ORAL ARGUMENT NOT YET SCHEDULED

No. 16-5287

In the

United States Court of Appeals

for the

District of Columbia Circuit

SAVE JOBS USA,

Plaintiff-Appellant,

– v. –

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendant-Appellee.

On appeal from the United States District Court for the District of Columbia, Case No. 15-cv-615-TSC, Hon. Tanya S. Chutkan

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*. Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant Save Jobs USA:

- Intervenors are Immigration Voice, Anujkumar Dhamija, and Sudarshana Sengupta.
- *Amici* are the Chamber of Commerce of the United States of America, the Information Technology Industry Council, and the National Association of Manufacturers.

Rulings Under Review. References to the rulings at issue appear in the Brief for Appellant Save Jobs USA.

Related Cases. Other than *Washington Alliance of Technology Workers v. DHS*, 892 F.3d 332 (D.C. Cir. 2018), *amici* do not believe the cases listed in the Brief for Appellant Save Jobs USA involve "substantially the same parties and the same or similar issues" as those involved in this case. D.C. Cir. R. 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amici* state that they are nonprofit trade associations and do not issue stock or have any parent corporations. *Amici* operate for the purpose of promoting the general legislative, professional, and commercial interests of their memberships.

STATEMENT REGARDING CONSENT TO FILE

All parties have consented to the filing of this brief. The Chamber of Commerce of the United States of America, the Information Technology Industry Council, and the National Association of Manufacturers filed their notice of intent to participate in this case as *amici curiae* on April 8, 2019.

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GLOSSARY

DHS: Department of Homeland Security

INA: Immigration and Nationality Act

INS: Immigration and Naturalization Service

ITI: Information Technology Industry Council

NAM: National Association of Manufacturers

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Appellant Save Jobs USA and its appendix.

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. One of the Chamber's important functions is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of concern to the business community.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contributions to the preparation or submission of this brief.

The Information Technology Industry Council (ITI) is the global voice of the technology sector. As an advocacy and policy organization for the world's leading innovation companies, ITI navigates the relationships between policymakers, companies, and non-governmental organizations, providing creative solutions that advance the development and use of technology around the world. ITI advocates for policies that encourage innovation and the promotion of global competitiveness.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amici have a substantial interest in maintaining the H-4 Rule at issue in this case, a Rule which enables select spouses of H-1B visa holders to lawfully work in the United States. At present, approximately 90,000 individuals have gained work authorization under this Rule. These individuals are, on the whole, highly educated. *Amici*'s member companies have hired many of

these skilled workers. Appellant seeks to compel the termination of these thousands of employment relationships. What is more, *amici*'s members employ several thousand highly skilled H-1B workers; if the H-4 Rule were invalidated, those employees would be severely harmed. *Amici* participate in this case to protect the welfare of their members' employees—and to ensure an economic environment in which American businesses have access to the world's leading talent.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is the policy of the United States to attract skilled workers from around the world to contribute to American competitiveness and economic growth. Under certain circumstances, skilled workers who enter the country as H-1B visa holders may adjust their status to lawful permanent residency, joining the community of permanent American residents.

Because of country quotas imposed by statute, H-1B visa holders approved for lawful permanent residence may have to wait years for a green card. For individuals from India on H-1B visas, for example, the wait is currently about 17 years. Laura D. Francis, *U.S. May Speed Green Cards for Some Countries, Make Others Wait*, Bloomberg Law (Oct. 31, 2018), perma.cc/EPP4-CJTQ; *see also* U.S. Dep't of State, *Visa Bulletin for March 2019* (Feb. 8, 2019), perma.cc/7WHX-BBFZ.

Before 2015, the spouses of H-1B skilled workers (who hold H-4 nonimmigrant visas) had no legal authorization to be employed. Thus, throughout

this lengthy delay, the households of H1-B visa holders were limited to a single income—a serious limitation that had discouraged many valuable skilled workers from coming to the United States in the first place. For those who did, their spouses (a population that is overwhelmingly female) were categorically locked out of the workplace.

To mitigate this situation, the Department of Homeland Security (DHS) in 2015 promulgated the Rule challenged in this action—the H-4 Rule. The H-4 Rule provides work authorization for H-4 spouses of some H-1B skilled workers—specifically, H-1B workers who have been approved for permanent residency but are waiting for a green card to become available. *Employment Authorization for Certain H-4 Dependent Spouses*, 80 Fed. Reg. 10,284, 10,285 (Feb. 25, 2015) (*H-4 Rule*).[2] The H-4 Rule thus aims "to ameliorate certain disincentives that currently lead H-1B nonimmigrants to abandon efforts to remain in the United States while seeking [lawful permanent resident] status, thereby minimizing disruptions to U.S. businesses employing such workers" and "support[ing] the U.S. economy." *Id.*

Since its promulgation in 2015, tens of thousands of families have come to rely on the work authorization provided by the H-4 Rule. The vast majority

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[2] Appellant repeatedly appears to distinguish H-4 spouses from "American workers." But the Rule renders eligible for employment only those H-4 spouses who have been *approved* for lawful permanent residence. That is, the government has granted their request to permanently live and work in the United States—the sole cause of delay is an antiquated country quota system. In that respect, they are American workers.

of these individuals have made one or more irreversible life decisions in reliance on the Rule's promise of dual incomes: having a child, buying a home, or seeking advanced education. If Appellant were to succeed in this lawsuit, tens of thousands of individuals across the country would be forced from their jobs and left without means to afford their educational loans, their mortgages, or their families.

The H-4 Rule, moreover, has had significant, positive effects on the U.S. economy as a whole. Recent economic analysis demonstrates that it has contributed billions of dollars to the United States' gross domestic product and filled tax coffers with additional billions, all with a net neutral effect on the employment of other American workers.

Despite these benefits, the H-4 Rule has come under attack by Appellant Save Jobs USA. Appellant's arguments on the merits are insubstantial. Congress has granted DHS wide-ranging authority to determine that classes of immigrants are eligible for work authorization. The H-4 Rule was properly promulgated pursuant to that authority.

That said, the Court need not reach any of these issues now. Below, the district court rested solely on its conclusion that Appellant lacks standing to pursue this lawsuit. If the Court reverses that determination, the proper course is to remand this matter to the district court, allowing that court to reach a conclusive holding on the merits in the first instance. This course is

especially warranted insofar as DHS is presently proposing rescission of the H-4 Rule.

ARGUMENT

I. TENS OF THOUSANDS OF INDIVIDUALS RELY ON THE H-4 RULE, AND THEIR EMPLOYMENT CONTRIBUTES BILLIONS OF DOLLARS TO THE AMERICAN ECONOMY.

A. The H-4 Rule is responsible for billions of dollars of economic activity and tax revenues.

DHS's goal in promulgating the H-4 Rule was "to support the retention of highly skilled workers" who, among other things, "contribute to advances in entrepreneurship and research and development, which are highly correlated with overall economic growth and job creation." *H-4 Rule*, 80 Fed. Reg. at 10,284-85.

New research confirms that the Rule has been enormously successful in achieving this goal. A recent empirical analysis by two prominent economists concluded that rescinding the H-4 Rule would cost the economy (and the federal and state governments) billions of dollars, would not meaningfully benefit American workers, and would upset the settled expectations of tens of thousands of families that have reasonably relied on the Rule. *See generally* Ike Brannon & M. Kevin McGee, *Hurting Americans in Order to Hurt Foreigners*, Regulation (Winter 2018-2019), at 8, perma.cc/QV8H-2QBJ (*Hurting Americans*).

The study's authors collected demographic, economic, and personal data from nearly five thousand individuals currently holding H-4 visas. *Hurting Americans* at 9. They analyzed the subset of those individuals who had been granted work authorization under the H-4 Rule, and extrapolated the data to all of the Rule's beneficiaries—roughly 91,000 people, according to DHS statistics. *Id.* at 10; *see* U.S. Citizenship & Immigration Servs., *I-765 Applicants for Employment Authorization for H-4 Non-Immigrants by Gender, Fiscal Years 2015-2018* (Mar. 23, 2018), perma.cc/5QXL-7MPR.

The report's analysis reveals that the H-4 spouses working pursuant to the Rule are predominately highly educated and experienced professionals, and that they contribute billions of dollars to the economy.

First, the study shows that nearly 60% of H-4 spouses have attained at least a master's degree, and 99% are college graduates. *Hurting Americans* at 9. That is, they are exactly the kind of highly skilled professionals that the United States benefits from attracting and retaining. *See H-4 Rule*, 80 Fed. Reg. at 10,295 ("[T]here is a large body of research that supports the findings that immigration of highly skilled workers is beneficial to the U.S. economy and labor market in the long-term.").

Second, the economists concluded that the 91,000 H-4 spouses authorized to work under the H-4 Rule collectively contribute roughly $5.5 billion to the United States' gross domestic product annually. *Hurting Americans* at 10-11. Another study estimated their contributions to be even higher, at near-

ly $13 billion per year. Jacqueline Varas, Am. Action Forum, *The Economic Value of Work Permits for H-4 Visa Holders*, 6 & tbl. 4 (Mar. 20, 2019), perma.cc/F5TX-U2SM.

Third, the H-4 Rule has been an important factor in many H-1B families' decisions to remain in the country. Without the Rule, an additional $2 billion in productivity would be lost because some H-1B workers would take their talents to countries like Canada, which provides for nonimmigrant spousal employment. *Hurting Americans* at 10; *see H-4 Rule*, 80 Fed. Reg. at 10,309 (recognizing the need to compete with Canada's "open" work permits for spouses of skilled foreign workers). Invalidation of the H-4 Rule thus would reduce the national GDP by somewhere between $7.5 billion and $15 billion annually. *Hurting Americans* at 10; *see* Varas, *supra*, at 6 & tbl. 4.

Finally, the productivity of H-4 spouses accrues not only to the companies that employ them and the economy as a whole, but also to the federal and state governments through tax revenues. Without the H-4 Rule, the federal government would forego the $1.9 billion it collects annually in taxes from H-4 spousal workers. *Hurting Americans* at 10. State and local governments similarly would see losses of at least $530 million in annual tax revenues. *Id.* at 11. H-4 spouses employed under the Rule thus contribute substantially to this country's fiscal health, in addition to its overall economic prosperity.

In short, "[i]t is hard to conceive how the government could find that rescinding the ability of H-4 visa holders to work could be judged as cost effective." Ike Brannon, *At What Cost: Assessing the High Cost of Removing H-4 Visa Holders from the American Workforce*, Forbes (Mar. 5, 2019), perma.cc/T5HM-2GV9. That conclusion applies with equal force to Appellant's effort to rescind the regulation by means of this lawsuit.

B. Tens of thousands of individuals have made irrevocable life decisions in reliance on the H-4 Rule.

Countless families have made major and frequently irreversible life decisions in reliance on the economic security provided by the H-4 Rule. Information collected by the authors of the *Hurting Americans* study shows that over 27,000 families decided to have a child—and incur the major, unavoidable expenses that having a child entails—based on the Rule's authorization of a second income for the H-4 spouse. Ike Brannon & M. Kevin McGee, *Repealing H-4 Visa Work Authorization: A Cost-Benefit Analysis*, 13 & tbl. 3 (Mar. 4, 2019), goo.gl/EoUzvK (*Repealing H-4 Visa Work Authorization*). If Appellant succeeds in invalidating the H-4 Rule, approximately 27,000 families in this country will lose the second income on which they depend to support their children.

The survey also reveals that over 52,000 families have bought a home in the United States (and banks have lent money for that purpose) in reliance on the H-4 spouse's ability to work. *Repealing H-4 Visa Work Authorization*

at 13 & tbl. 3. If Appellant succeeds in invalidating the H-4 Rule, about 52,000 families will no longer have the income on which they relied in purchasing a home. *Id.* And nearly 20,000 families have invested their time, energy, and money in additional education based on the promise of a second income to help defray the cost. *Id.* Undermining the H-4 Rule would turn the lives of these families upside down.

In total, over 87% of families that now have dual-incomes as a result of the H-4 Rule have taken at least one of these three major life steps in reliance on the Rule's promise of greater economic freedom. *Repealing H-4 Visa Work Authorization* at 13 & tbl. 3; *see also* Ike Brannon & Kevin McGee, *Trump Says He Wants Skilled Immigrants. He's about To Stop 70,000 from Working*, Wash. Post (Mar. 27, 2019), perma.cc/CAW7-LHED (detailing the stories of two such families).

What is more, H-4 spouses are approximately 90% female. *Hurting Americans* at 9. Overturning the Rule would thus have a substantially disproportionate effect on women, forcing tens of thousands of them from their employment.

In sum, invalidation of the H-4 Rule would wholly upend the lives of thousands of law-abiding immigrants whose contributions to America transcend mere economics. When an agency contemplates rescinding a lawfully promulgated regulation, agencies (and courts reviewing their actions) must take into account "serious reliance interests" engendered by the targeted reg-

ulation. *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 719 (D.C. Cir. 2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). The same considerations should weigh heavily here: The massive public reliance interests at stake for tens of thousands of individuals must factor into the calculus when evaluating the kind of protectionist claims pressed by Appellant.

C. The H-4 Rule does not impose costs on other American workers.

Gains in overall productivity from allowing H-4 spouses to work and pay taxes do not come at the detriment of other American workers. Rather, because they are highly educated, skilled, and experienced, the H-4 spouses empowered by the Rule largely occupy jobs for which there is no alternative supply of appropriately qualified labor. "The near-record-low unemployment rates in the U.S.—especially for educated workers—put lie to the notion that H-4 holders displace domestic workers in the occupations and industries where they predominate." Brannon, *At What Cost*, *supra*.

Indeed, over two-thirds of H-4 spouses are employed in occupations with total unemployment rates below 2%—meaning that all the unemployed workers in those fields are likely in transition between available jobs, rather than representing a true pool of untapped labor. *Hurting Americans* at 11.[3]

[3] Economists refer to this type of unemployment as "frictional" unemployment, which results "when people are temporarily unemployed, either because they are new to the job market or are searching for a better job." Scott

Thus, only about 5,500 to 8,200 of the jobs currently held by H-4 spouses would likely be filled by other American workers in the absence of the H-4 Rule. *Id.* And those gains would be almost exactly cancelled out by the destruction of the roughly 6,800 jobs *created* by H-4 spouses, 2% of whom own their own businesses, employing an average of five additional workers each. *Id.*

In addition, H-4 spouses authorized to work "boost overall economic activity." *Hurting Americans* at 8. A dual-income family that earns more in wages typically spends more on both goods and services—and that enhanced spending itself creates jobs. *Id.* For example, this "creat[es] more opportunities and jobs for both skilled and unskilled domestic workers." *Id.* The *Hurting Americans* study concluded that the H-4 program ultimately improves employment prospects for everyone in the United States.

II. THE H-4 RULE IS A LAWFUL EXERCISE OF DHS AUTHORITY.

If the Court concludes that Appellant has standing in this case, the proper course is to remand for the district court to address Appellant's contention that DHS lacked statutory authority to issue the H-4 Rule. That is

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A. Wolla, Fed. Reserve Bank of St. Louis, *Making Sense of Unemployment Data* (Feb. 2016), perma.cc/N8BX-2S99. Frictional unemployment is distinct from "structural" unemployment ("a mismatch in the skills held by those looking for work and the skills demanded by those seeking workers") and "cyclical" unemployment ("jobs lost due to recession") and is a naturally occurring phenomenon in any economy. *Id.* ("Because workers are always entering the labor force and switching jobs, a certain amount of frictional unemployment is inevitable.").

especially so insofar as the government appears poised to issue a Notice of Proposed Rulemaking that would rescind the H-4 Rule in its entirety.

In the event the Court proceeds to the merits of Appellant's claim, it should conclude that DHS has the power to authorize the employment of noncitizens by means of regulation. The Executive Branch, Congress, and the courts have uniformly recognized this core principle.

A. The power to promulgate the H-4 Rule is inherent in DHS's broad rulemaking authority under the INA.

Section 1103 of title 8, enacted as part of the 1952 Immigration and Nationality Act (as amended), provides the Secretary of Homeland Security with broad, discretionary authority to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the INA]." 8 U.S.C. § 1103(a)(3). This section empowers DHS to authorize the employment of noncitizens.

From the start, courts have understood that the relevant federal agencies (including the former Immigration and Naturalization Service (INS)) were granted authority under Section 1103 to permit noncitizens to work. *See, e.g., Husan Wei v. Robinson*, 246 F.2d 739, 743 (7th Cir. 1957) (noting regulations prohibiting nonimmigrants from working "unless such employment . . . has first been authorized by the district director or the officer in charge"); *Diaz v. INS*, 648 F. Supp. 638, 646 (E.D. Cal. 1986) ("The Refugee Act does not address the question of whether political asylum applicants may

work in the United States while their applications are in process," but "pursuant to 8 U.S.C. § 1158(a) and 8 U.S.C. § 1103, the Attorney General, through the Commissioner of the INS, has published two regulations permitting the district director of the INS to grant work authorization to those aliens awaiting the determination of their political asylum applications."). As the Ninth Circuit recently reiterated, "Congress has given the Executive Branch broad discretion to determine when noncitizens may work in the United States." *Ariz. DREAM Act Coal. v. Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014).

The relevant federal agencies have long shared this understanding. *E.g.*, *Matter of S-*, 8 I. & N. Dec. 574, 575 (B.I.A. 1960) ("[T]he Immigration Service has issued printed material putting nonimmigrant aliens on notice that they may not engage in employment without permission of the Immigration Service."). The INS confirmed its understanding that Section 1103 empowered it to authorize noncitizen employment in 1979, when it published a notice of proposed rulemaking to codify in a single location its previously internal employment-authorization procedures. *Proposed Rules for Employment Authorization for Certain Aliens*, 44 Fed. Reg. 43,480 (July 25, 1979). In the preamble to the proposed rule, the agency explained "[t]he Attorney General's authority to grant employment authorization stems from [8 U.S.C. § 1103(a)], which authorizes him to establish regulations, issue instructions, and perform any actions necessary for the implementation and administration of the

Act." *Id.* at 43,480. More generally, "[t]he authority of the Attorney General to authorize employment of aliens in the United States [is] a necessary incident of his authority to administer the Act." *Id.* This was not a controversial proposition at the time and should not be today.

The final rule was promulgated in 1981. *Employment Authorization to Aliens in the United States*, 46 Fed. Reg. 25,079 (May 5, 1981). Notably, the regulations that emerged were not limited to the employment of noncitizens specifically authorized to work by the INA. Rather, the 1981 rule authorized the employment of several categories of noncitizens outside of the statutory scheme. *Id.* at 25,081 (codifying these regulations at 8 C.F.R. § 109.1(b)). It even permitted employment of noncitizens benefitting from "deferred action"—that is, individuals who had no statutory basis even to be present in the country. *Id.*; *see Regents of Univ. of Cal. v. DHS*, 908 F.3d 476, 487 (9th Cir. 2018) ("[D]eferred action is not expressly grounded in statute.").

The immigration agencies have thus interpreted the INA as providing the authority for the H-4 Rule since the statute's enactment in 1952, and published that understanding in the Federal Register as early as 1979. Given the numerous times the INA has been amended since 1952 (and even since 1979), this history alone goes a long way toward establishing the Rule's validity: "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is per-

suasive evidence that the interpretation is the one intended by Congress.'" *Altman v. SEC*, 666 F.3d 1322, 1326 (D.C. Cir. 2011) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 883, 846 (1986)); *see also Sec'y of Labor, Mine Safety & Health Admin. v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003) ("[W]e give weight to the fact that the agency that administers the statute . . . has interpreted [it] the same way for more than 25 years."). *See* pages 23-24, *infra* (cataloging subsequent statutory alterations to employment authorization).

B. Section 1324a recognizes and ratifies DHS's authority.

Although courts' and the agencies' longstanding interpretation of Section 1103 provides ample authority for the H-4 Rule, that provision does not stand alone. In 1986, Congress explicitly ratified the Executive's authority to permit noncitizen employment by enacting 8 U.S.C. § 1324a, which imposes penalties on those who employ "unauthorized aliens." 8 U.S.C. § 1324a(a); *see* Pub. L. No. 99-603, § 101(a), 100 Stat. 3359, 3368 (1986). As relevant here, the statute defines that term to mean "that the alien is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by [the INA] *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added).[4]

[4] With the transfer of immigration authority to DHS in 2003, the statutory reference to the Attorney General is now "deemed to refer to the Secretary" of Homeland Security. 6 U.S.C. § 557.

The only plausible reading of Section 1324a is that the Attorney General may authorize a noncitizen to work wholly apart from any express work authorization provided in the statute. That is the necessary result of the statute's use of the disjunctive "or." *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law* 116 (2012) ("*[A]nd* combines items while *or* creates alternatives."). In Section 1324a, Congress thus ratified the Attorney General's longtime understanding that the INA empowered him to authorize the employment of noncitizens. And "[w]here, as here, 'Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,' [the Court] cannot but deem that construction virtually conclusive." *Schor*, 478 U.S. at 846 (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381-82 (1969)).

Appellant's rejoinders fail to convince. First, the argument that Section 1324a(h)(3) "is merely a definition and does not authorize DHS to do anything" (Appellant Br. 37) misunderstands the point. That provision is not a freestanding grant of power, but a recognition and affirmation of the Attorney General's preexisting authority under Section 1103. *See Schor*, 478 U.S. at 846. By defining "unauthorized alien" to exclude a noncitizen "authorized to be [] employed . . . by the Attorney General" (8 U.S.C. § 1324a(h)(3)), Congress necessarily recognized that the Attorney General *has the power to authorize employment*. Otherwise, the definition would make no sense.

Appellant argues in the alternative that Congress included "or by the Attorney General" to reach situations where the INA explicitly provides for work authorization for noncitizens within particular classes, but grants DHS discretion to adjudicate the cases of individual people within those classes. Appellant Br. 39. But that interpretation renders "or by the Attorney General" mere surplusage; the statutory text would mean precisely the same thing as Appellant argues without those words included. Of course, courts should generally choose the "interpretation which avoids surplusage." *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (emphasis omitted).[5]

Appellant responds that DHS's reading of Section 1324a would result in surplusage—namely the post-1986 provisions under which DHS "may" authorize the employment of certain noncitizens. "Under the agency's . . . interpretation of [Section] 1342a(h)(3)," the argument goes, "DHS already had the power to grant these discretionary work authorizations." Appellant Br. 39-40.

But Appellant misrepresents the nature of those statutes. The Violence Against Women and Department of Justice Reauthorization Act of 2005 *requires* DHS to provide covered individuals work authorization: The Act pro-

[5] Appellant's second alternative is even stranger. It says that "or by the Attorney General" can also refer to a case where Congress "directed DHS to grant certain aliens employment that is not conferred by an alien's visa classification." Appellant Br. 39. It is hard to see how a "Special Agriculture Worker[]"—one of the examples provided by Appellant—is not "authorized to be employed [under the INA]" when the INA plainly states that such an individual "shall be granted authorization to engage in employment in the United States." 8 U.S.C. § 1160(a)(4).

vides that "a VAWA self-petitioner … *is eligible* for work authorization." Pub. L. No. 109-162, § 814, 119 Stat. 2960, 3059 (2006) (emphasis added). Appellant quotes from the subsequent provision which identifies merely that such individuals "may be provided an 'employment authorized' endorsement or appropriate work permit incidental to such approval." *Id*. Likewise, the Haitian Refugee Immigration Fairness Act of 1998 provides that if an individual covered by the Act has applied for work authorization, and the application has been "pending for a period exceeding 180 days" and "has not been denied," "the Attorney General *shall* authorize such employment." Pub. L. No. 105-277, § 2(c), 112 Stat. 2681-538 (emphasis added).

In short, both Acts that Appellant identifies *restricted* DHS authority by deeming certain individuals authorized to work. The Acts thus determined that certain aliens are "authorized to be so employed by [the INA]." 8 U.S.C. § 1324a(h)(3). These provisions were decidedly not surplusage.

Other courts of appeals have recognized the broad discretion provided by Section 1324a. Once more, the Ninth Circuit's view is that "Congress has given the Executive Branch broad discretion to determine when noncitizens may work in the United States." *Ariz. DREAM Act Coal.*, 757 F.3d at 1062 (citing 8 U.S.C. §§ 1324a(h)(3), 1103); *see also Regents*, 908 F.3d at 490 (Section 1324a(h)(3) "empower[s] the Executive Branch to authorize the employment of noncitizens"). The Fifth Circuit likewise has recognized that, because "[t]here is nothing in the [INA] expressly providing for the grant of employ-

ment authorization . . . to aliens who are the beneficiaries of approved visa petitions," such authorization is "purely [a] creature[] of regulation." *Perales v. Casillas*, 903 F.2d 1043, 1048 (5th Cir. 1990).

Even the Supreme Court has acknowledged the balance Congress struck in Section 1324a without the slightest suggestion that the Executive's power is circumscribed. *See Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 589 (2011) (noting Section 1324a's definition of "unauthorized alien" as including individuals "not otherwise authorized by the Attorney General to be employed in the United States").

In arguing to the contrary, Appellant relies heavily on the Fifth Circuit's decision in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), asserting that that court rejected the same claim of authority DHS makes here. Appellant Br. 29. But *Texas* said nothing at all about the question implicated by this case: whether DHS has authority to provide work authorization to individuals *already lawfully present in the United States*. What *Texas* actually held was that it was beyond DHS's power to grant deferred action to 4.3 million undocumented individuals. 809 F.3d at 179-86. Because preexisting DHS regulations provided work authorization for deferred action recipients (*see* 8 C.F.R. § 274a.12(c)(14)), the court also touched on DHS's powers regarding employment. But to the extent it did so, the court's conclusion was that those powers could not be used to authorize work for millions of undocumented immigrants, because to do so would "undermin[e] Congress's stated goal" of

"preserving jobs for those *lawfully in the country*." *Texas*, 809 F.3d at 181 (emphasis added); *see also id.* at 184 (finding "untenable" an interpretation that "would allow [DHS] to grant lawful presence and work authorization to any illegal alien in the United States").

That conclusion has no application here. H-4 spouses are by definition lawfully present in the United States. As the H-4 Rule itself explains, moreover, the subset of H-4 spouses authorized to work by the Rule consists largely of those who will eventually be able to work by virtue of permanent residency anyway; the Rule merely speeds up that process. *See H-4 Rule*, 80 Fed. Reg. at 10,285 ("[T]he changes made in this rule simply alleviate the long wait for employment authorization that these H-4 dependent spouses endure through the green card process, and accelerate the timeframe within which they generally will become eligible to apply for employment authorization."). *Texas* has nothing to say about this significantly more modest assertion of Executive authority.

In short, and in the words of the leading immigration law treatise, "[w]hether or not the immigration agency earlier had the implied authority to issue such work authorization, [Section 1324a], in its definition of 'unauthorized alien,' has now implicitly granted such authority to the Attorney General." 1 Charles Gordon et al., *Immigration Law & Procedure* § 7.03[2][c] (2018).

C. Subsequent developments further confirm DHS's authority.

DHS itself adopted that exact interpretation of Section 1324a immediately after it was enacted in 1986—and Congress has acquiesced in this interpretation. *See Altman*, 666 F.3d at 1326 ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'") (quoting *Schor*, 478 U.S. at 846).

Prior to Section 1324a's enactment, an anti-immigration interest group challenged the INS's 1981 employment authorization regulations, described above, on precisely the grounds invoked by Appellant here: that the Executive Branch is without authority under Section 1103 to authorize work for noncitizens beyond those classes explicitly provided by Congress. *See Employment Authorization*, 51 Fed. Reg. 39,385, 39,388-89 (Oct. 28, 1986) (petition for rulemaking). After inviting further comment regarding the effect of Section 1324a on this analysis, the Reagan administration rejected this argument in no uncertain terms:

> Assuming for the sake of argument that [Section 1103] did not vest in the Attorney General the necessary authority to promulgate [the regulations], such authority is apparent in the new [Section 1324a,] which was created by the Immigration Reform and Control Act of 1986.
>
> . . .

> *[T]he only logical way to interpret* [Section 1324a] is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, *in addition to those who are authorized employment by statute*.

Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987) (emphasis added) (denying petition for rulemaking).

In the years since 1987, the immigration agencies across multiple administrations of both political parties have time and again relied on Sections 1103 and 1324a as authority for allowing the employment of noncitizens not statutorily authorized to work. *See, e.g.*, *Nonimmigrant Classes; Special Requirements for Admission, Extension and Maintenance of Status, Control of Employment of Aliens*, 53 Fed. Reg. 46,850 (Nov. 21, 1988); *Entry of Aliens Needed as Witnesses and Informants; Nonimmigrant S Classification*, 60 Fed. Reg. 44,260 (Aug. 25, 1995); *Employment Authorization for Dependents of Foreign Officials*, 75 Fed. Reg. 47,699 (Aug. 9, 2010).[6]

Congress has likewise frequently amended Section 1324a's unauthorized-employment scheme since the INS announced its interpretation of that provision, and has never objected to the Executive Branch's claim of authority. *See* Pub. L. No. 100-525, § 2, 102 Stat. 2609, 2609-10 (1988); Pub L. No.

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[6] For a list of 20 such regulations, see the government's reply in support of its motion for summary judgment below. D. Ct. Dkt. 32, at 16-17.

101-649, §§ 521(a), 538(a), 104 Stat. 4978, 5053, 5056 (1990); Pub. L. No. 102-232, §§ 306(b)(2), 309(b)(11), 105 Stat. 1733, 1752, 1759 (1991); Pub. L. No. 103-416, §§ 213, 219(z)(4), 108 Stat. 4305, 4314, 4318 (1994); Pub. L. No. 104-208, §§ 379, 411-412, 110 Stat. 3009, 3009-649, 3009-666 to 3009-668 (1996); Pub. L. No. 108-390, 118 Stat. 2242 (2004). That is, Congress has continually "revisit[ed]" the statute giving rise to DHS's "longstanding administrative interpretation" that it is broadly empowered to authorize employment, and the "congressional failure to revise or repeal" that interpretation is thus "persuasive evidence that the interpretation is the one intended by Congress." *Schor*, 478 U.S. at 846; *accord* 2B *Sutherland Statutes & Statutory Construction* § 49:9 (7th ed. 2018) ("[L]egislative action by amendment or appropriation of some parts of a law which has received a contemporaneous and practical construction may indicate approval of interpretations relating to the unchanged and unaffected parts.").

Importantly, this is not a case in which there is any lack of "evidence of (or reason to assume) congressional familiarity with the administrative interpretation at issue." *Pub. Citizen, Inc. v. U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 669 (D.C. Cir. 2003) (declining to rely on congressional acquiescence in such a case). The longstanding interpretation here arises from repeated assertions by the top law enforcement officer in the cabinet (and, later, another cabinet officer) of authority to take action that—if Appellant is to be believed— is not only *ultra vires* but actually contrary to the cen-

tral purpose of one of our Nation's most frequently amended statutes. *See* Appellant Br. 44-46. It is simply not plausible that Congress would have been unaware of the Executive Branch's consistent interpretation concerning such a high-profile subject: the ability of aliens to work in the United States (and, as Appellants tell it, thus to displace American-born workers). *Cf. Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 214 (D.C. Cir. 2011) (declining to find congressional ratification where the agency's position "came to light only recently," and was thus "of too recent vintage to presume that Congress has tacitly ratified" it).

D. Congress did not preclude the employment of H-4 spouses.

In addition to questioning DHS's general authority to allow noncitizens to work, Appellant also suggests that Congress has precluded DHS from authorizing H-4 spouses' employment in particular. In its telling, (a) the enactment of specific provisions regarding the employment of other categories of noncitizen spouses indicates that Congress made "a conscious decision" not to do the same for H-4 spouses; and (b) proposed but un-enacted legislation that would have authorized H-4 employment is evidence that Congress thinks legislative action is required. Appellant Br. 31-32. Neither contention is correct.

First, that Congress has specifically directed the employment authorization of different categories of spouses says nothing about its intent (or lack thereof) respecting H-4 spouses. As an initial matter, this sort of negative-implication reasoning has little force in the administrative context: "When in-

terpreting statutes that govern agency action, we have consistently recognized that a congressional mandate in one section and silence in another often 'suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion.'" *Catawba Cty. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009) (emphasis omitted) (quoting *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990)). And in any event, courts "do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Appellant points to nothing suggesting that Congress "meant to say no" to H-4 employment by authorizing other spouses to work. *Cf. Regents*, 908 F.3d at 509 ("We do not read an 'and no one else' clause into each of Congress's individual express grants of deferred action.").

Nor do the ultimately unsuccessful bills that would have expressly granted work authorization to H-4 spouses undercut DHS's power to implement the same remedy. When these bills were introduced and debated, the H-4 Rule had not yet been promulgated. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 4102 (2013). That individual members of Congress introduced legislation to address the issue, in light of DHS's earlier failure to do so, does not suggest that DHS ultimately lacked authority to act on the same subject.

* * *

The H-4 Rule is a lawful exercise of the authority that Congress granted the Executive Branch. And it is a Rule that tens of thousands of people have come to rely on, to the enduring benefit of the United States economy. The Court should decline Appellant's request to hold the H-4 Rule unlawful—a holding that would directly result in the termination of tens of thousands of employment relationships, to the substantial detriment of employees and employers across the country.

CONCLUSION

The H-4 Rule is a lawful exercise of DHS authority.

Respectfully submitted,

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Dated: April 8, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), the undersigned counsel for *amici curiae* certifies that this brief:

(i) complies with the word limitation of Rule 29(b)(4) because it contains 6,303 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: April 8, 2019 /s/ *Paul W. Hughes*

CERTIFICATE OF SERVICE

I hereby certify that that on April 8, 2019, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: April 8, 2019 /s/ *Paul W. Hughes*