under 8 U.S.C. §§ 1103(a) and

13 *Int'l Longshoremen* came after the enactment of § 1324a yet there is no mention of that provision in the opinion.

1324a(h)(3). *Save Jobs USA*, 210 F. Supp. 3d. at 12–13[108].

Even in cases where the courts have found the agency had authority to admit foreign labor, they have done so by examining specific provisions authorizing such labor and never the general authority under 8 U.S.C. § 1103. In *Bustos v. Mitchell*, this court addressed whether the INS had the authority to promulgate regulations allowing aliens to commute from Mexico and Canada to engage in employment in the United States. 481 F.2d at 481. This Court held the regulations were lawful in regard to daily commuters who could be treated as returning resident aliens under 8 U.S.C. § 1181(b) (1970), *id*. at 486, but were in excess of INS authority in regard to seasonal commuters, *id*. at 487. The Supreme Court affirmed in regard to the daily commuters but reversed in regard to the seasonal commuters, holding both could be treated as returning resident aliens. *Saxbe v. Bustos*, 419 U.S. at 79. Neither this Court nor the Supreme Court made any mention of the agency possessing the unlimited authority to permit aliens to work that DHS now claims under 8 U.S.C. § 1103, and which—had it really existed—should, under the challenged DHS theory, have been controlling even prior to the passage of IRCA in 1986.

D. The system Congress established for admitting foreign labor does not contemplate the executive having independent authority to permit any alien to work in the United States.

The 1952 INA was a "complete revision" of our immigration laws, providing a clear starting point for the legislative history of the immigration system. S. Rep. No. 82-1072, at 2 (1952). Section 103 of the INA (codified at 8 U.S.C. § 1103) provided for the general authority of the Attorney General to administer the immigration system and to promulgate regulations "necessary for carrying out his authority." This provision has been amended several times. 8 U.S.C. § 1103 (Amendments Section). Notably the Homeland Security Act of 2002 transferred this authority to the Secretary of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2273–74. Throughout its entire prior history, however, 8 U.S.C. § 1103 has never been interpreted to grant the authority to admit aliens into the American labor market. It is implausible that Congress would have created a comprehensive scheme governing the employment of aliens in the INA and, at the same time, conferred on the executive the authority to supplant that scheme through regulation in a general provision. *See Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623, 639 (D.C. Cir. 2014) ("Congress does not . . . 'hide elephants in mouseholes.'") (quoting *Whitman*, 531 U.S. at 468); *Motion Picture Ass'n*, 309 F.3d at 798–99, 802–03 (finding the general authority of the Federal

Communications Commission to regulate television did not grant it unlimited authority to act as it sees fit with respect to all aspects of television transmissions).

The lack of such authority to permit any alien to work in the United States is clear from the legislative history. Both the House and Senate reports on the INA state that it "provides strong safeguards for American labor" and that all aliens (with three exceptions not applicable here) seeking to perform labor are excluded if the Secretary of Labor determines that American workers are available or that the foreign labor would adversely affect American workers. S. Rep. No. 82-1137, at 11 and H.R. Rep. No. 82-1365, at 50–51 (identical text). Neither the House nor the Senate reports on the INA makes any mention of granting the executive authority to permit foreign labor through regulation or that such regulation would be exempt from these requirements. S. Rep. No. 82-1137 or H.R. Rep. No. 82-1365. If such authority had been intended, surely Congress would have listed this class of labor among the exceptions to labor protection requirements—but it did not. *Id.*

The Immigration and Nationality Act of 1965 strengthened the protections for American workers by requiring an affirmative certification by the Secretary of Labor that American workers were not available and that the alien labor would not adversely affect American workers prior to the admission of foreign labor. § 9, 79 Stat.

917–18 (then codified at 8 U.S.C. § 1182(a)(14)). Like the 1952 INA, the 1965 Act did not create an exemption from labor certification for aliens granted permission to work through regulation. *Id.* Over the decades, Congress has repeatedly required most foreign labor to comply with statutory labor protections and it has never included labor independently authorized through regulation as one of the exceptions. *Id.*; INA, § 9, 66 Stat. at 282; Immigration and Nationality Act of 1965, § 9, 79 Stat. at 817.

E. If the courts adopt the district court's interpretation of §§ 1103(a) and 1324a(h)(3), alien employment in the immigration system will be defined by regulation rather than by statute.

The scope of DHS's newfound authority to permit aliens to work in the United States is unprecedented, as is the volume of agency actions acting on this newly discovered, unlimited authority. Should other courts follow the district court in upholding the existence of such authority (rather than the Fifth Circuit's rejection of it), the United States would no longer have a statutory scheme for admitting foreign labor. Under the claim of agency authority challenged by Save Jobs USA, there is no bar preventing the agency from promulgating a regulation that allows any alien to pay a $465 fee and authorizes him to work in the United States regardless of immigration status. *C.f. Texas*, 809 F.3d at 192.

This is not hyperbole. The regulatory path is already headed in

that direction. The district court's opinion demonstrates the newfound authority is not a bar to authorizing employment to lawful aliens lacking a statutory authorization to work where the statutory definition of their visa status does not explicitly authorize the aliens to work. *Save Jobs USA*, 210 F. Supp. 3d. at 13[110]. Even where the statutory definition of the visa status explicitly precludes work, this new authority allows such work through administrative action. For example, the statutory definition of B visitor visas status excludes aliens coming to the United States for "performing skilled or unskilled labor." 8 U.S.C. § 1101(a)(15)(B). However, through administrative action, under a program known as *B in Lieu of H* ("BILOH"), aliens otherwise eligible for H-1B guestworkers are permitted to work on B visas instead. 9 FAM 402.2-5(F) (2016). Another example is F-1 student visa status that restricts the alien to solely pursuing a course of study at an approved academic institution that will report termination of attendance. 8 U.S.C. § 1101(a)(15)(F)(i). Yet DHS regulations allow aliens to remain in the United State and work for years after graduation in student visa status. OPT Rule, 81 Fed. Reg. at 13,040.

What is more, lacking lawful presence in the United States is not even a bar to the executive's permitting aliens to work under DHS's newly discovered authority. The purpose of IRCA was to "control illegal immigration" and establish penalties for employers

that hire illegal aliens. H.R. No. Rep. 99-682, at 1 (1986). Yet DHS now claims that IRCA (8 U.S.C. § 1324a(h)(3)) confers on it authority to allow illegal aliens to remain and work in the U.S. *Texas*, 809 F.3d at 182–83.

DHS's claim of authority here is not even limited to aliens already in the United States. Under the proposed International Entrepreneur Rule, DHS claims that it can allow aliens to apply to *enter* the United States and work, with no statutory authorization, under the parole power. 81 Fed. Reg. at 60,133–36.

If the courts adopt DHS's claim of unlimited authority to admit foreign labor into the American job market, every statutory protection for American workers in the entire immigration system is at risk of nullification through regulation. *E.g.*, Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students, 73 Fed. Reg. 18,944, 18,946 (Apr. 8, 2008) (agency regulations promulgated without notice and comment whose very purpose was to circumvent protections for American workers in the H-1B program). Should the courts ultimately reject the Fifth Circuit's interpretation and adopt the district court's interpretation, the stage would be set for an administrative dismantling of the entire statutory scheme for alien employment in favor of one promulgated through regulation or other executive action.

V. Immigration Voice lacks standing to intervene.

"Lack of jurisdiction may be raised at any time." *Laughlin v. Cummings*, 105 F.2d 71, 72 (D.C. Cir. 1939). The court has expanded the bounds of standing by permitting Immigration Voice *et al.* to intervene in this appeal and any future proceedings. The Supreme Court has stated that "Congress may create a statutory right . . . the alleged deprivation of which can confer standing," *Warth*, 422 U.S. at 514. Mere agencies, however, cannot create rights. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). Rights arising from agency action must flow from a statute because "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.* In all previous cases in this circuit where an interest in an agency action has given rise to standing, the right involved has arisen from the agency implementing a directive from Congress. *E.g.*, *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998);); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731–33 (D.C. Cir. 2003)

H-4 employment is not mandated by Congress. 8 U.S.C. § 1101(a)(15)(H). The H-4 visa was created in 1970. Pub. L. No. 91-224, 84 Stat. 116. Nearly a half-century passed before H-4 employment was authorized by regulation. 80 Fed. Reg. 10,284. DHS could rescind H-4 employment just as easily as it was established. "A legally cognizable interest means an interest recognized at common law or specifically recognized as such by the Congress." *Sargeant v.*

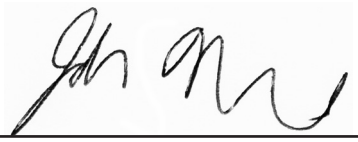
Dixon, 130 F.3d 1067, 1069 (D.C. Cir. 1997). Therefore, the ability to work in H-4 visa status, existing solely at the discretion of DHS, cannot qualify as a "legally protected interest." *Lujan*, 504 U.S. at 560. Because employment under the H-4 Rule is not a legally protected interest, Immigration Voice *et al.* lack standing as an intervener. *Id.*

Congress explicitly placed limits on the number of foreign workers that are allowed to compete with Save Jobs USA members and the terms under which those competitors may work. 8 U.S.C. §§ 1182(n), 1184(g). It is, therefore, troubling that non-immigrant, alien guestworkers are able to fly through the standing gauntlet unimpeded on the basis of an interest that exists solely at the whim of bureaucrats while American citizens have to run a steeplechase, where new standing rules pop up like mushrooms, to gain access to the courts of their own country to defend the limits on foreign labor that Congress has established to protect them. *See Save Jobs USA*, 210 F. Supp. 3d 1, 6–7[4–5], 10–11[7–9] (D.D.C. 2016); see also *Arpaio v. Obama*, 797 F.3d 11, 24–25 (2015) (Brown, J. concurring) (describing the federal courts' "obsession" with standing and calling for a reevaluation of the standing requirements). "A primary purpose in restricting immigration is to preserve jobs for American workers"—not to preserve jobs for nonimmigrant, alien guestworkers and their spouses. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984).

CONCLUSION

For the reasons given above, the court should hold the district court erred when it ruled Save Jobs USA's members lacked standing to challenge the H-4 Rule that allows competitors into their job market while in H-4 visa status and provides an incentive to their competitors in H-1B status to remain in the American job market. The court should also hold the H-4 Rule is in excess of DHS authority and set it aside under 5 U.S.C. § 706(2)(C). Finally, the court should hold that Immigration Voice *et al.* lack standing to intervene in further proceedings.

Respectfully submitted,
Dated: January 16, 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 12,127 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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STATUTES AND REGULATIONS

8 U.S.C. § 1101(a)(15)(H)

(H) an alien (i) [(a) Repealed. Pub. L. 106–95, §2(c), Nov. 12, 1999, 113 Stat. 1316] (b) subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 1184(g)(8)(A) of this title, who is engaged in a specialty occupation described in section 1184(i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title, or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of title 26, agriculture as defined in section 203(f) of title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

H-4 Status Definition

§ 1103. Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

(2) He shall have control, direction, and supervision of all employees and of all the files and records of the Service.

(3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.

(4) He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service.

(5) He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper.

(6) He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

(7) He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

(8) After consultation with the Secretary of State, the Attorney General may authorize officers of a foreign country to be stationed at preclearance facilities in the United States for the purpose of ensuring that persons traveling from or through the United States to that foreign country comply with that country's immigration and related laws.

(9) Those officers may exercise such authority and perform such duties as United States immigration officers are authorized to exercise and perform in that foreign country under reciprocal agreement, and they shall enjoy such reasonable privileges and immunities necessary for the performance of their duties as the government of their country extends to United States immigration officers.

(10) In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

(11) The Attorney General, in support of persons in administrative detention in non-Federal institutions, is authorized—

(A) to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law under an agreement with a State or political subdivision of a State; and

(B) to enter into a cooperative agreement with any State, territory, or political subdivision thereof, for the necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention services in any State or unit of local government which agrees to provide guaranteed bed space for persons detained by the Service.

8 U.S.C. § 1324a(h)(3)

(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.

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,

Appellants,

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
No. 1:15-cv-615
The Hon. Tanya S. Chutkan

Certificate of Service

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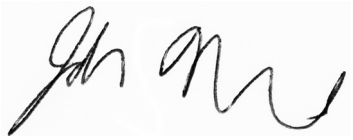
I certify that on January 16, 2019, I filed Appellant's Replacement Brief with the Clerk of the Court using the CM/ECF system that will provide notice and copies to the Appellee's attorneys of record.



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