**No. 21-5028**

***In the***

# United States Court of Appeals

***for the***

# District of Columbia Circuit

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WASHINGTON ASSOCIATION OF TECHNOLOGY WORKERS,

*Plaintiff-Appellant*,

– v. –

U.S. DEPARTMENT OF HOMELAND SECURITY,

*Defendant-Appellee,*

NATIONAL ASSOCIATION OF MANUFACTURERS, et al.,

*Intervenors-Appellees.*

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On appeal from a final judgment of the
United States District Court for the District of Columbia
No. 16-cv-01170
Hon. Reggie B. Walton

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## INTERVENORS-APPELLEES' OPPOSITION TO APPELLANT'S PETITION FOR REHEARING EN BANC

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# CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

## A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the petition for rehearing en banc filed by Plaintiff-Appellant.

## B. Rulings Under Review

References to the rulings at issue appear in the petition for rehearing en banc filed by Plaintiff-Appellant.

## C. Related Cases

This case was previously before the Court in *Washington Alliance of Technology Workers v. DHS*, No. 17-5110. And, as Washtech puts it (Pet. iv), this case is a "continuation of litigation that has previously been" before the Court in *Washington Alliance of Technology Workers v. DHS*, No. 15-5239.

/s/ *Paul W. Hughes*

## CORPORATE DISCLOSURE STATEMENT

The Intervenors-Appellees are the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council.

None of the Intervenors-Appellees has a parent company, and no publicly held company has a 10% or greater ownership interest in any of the Intervenors-Appellees. Each Intervenor-Appellee is a trade association for purposes of Circuit Rule 26.1(b).

/s/ *Paul W. Hughes*

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# TABLE OF AUTHORITIES[†]

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[†] Authorities on which we chiefly rely are marked with asterisks.

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## GLOSSARY

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|---|---|
| DHS | Department of Homeland Security |
| INA | Immigration and Nationality Act |
| OPT | Optional Practical Training |
| Washtech | Washington Alliance of Technology Workers |

## INTRODUCTION

In a thorough and well-reasoned opinion, the panel majority reached what should be a non-controversial holding: The Immigration and Nationality Act (INA) does not foreclose a program that has existed, in one form or another, since the Truman administration. Contrary to Plaintiff Washtech's core claim, the Executive has ample statutory authority "to permit foreign visitors on student visas to complement their classroom studies with a limited period of post-coursework Optional Practical Training (OPT)." Slip op. 3. Not only is this program consistent with the statutory text, but Congress was made aware of this longstanding program *before* it enacted the INA in 1952, and it chose not to override the program then or at any time in the intervening seventy years.

Washtech now raises three scattershot objections to the panel's analysis, but none persuades. The panel's statutory construction is faithful to both the text and longstanding history; this case does not implicate the major questions doctrine; and the panel properly applied the congressional ratification canon.

Washtech's petition is ultimately a meritless request for granular, statute-specific error correction. It raises no cross-cutting question of recurring doctrinal significance. And while the OPT program at issue here

is important, most cases this Court resolves involve important programs. Nothing elevates the issues here to ones worthy of en banc review.

## ARGUMENT

### A. The panel properly interpreted the text of the INA.

**1.** The panel's core statutory holding was that the F-1 student-visa definition in 8 U.S.C. § 1101(a)(15)(F)(i) must be read in concert with the Executive's authority under Section 1184(a)(1) to "prescribe" the "time and … conditions" for "[t]he admission to the United States of any alien as a nonimmigrant." That is, "the INA uses visa classes to identify who may enter temporarily and why, but leaves to DHS the authority to specify, consistent with the visa class definitions, the time and conditions of that admission." Slip op. 23.

As the panel explained, the INA's definitions of visa categories—including the specific F-1 definition for international students—must work hand-in-glove with Section 1184(a)(1)'s grant of authority to DHS to set reasonable restrictions on the "time" and "conditions" of a noncitizen's stay. The nonimmigrant visa definitions in general "are each very brief, specifying little more than a type of person to be admitted and the purpose for which they seek to enter," and "[n]o definition states exactly how long the person may stay, nor spells out precisely what the nonimmigrant may or may not do while here for the specified purpose." Slip op.

23; *see generally* 8 U.S.C. § 1101(a)(15)(A)-(V) (defining nonimmigrant visa classes). This strongly suggests that "[t]hose are parameters that Congress expected the Executive to establish 'by regulations,' which is exactly what section 1184(a)(1) grants DHS the authority to do." Slip op. 23.

Not only does the overall statutory scheme thus indicate that "the time and conditions DHS sets are not cabined to the terms of the entry definition" (Slip op. 45), but "[t]he F-1 provision itself shows that the student-visa entry criteria are not terms of stay" (*id.* at 37). *See also id.* at 24 ("In fact, [the F-1 definition] cannot rationally be read as setting forth terms of stay.").

In particular, the F-1 definition contains several terms that can only credibly be read as aimed at the time of entry (rather than as a continuing requirement), including that the noncitizen "*seeks to enter* … for the purpose of pursuing [a full] course of study." 8 U.S.C. § 1101(a)(15)(F)(i) (emphasis added). As the panel explained, Washtech's contrary interpretation "nonsensically would require an admitted F-1 student to continue throughout her stay to seek to enter the country," among other anomalies. Slip op. 38. "These 'implausible' and 'counterintuitive' readings illustrate the error in Washtech's view of the F-1 provision and its role in the statutory scheme." *Id.*

More, Washtech accepts that, by regulation, F-1 students may arrive 30 days before their course of study begins, remain for 60 days after it concludes, and stay in the United States during academic vacations and gaps between distinct educational programs. Slip op. 24-25, 38. All of these commonsense results—unchallenged by Washtech (*id.*)—demonstrate that DHS has authority pursuant to Section 1184(a)(1) to govern the "time" and "conditions" of a noncitizen's stay pursuant to an F-1 visa. *See, e.g.*, *id.* at 4 (rejecting Washtech's incorrect "assum[ption] that, beyond setting terms of entry, the visa definition itself precisely demarcates the time and conditions of the students' stay once they have entered").

To be sure, as the panel recognized, there is a clear limitation on the scope of DHS's authority: "[T]he INA constrains the Department to set only such times and conditions for F-1 students' admission as are reasonably related to their visa class." Slip op. 28. This is because, "[w]here Congress has delegated general authority to carry out an enabling statute, an agency's exercise of that authority ordinarily must be 'reasonably related' to the purposes of the legislation.'" *Id.* at 25 (quoting *Doe, 1 v. Fed. Election Comm'n*, 920 F.3d 866, 871 (D.C. Cir. 2019)).

Because the OPT rule challenged here *is* "reasonably related to the nature and purpose of the F-1 visa class," it is a lawful exercise of the

Executive's statutorily defined power. Slip op. 25-28. The panel elaborated on record evidence demonstrating that "[m]any students, especially those in the fields of science, technology, engineering, and mathematics, can succeed at classroom training but need practical training in a workplace setting to operationalize their new knowledge." *Id.* at 25-26. As a whole, "[t]he record shows that practical training not only enhances the educational worth of a degree program, but often is essential to students' ability to correctly use what they have learned when they return to their home countries." *Id*. at 5; *see also id.* at 25-27 (describing record evidence). And the OPT regulation requires that "[t]he practical training must be approved by both the school and DHS, … and the student's practical training must be overseen by both the employer and the school. *Id*. at 3; *see also id*. at 14-15, 27 (describing relevant regulatory provisions). In all, the OPT rule "closely ties students' practical training to their course of study and their school," confirming that OPT "reasonably relate[s] to the distinct composition and purpose of the F-1 nonimmigrant visa class." *Id*. at 5.

For its part, Washtech does not meaningfully contest the substance of the panel's extensive analysis detailing the reasonable relationship between OPT and the educational purpose of the F-1 visa category. *Cf.* page 13 & n.4, *infra*. Nor has Washtech ever before pressed such an argument.

Because there is a reasonable tie between this regulatory program and the underlying statutory purpose, OPT is within the scope of DHS authority.

**2.** The unique history of the INA confirms that authorizing post-completion practical training is within the statutory power of the Executive. As the panel described in detail, the precursor to the 1952 INA contained a materially identical student-visa definition and a provision similarly empowering the Executive with authority to set the time and conditions of a noncitizen's admission. Slip op. 8-9, *see id.* at 28-30. Applying these provisions, the Truman administration in 1947 issued a rule authorizing foreign students to engage in "employment for practical training" for six months, extendable up to 18 months. *Id.* at 29 (quoting *Immigration and Naturalization Service,* 12 Fed. Reg. 5,355, 5,357 (Aug. 7, 1947)).

Three years later, the Senate Judiciary Committee report that became the "genesis" of the 1952 INA (1 Charles Gordon et al., *Immigration Law & Procedure* § 2.03[1] (2019)) reported to Congress that, under the 1947 regulations, "practical training has been authorized for 6 months *after completion of the student's regular course of study*." S. Rep. No. 81-1515, at 503 (1950) (emphasis added). That is, it is beyond cavil that the Congress that enacted the INA was fully informed that the Executive had

interpreted the precursor statute to authorize post-completion practical training—yet Congress "reenacted" the relevant statutory sections without meaningful change, thus "ratif[ying] the [Executive's] understanding" that post-completion practical training is consistent with the statute. *Owens v. Republic of Sudan*, 864 F.3d 751, 778 (D.C. Cir. 2017); *see, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

Thus, "evidence reaching back several generations shows 'that Congress intended to ratify' the Executive's interpretation"—that post-completion practical training is not precluded by the relevant text—"'when it reiterated the same definition[s] in' the INA that it had used in the 1924 Act." Slip op. 30 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)). Together with the text and statutory structure, this history puts the panel's conclusion on sound footing.

**3.** Washtech claims that this well-considered interpretation conflicts with other courts' construction of the nonimmigrant visa statute, citing numerous cases from around the country. Pet. 8-12 (collecting cases). But Washtech already presented this argument—delivered via a largely identical string-cite—to the panel, which rightly rejected it. *See*

Washtech Br., Doc. No. 1897433, at 17-19. That is because, upon inspection, *none* of those cases actually addressed the issue posed here: the "interplay" between "Section 1184(a)(1)'s" grant of authority to "prescribe" "time and . . . conditions," on the one hand, and "the INA's definition of admissible nonimmigrants," on the other. Slip op. 23. That is, none of Washtech's cases addresses the metes and bounds of the Executive's authority, under Section 1184(a)(1), to implement the INA's nonimmigrant visa definitions through time and conditions regulations, and they certainly do not suggest that that authority is lacking.

For example, *Jie Fang v. Director, USCIS*, 935 F.3d 172, 175 (3d Cir. 2019), simply states in the background section of the opinion that "'[n]onimmigrant students' … may lawfully obtain an F-1 visa and reside in the United States while enrolled at Government-approved schools." The case had nothing to do with the Executive's authority under Section 1184(a)(1) to set the time and conditions of nonimmigrants' admission—and indeed, the opinion *acknowledged the existence of OPT* (*id.* at 175 & n.15); it is surely not authority that OPT is unlawful. Other of Washtech's cases (*Xu Feng*, *Igbatayo*, *Khano*, and *Olaniyan*) merely hold that a student becomes deportable when she drops below a full course of study, drops out entirely, or accepts employment that is not authorized by the

government—each of which is prohibited by DHS regulations, and none of which is disputed here.

As for *Elkins v. Moreno*, 435 U.S. 647 (1978)—and *Anwo v. INS*, 607 F.2d 435 (D.C. Cir. 1979), which simply applies *Elkins*—the principle at issue there is non-controversial: In exercising its authority to set the conditions governing noncitizens lawfully admitted to the United States, the government *may* determine that it will deport individuals who, following admission, lose a condition of their entry. *Elkins*, 435 U.S. at 666 ("a nonimmigrant alien who does not maintain the conditions attached to his status *can* be deported") (emphasis added). That observation does not compel the government to exercise its authority to develop regulations that in fact so narrowly restrict the conditions of an individual's lawful continued presence.[1]

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[1] And even if that were not so, those cases address a different question: the requirement that certain classes of nonimmigrants, including F-1 students, maintain a foreign residence. That requirement is phrased "having a residence in a foreign country," which could suggest an ongoing requirement—and moreover is set off by commas and thus syntactically distinct from the "course of study" requirement, which applies when the noncitizen "seeks to enter the United States" (8 U.S.C. § 1101(a)(15)(F)(i)). Even if the foreign-residence requirement persists past admission, that does not mean that the course-of-study requirement does so as well.

In sum, none of Washtech's cases conflicts with the panel's well-supported holding that the INA empowers the Executive to determine the "time" and "conditions" attendant to each nonimmigrant visa category, so long as those conditions are "reasonably related to the purpose of the nonimmigrant visa class." Slip op. 45.

**4.** Finally, Washtech alludes to the supposed dire consequences of the panel's holding (*see, e.g.*, Pet. 8-9)—but the panel directly addressed this "floodgates" argument, explaining that "[t]he INA's structure and basic principles of administrative law constrain DHS's regulatory authority and prevent Washtech's predicted flood." Slip op. 44; *see id.* at 44-46. Because the Executive's authority to set the time and conditions of a nonimmigrant's admission extends only so far as those conditions bear a reasonable relationship with the specific purpose of the visa category in question, DHS could not, for example, "grant[] indefinite work authorization as a condition of a B-2 tourist's admission, the purpose of which is to enter the country 'temporarily for pleasure.'" *Id.* at 45 (quoting 8 U.S.C. § 1101(a)(15)(B).

As the panel correctly explained, "[a]dmitting a nonimmigrant tourist is different from admitting a nonimmigrant student, business traveler, diplomat, agricultural worker, performer, or crime witness, and the authority to set times and conditions on those distinct admissions differs

accordingly." *Id.* (citations omitted).[2] The panel's conclusions were reasoned, balanced, and of limited scope—leaving no basis for further review.

**B. This case does not implicate the major questions doctrine.**

There is no doubt that the major questions doctrine, including as recently described in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), is an important limitation on the power of administrative agencies. But Washtech is wrong to invoke it here. *See* Pet. 12-14.

*First*, Washtech did not properly preserve this contention for en banc review. Washtech's own petition for rehearing acknowledges that the major questions doctrine existed in this Court's case law prior to the

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[2] Washtech also repeats another point the panel has already soundly rejected: Washtech claims that "DHS is required to deny entry to anyone seeking to participate in OPT" because the F-1 definition "limits entry to those with the sole purpose of pursuing a course of study at an academic institution," which (Washtech claims) OPT does not. Pet. 11-12. As the panel explained, "it does not detract from the accuracy or sincerity of F-1 students' purpose to come to this country 'solely' to undertake a degree program that they may, once here, participate in practical training recommended, approved, and overseen by their school to augment the educational value of that degree." Slip op. 40. Indeed, school officials "screen post-graduation work opportunities for their educational value and monitor the specific work-based experience to ensure that it enriches the participant's course of study" (*id*. at 41), and further, OPT "*does* require an ongoing relationship between the academic institution and the F-1 student" (*id*. at 42).

Supreme Court's decision in *West Virginia* (*see* Pet. 12), yet Washtech did not squarely raise the doctrine in its opening brief before the panel. That failure results in forfeiture. *See, e.g.*, *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) ("A party forfeits an argument by failing to raise it in his opening brief.").[3] That is no doubt why the panel majority did not address the issue. Even setting the finer points of forfeiture law to the side, a point barely alluded to before the panel—and not addressed by the panel—does not warrant the full Court's time and attention.

*Second*, this is not a case where an agency has "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *West Virginia*,

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[3] Washtech's brief's passing citation to *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), does not preserve the question it now presses. *See* Washtech Br., Doc. No. 1897433, at 30. First, this discussion is improperly "skeletal" and thus is insufficient for preservation. *Allen v. District of Columbia*, 969 F.3d 397, 405 (D.C. Cir. 2020); *accord, e.g.*, *Al-Tamimi*, 916 F.3d at 6 ("Mentioning an argument 'in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones' is tantamount to failing to raise it."). Second, Washtech raised this point *solely* in service of its claim that Section 1324a(h)(3) in particular "confers no authority on DHS." Doc. No. 1897433, at 28. But the panel *agreed* with Washtech on this score, concluding that "Washtech is right that section 1324a(h)(3) is not the source of the relevant regulatory authority." Slip op. 49. Washtech did not advance the broader claim it now presents—that OPT itself "creates a question of vast economic and political significance." Pet. 12.

142 S. Ct. at 2610 (quoting *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *see also id.* at 2608-2609 (discussing prior cases in which "unprecedented" claims of authority, which had "never before been" invoked by the relevant agency, were subjected to major questions scrutiny).

Quite to the contrary, "the Executive Branch under *every president from Harry Truman onward* has interpreted enduring provisions of the immigration laws to permit foreign visitors on student visas to complement their classroom studies with a limited period of post-coursework Optional Practical Training." Slip op. 2-3 (emphasis added). Indeed, as discussed above, the power to grant work authorization for practical training to noncitizens on student visas was first claimed *before* the 1952 INA was enacted; Congress was made aware of this claim of authority; and Congress reenacted the relevant statutory provisions in the INA without material change. *See* pages 6-7, *supra*; Slip op. 28-30.[4]

[4] Washtech also gestures at an argument that the OPT rule contains "an after-the-fact pretextual educational justification." Pet. 13-14. Yet Washtech does not even attempt to satisfy the doctrinal framework surrounding claims of administrative pretext (*see Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573-2576 (2019)—nor has it done so at any prior stage of this litigation—so any argument along these lines has long ago been forfeited (*see, e.g.*, *Al-Tamimi*, 916 F.3d at 6; *Allen*, 969 F.3d at 405), and is underdeveloped for en banc review.

### C. The panel properly applied the reenactment canon.

Finally, Washtech challenges the panel's conclusion that "evidence reaching back several generations shows 'that Congress intended to ratify' the Executive's interpretation 'when it reiterated the same definitions in' the INA that it had used in the 1924 Act." Slip op. 30. This fact-bound argument too fails on several scores.

*First*, Washtech relies on the false factual premise that there is "not an iota of evidence showing awareness of employment on student visas *after graduation*." Pet. 15. As the panel meticulously showed, "[i]t is unusually clear that Congress was aware of the prior practice of authorizing foreign students' [post-completion] practical training" when it enacted the INA in 1952. Slip op. 29-30. The 1950 Senate Report that was the "genesis" of that legislation said so plainly, giving Congress "full knowledge that the Executive was permitting post-graduation practical training for visiting students under the time-and-conditions authority conferred on it by the 1924 statute." *Id.*; *see* pages 6-7, *supra*. The 1950 Senate Report made clear that, "'since the issuance of the revised regulations in August 1947 … practical training has been authorized for 6 months after completion of the student's regular course of study.'" Slip op. 29 (quoting S. Rep. No. 81-1515, at 503 (1950)).

The panel also recounted further evidence from the years after the INA's enactment. *See* Slip op. 32-33. This and other evidence reveals that it is simply not true that, as Washtech would have it, a 2015 committee hearing somehow "was the *very first* legislative history showing that Congress was informed of work taking place on student visas *after graduation*." Pet. 16.[5]

*Second*, WashTech's legal arguments are incorrect. To start, there is no requirement that "a formal regulation … address the question at issue." Pet. 15. In *Public Citizen v. U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 669 (D.C. Cir. 2003), the Court used that phrase to illustrate *one* way in which it could find "evidence of (or reason to assume)

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[5] *Contra, e.g.*, *Immigration Policy: An Overview: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 15-16 (2001) (statement of Warren R. Leiden, American Immigration Lawyers Association) ("Foreign students in F-1 status are eligible for two primary types of 'practical training' work authorization" including "optional practical training … which can be undertaken during studies *or for one year after graduation*") (emphasis added); *Immigration Reform: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary on S. 358 and S. 448*, 101st Cong. 485-486 (1989) (statement of Frank D. Kittredge, President, National Foreign Trade Council) ("Under current INS regulations, foreign students under § 101(a)(15)(F) of the Act are appropriately given the opportunity to engage in a brief period of practical training *upon completion of their university education* and in furtherance of their educational goals.") (emphasis added).

congressional familiarity with the administrative interpretation at issue." But *Public Citizen* does not preclude finding such "congressional familiarity" via other forms of evidence, and precedent forecloses such a holding. *See, e.g.*, *Bragdon*, 524 U.S. at 642 (relying on an OLC opinion, which is not a regulation, as the administrative interpretation that was ratified by Congress). Here, the evidence of "congressional familiarity" is express and overwhelming. *See*, *e.g.*, slip op. 29-30.

Nor must there be some "express approval of an interpretation for ratification by Congress." Pet. 15 (citing *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 135 (1978)). Washtech asserts that, to find an "express approval," a court must consult "the legislative history of the reenactment." *Id*.

But, consistent with some judicial reservations regarding the reliability of legislative history, more recent cases have found that the reenactment itself qualifies as Congress's express approval of prior constructions. The Supreme Court held in *Merrill Lynch* that "the fact that a comprehensive reexamination and significant amendment of the [statute in question] left intact the statutory provisions" that were subject to earlier interpretations "*is itself evidence* that Congress affirmatively intended to preserve" those interpretations, before moving on to consider legislative history in a confirmatory capacity. 456 U.S. at 381-382 (emphasis added).

And more recent statements of the doctrine omit the supposed "express approval" requirement altogether. *See, e.g.*, *Bragdon*, 524 U.S. at 645 ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); Antonin Scalia & Bryan A. Garner, *Reading Law* 322 (2012) ("If a statute uses words or phrases that have already received … uniform construction by a responsible administrative agency, they are to be understood according to that construction."). Once again, the panel's decision here breaks no new ground.

*Third*, while the panel's examination of the history of post-graduation work—and the resulting application of the ratification canon—buttressed its conclusion that OPT is a permissible exercise of authority (*see* slip op. 28-36), the panel never suggested that its holding *depended* on this finding. Rather, the panel principally focused on the plain meaning of the statutory text. This issue, too, is undeserving of en banc review.

## CONCLUSION

The Court should deny the petition for rehearing en banc.

Dated: December 1, 2022

Respectfully submitted,

*/s/ Paul W. Hughes*

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for intervenor certifies that this petition:

(i) complies with the type-volume limitation of Rules 35(b)(2)A) and (e) because it contains 3,865 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); 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 New Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: December 1, 2022 /s/ *Paul W. Hughes*

**CERTIFICATE OF SERVICE**

I hereby certify that that on December 1, 2022, I filed the foregoing document via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: December 1, 2022 /s/ *Paul W. Hughes*