Nos. 18-587, 18-588, 18-589

In The Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Petitioners,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Respondents.

KEVIN K. McALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, *et al.*,
Petitioners,
v.
MARTIN JONATHAN BATALLA VIDAL, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Ninth Circuit, District Of Columbia Circuit, And Second Circuit

AMICUS BRIEF OF SAVE JOBS USA AND THE WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS IN SUPPORT OF PETITIONERS

JOHN M. MIANO
Counsel of Record
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 315
Washington DC 20001
(202) 232-5590
miano@colosseumbuilders.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici submits this brief in support of their own interests as plaintiffs in ongoing federal court cases. The central issue in *Amici*'s cases is whether the U.S. Department of Homeland Security (DHS) shares dual authority with Congress to define classes of aliens eligible for employment.

Amicus Save Jobs USA is a group of American computer professionals who worked at Southern California Edison until they were replaced by foreign guestworkers possessing H-1B visas. *Save Jobs USA* v. *United States Dep't of Homeland Security*, No. 16-5287 (D.C. Cir.) is an Administrative Procedure Act (APA) challenge to DHS regulations granting work authorization to the spouses of certain H-1B guestworkers. Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015).

Amicus the Washington Alliance of Technology Workers, Local 37083 of the Communication Workers of America, the AFL-CIO (Washtech), is a union that represents American technology workers throughout the United States. *Wash. Alliance of Technology Workers* v. *United States Dep't of Homeland Security*, No. 16-1170 (D.D.C) is an APA challenge to the regulation Improving and Expanding Training Opportunities for

[1] The parties have given blanket consent to the filing of *amicus curiae* briefs in this case. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amici*, their respective members, or their respective counsel made a monetary contribution to the preparation or submission of this brief. *Amici* do not have parent corporations or issue stock.

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). This regulation authorizes aliens holding F-1 student visas to work in the United States for over three years after the aliens graduate.

Amici's cases share a key common issue with this case: whether DHS shares dual authority with Congress to define classes of aliens eligible for employment. This is because the Deferred Action for Childhood Arrivals (DACA) program at issue here is yet another example of DHS using its claim of dual authority to permit alien employment administratively. *E.g.*, *Regents of the Univ. of Cal.* v. *United States Dep't of Homeland Sec.*, 908 F.3d 476, 490 (9th Cir. 2018).

The question of whether DHS shares dual authority with Congress was not contested in the courts below in this case because no party had any incentive to raise this key issue regarding the lawfulness of DACA. Because no party raised the issue, courts below that have blocked the DHS from rescinding the DACA program rely on the erroneous conclusion that the program is substantively lawful.

As *Amici*'s cases illustrate, this question of DHS authority over alien employment has broad implications that extend beyond DACA. DACA is just one of several recent DHS actions that have been made pursuant to the agency's claim that it has unlimited authority to grant alien employment. This Court cannot find that the DACA program is substantively lawful

without validating DHS's claim that it has such unlimited authority. Should this Court take that path, DHS can continue its use of regulations to wipe out protections for American workers that Congress has enacted as part of the immigration system. Consequently, *Amici*'s interests are aligned with the government's interests in this case in regard to outcome but diverge from the government's interests on the important question of whether DHS has the general authority to issue work authorizations to aliens.

SUMMARY OF THE ARGUMENT

The Deferred Action for Childhood Arrivals (DACA) program is substantively unlawful because the Department of Homeland Security (DHS) has no authority to permit illegal aliens to be employed through regulation. In recent years, DHS has claimed that Congress implicitly established dual authority to extend employment to aliens. Under this claimed system, alien employment can be authorized either by Congress through statute or by DHS through regulation.

Congress has never attempted to create such a system. Because neither Petitioners nor Respondents had any incentive to question whether DHS had the vast power over alien employment that it claims, the issue was uncontested in the courts below. The courts below stated that DHS's authority to issue employment authorization documents to DACA participants

comes from the definition of the term unauthorized alien in 8 U.S.C. § 1324a(h)(3), a definition that is limited in scope to its own section and does not authorize DHS to do anything. By concluding that this provision confers on DHS equal authority with Congress to extend employment to aliens, the courts below have found an "elephant[] in [a] mousehole[]." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Even under the implausible assumption that Congress intended to confer on DHS the alien employment authority necessary to implement DACA, that would make § 1324a(h)(3) unconstitutional under the nondelegation doctrine because Congress has provided no guidance whatsoever on how DHS is to use that alleged authority. Because a contrary reading of § 1324a(h)(3)—that it provides no such sweeping authority to DHS—is possible, and indeed preferable, the doctrine of constitutional avoidance mandates its adoption.

ARGUMENT

I. DACA is unlawful because DHS has no authority to permit alien employment through administrative actions not authorized by Congress.

Petitioners assert that the DACA program is unlawful, but they focus solely on the issue of whether such a blanket action truly represents agency discretion. Pet. Br. 43–50. The question of whether DACA is

substantively lawful, however, goes beyond whether it is a valid exercise of discretion not to prosecute; DACA also incorporates the "affirmative agency action" of "issu[ing] . . . employment authorization." *Texas* v. *United States*, 809 F.3d 134, 168 (5th Cir. 2015) (observing the operation of the closely-related Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program). Furthermore, "allowing for the issuance of employment authorizations to any class of illegal aliens whom DHS declines to remove [] is beyond the scope of what the [Immigration and Nationality Act] can reasonably be interpreted to authorize. . . ." *Id.* at 169. Despite the glaring unlawfulness of DACA's work authorizations, Petitioners completely neglect to address that issue where a decision by this Court would impact labor protections in the entire immigration system. Pet. Br. 43–50, Pet. 27–30 (No. 18-587), Pet. 14–15 (No. 18-588).

A. Section 1324a(h)(3) cannot confer on DHS the authority to authorize alien employment because it is a term definition, limited in scope to its own section.

The courts below brushed off the question of where Congress has authorized DHS to grant employment to DACA participants. In *NAACP* v. *Trump*, the district court made no mention at all of the employment issue in its analysis of whether DACA was lawful. 298 F. Supp. 3d 209, 238–40 (D.D.C. 2018). In *Vidal* v. *Nielsen*, the district court simply stated in dicta within a parenthetical that 8 U.S.C. § 1324a(h)(3) conferred

that authority. 279 F. Supp. 3d 401, 412 (E.D.N.Y. 2018). In *Regents of the Univ. of Cal.* v. *U.S. Dep't of Homeland Sec.*, the district court also stated § 1324a was the source of the employment authority. 279 F. Supp. 3d 1011, 1020 (N.D. Cal. 2018) (citing *Arizona Dream Act Coal.* v. *Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014)); *but see 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.").

In the earlier litigation over the similar Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, the employment question *was* addressed in an adversarial context. *See Texas* v. *United States*, No. 15-40238, Reply Brief (5th Cir. May 18, 2016). In finding the DAPA program unlawful, the U.S. Court of Appeals for the Fifth Circuit rejected the argument that § 1324a conferred the authority to authorize alien employment. *Texas* v. *United States*, 809 F.3d 134, 182–83 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2015). The Fifth Circuit observed that 8 U.S.C. § 1324a(h)(3) is a "'miscellaneous' definitional provision expressly limited to § 1324a, a section concerning the 'Unlawful employment of aliens'" and that it "cannot reasonably be construed as assigning 'decisions of vast economic and political significance.'" *Id.* at 183 (quoting *Util. Air*

Regulatory Grp. v. *Envtl. Prot. Agency*, 573 U.S. 302, 323–24 (2014)).

Claiming 8 U.S.C. § 1324a(h)(3) confers on DHS the authority to define classes of aliens eligible for employment administratively requires taking that provision out of context. Congress created § 1324a in the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3445. This Act, for the first time, imposed civil and criminal sanctions on employers who employed aliens that were not authorized to work under the immigration system. *Id.* Section 1324a(h)(3) defined such aliens as:

> (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.

That Act also contains seven provisions directing the Attorney General to extend alien employment outside of the scheme of the Immigration and Nationality Act. § 101, 100 Stat. at 3368; § 201 ("Legalization") 100 Stat. at 3397 & 3399 (two), § 301 ("Lawful Residence for Certain Special Agriculture Workers") 100 Stat. at 3418 & 3421 (two), 3428. Had Congress omitted the clause "or by the Attorney General" in § 1324a(h)(3)(B), it would have created the absurd situation in which the

Act authorized certain aliens be employed, but at the same time made hiring these aliens unlawful.

Yet, because this issue was uncontested, the courts below allowed an innocuous clause in a term definition, limited in scope to its own section, and necessary for other provisions of the Act to function properly, to be transformed into unlimited authority for DHS to permit alien employment. *See Vidal*, 279 F. Supp. 3d at 412; *Regents of the Univ. of Cal.*, 279 F. Supp. 3d at 1020; *but see Texas* v. *United States*, 809 F.3d 134, 183 (5th Cir. 2015) (holding § 1324a(h)(3) did not confer such authority). Such an interpretation flouts the instructions of this Court: "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." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

B. Congress did not confer on DHS dual authority to define classes of aliens eligible for employment in the agency's general authority to promulgate regulations.

Given the obvious problem with the claim that § 1324a(h)(3)—a definition, limited in scope to its own section—conferred on DHS unlimited authority to permit alien employment, DHS had a brand new theory when the employment issue was raised before this Court in *Texas*: "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). Nonetheless, that line of reasoning is just as problematic as asserting such authority comes from a term definition.

Section 1103(a) defines the general powers of the Secretary of Homeland Security. This provision was created in the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (INA).[2] That act was a "complete revision" of our immigration laws. S. Rep. No. 82-1072, at 2 (1952). Yet there is no provision anywhere in the act that authorizes the secretary to permit alien employment through regulation. INA, *passim*. Furthermore, the legislative history of the act shows there was no implicit intent to confer on the secretary such authority. 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; H.R. Rep. No. 82-1365 at 50–51 (identical text). If Congress had intended to confer on an agency the ability to authorize alien employment outside the statutory scheme, surely this would have been listed as one of the exceptions to the labor protections of the act—but it was not. *Id.* In

[2] The Consolidated Appropriations Resolution, 2003, transferred to the Secretary of Homeland Security authority originally granted to the attorney general. Pub. L. No. 108-7, Div. L, § 105, 117 Stat. 11, 531.

any event, the claim that DHS's general authority gives it authority equal to that of Congress to define classes of aliens eligible for employment runs into the same problem as before: "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." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

There now exists the absurd situation where DHS claims that alien "employment may be authorized by statute or by the Secretary." Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284, 10,294 (Feb. 25, 2015).[3] Yet there is no provision that explicitly creates that authority and DHS has been inconsistent about where the authority was created.

Worse yet, DACA and DAPA are not the only examples where DHS has authorized large amounts of foreign labor to enter the U.S. job market. In recent years DHS has authorized massive increases in foreign labor through administrative action as it has responded to business interests seeking to undermine the protections for American workers that Congress has enacted in the immigration system. *E.g.*, 80 Fed. Reg. at 10,294; Enhancing Opportunities for H-1B1, CW-1, and E-3 Nonimmigrants and EB-1 Immigrants, 81 Fed. Reg. 2,068 (Jan. 15, 2016); Improving and Expanding Training Opportunities for F-1

[3] This was the very first regulation to claim alien employment could be authorized either by statute or by regulation.

Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040 (Mar. 11, 2016); International Entrepreneur Rule, 82 Fed. Reg. 5,238, 5,239 (Jan. 17, 2017). The Optional Practical Training program, created entirely through regulation, is now the largest guest-worker program in the entire immigration system measured by the number of aliens entering the workforce each year. Neil G. Ruiz and Abby Budiman, *Number of Foreign College Students Staying and Working in the U.S. After Graduation Surges*, Pew Research Center, May 10, 2018[4] at 4 (stating the number of approvals for Optional Practical Training exceed initial approvals for H-1B).

C. Even if Congress had attempted to confer on DHS the power to define classes of aliens eligible for employment, such a delegation of power would be unconstitutional.

Defining classes of aliens who are eligible for employment is a basic lawmaking function in the field of immigration, and Congress has defined such classes of aliens in 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. If one makes the baseless

[4] Available at https://assets.pewresearch.org/wp-content/uploads/sites/2/2018/05/10110621/Pew-Research-Center_Foreign-Student-Graduate-Workers-on-OPT_2018.05.10.pdf

assumption that Congress intended to confer on DHS (in either § 1103 or § 1324a) the alien employment authority necessary for DACA, Congress would have created a system that runs afoul of the Constitution. America would have a dual system of immigration lawmaking in which Congress (by statute) and DHS (by regulation) can independently define classes of aliens eligible for employment to cross-purposes. In fact, because any subsequent restriction Congress may enact to restrict this otherwise unlimited power conferred on DHS is subject to a veto (as are Congress's own employment authorizations), the executive's power to define alien employment in the immigration system would be greater than that of Congress. U.S. Const., Art. I, § 7. Such a system of dual lawmaking authority would be unconstitutional. "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).

Such an arrangement also runs headlong into the non-delegation doctrine. "[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).

Assuming that Congress implicitly intended to confer on the executive "dual authority" to define classes of aliens eligible for employment in 1952 in § 1103 or in 1990 in § 1324a(h)(3), it was not through a legislative act that provides an "intelligible principle" to which the executive must conform. Section 1103 makes no mention of alien employment at all and § 1324a(h)(3) is a term definition that does not direct DHS to do anything. Neither provision includes any parameters whatsoever on how the claimed delegated authority is supposed to be used. *Id.* Thus, making the completely unsupported assumption that Congress intended to confer on DHS authority to define classes of aliens eligible for employment results in an unconstitutional reading of these provisions. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Because another, constitutionally compliant reading—namely, that Congress conferred no general power to authorize employment in these provisions—is possible, and indeed far preferable, the doctrine of constitutional avoidance requires that it be adopted. *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2258–59 (2013) (explaining that this Court must adopt a fairly possible interpretation of a statute if doing so is necessary to avoid an interpretation that would make that statute unconstitutional).

II. Whether § 1324a(h)(3) confers on DHS co-equal authority with Congress to authorize any class of aliens it chooses to work will have major implications throughout the immigration system and is not an issue to be lightly considered.

Should this Court adopt DHS's novel interpretation that the definition of the term *unauthorized alien* in § 1324a(h)(3) (and limited in scope to that section) is a legislative grant to the agency of co-equal authority with Congress to permit any alien it chooses to work in the United States, the decision would have widespread ramifications throughout the immigration system. To affirm the courts below would be an affirmation that DHS has unlimited authority to define classes of aliens, because the lawfulness of this authority is a prerequisite for DACA's substantive lawfulness. *See*, § I, *supra*. An affirmation by this Court of such sweeping authority would enable DHS, through regulation, to continue to dismantle administratively the protections for American workers that Congress has enacted in the INA since 1952.

Such concern is not based on mere speculation or unsubstantiated fears. History demonstrates that *Amici*'s concerns are well founded. DHS's predecessor has previously attempted to subvert Congress's intricate statutory protections for American workers. *See*, *e.g.*, *Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985); *Int'l Longshoremen's & Warehousemen's Union* v. *Meese*, 891 F.2d 1374 (9th Cir. 1989). When challenges could be mounted

against such agency abuse, the courts could be counted on to intervene. *Id*.

This Court should take note of the facts of *Washington Alliance of Technology Workers* to better understand the consequences for American workers, including *Amici*, should this Court adopt the lower courts' overbroad gloss on § 1324a(h)(3). The H-1B visa program is routinely used to replace American workers in technology fields with lower-paid foreign workers. *E.g.*, Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, New York Times, June 3, 2015. To protect American workers, Congress has put in place limits on the number of H-1B visas that in turn limit the number of Americans that can be replaced by such workers. § 1184(g).

In 2007 Microsoft Corporation concocted a scheme to get around the H-1B quota by using student visas as a substitute. 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 (Apr. 8, 2008), Administrative Record (A.R.) at 120–23. Microsoft proposed that DHS allow aliens to work on student visas for 29 months after graduation. *Id*. Microsoft presented its proposal to the DHS secretary at a dinner party. *Id*. DHS then worked in secret with industry lobbyists to prepare regulations implementing Microsoft's scheme. A.R. 124–27, 130–34. The first notice to the public that such regulations were even being considered was when DHS put them in place as a *fait*

accompli, without notice and comment. 73 Fed. Reg. 18,950.

The nondelegation doctrine is supposed to ensure "that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Indus. Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring). Affirming the holdings of the courts below that DACA is substantively lawful would keep open the door to the creation of guest-worker programs by Washington insiders at dinner parties, and their enactment in secret rulemaking processes from which the public is excluded. As *Amici*'s cases demonstrate, this dark scenario is fact, not hyperbole.

CONCLUSION

For the foregoing reasons, this Court should rule in favor of petitioners, and hold that DACA is unlawful because DHS has no general authority to define classes of aliens eligible for employment.

Respectfully submitted,

JOHN M. MIANO
Counsel of Record
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 315
Washington DC 20001
(202) 232-5590
miano@colosseumbuilders.com