

ORAL ARGUMENT NOT YET SCHEDULEDIN THE UNITED STATES CIRCUIT COURT
FOR THE CIRCUIT OF COLUMBIAWASHINGTON ALLIANCE OF)
TECHNOLOGY WORKERS,)*Plaintiff-Appellant,*)

v.)

Civil Action No. 21-5028

U.S. DEPARTMENT OF)
HOMELAND SECURITY, *et al.*,)*Defendants-Appellees.*)**MOTION OF NISKANEN CENTER FOR LEAVE TO FILE AN *AMICUS*
CURIAE BRIEF IN SUPPORT OF APPELLEES**

Pursuant to Fed. R. App. P. 29(a) and D.C. Cir. R. 29(b) and (d), the Niskanen Center (“Niskanen”) respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in support of Appellees U.S. Department of Homeland Security, *et al.* With the exception of Plaintiff-Appellant Washington Alliance of Technology Workers, no party has an objection to the filing of Niskanen’s *amicus* brief. And while Appellant Washington Alliance of Technology Workers *do not* object to Niskanen participating as *amicus* in support of Appellees, it does object to Niskanen filing a separate brief from the other amici in support of Appellees.

I. AMICUS NISKANEN HAVE A SIGNIFICANT INTEREST IN THIS CASE.

1. Niskanen is a nonpartisan 501(c)(3) think tank that works to promote an open society: a social order that is open to political, cultural, and social change; open to free inquiry; open to individual autonomy; open to the poor and marginalized; open to commerce and trade; open to people who may wish to come or go; open to different beliefs and cultures; open to the search for truth; and a government that protects these freedoms while advancing the cause of open societies around the world. Niskanen therefore strongly believes that programs that open doors to the best and the brightest are programs we should defend.

II. AMICUS NISKANEN'S BRIEF WILL ASSIST THE COURT.

2. Niskanen's proposed brief, attached to this Motion as Exhibit A, presents a perspective that is not offered by either party or by the intervenors, offering insight from Niskanen's original research on the Optional Practical Training Program ("OPT"), which suggests that the OPT positively contributes to the open society and the social and economic well-being of the United States, to the benefit of native-born Americans, contrary to the allegations of Plaintiff-Appellant Washington Alliance of Technology Workers in this appeal.

3. This brief aids the Court by presenting results from Niskanen's study of the OPT program, which used data from the Student Exchange Visitor Information System on over 1.7 million OPT participants, in conjunction with data

obtained from the Local Area Unemployment Statistics Program, the American Community Survey, and the U.S. Patent and Trademark Office to determine the economic effects of the OPT program on native workers, on innovation and wages, and to report on the scale and growth of the program, educational attainment of participants, and their fields of study. Niskanen's brief demonstrates to the Court through data analysis that: the OPT Program does not injure native workers; the OPT program does not deprive OPT participants of statutory labor protections; and that the OPT program provides significant economic benefits by driving innovation and growth.

III. AMICUS NISKANEN NEEDS A SEPARATE BRIEF.

4. Niskanen needs a separate brief from the other amici in support of Appellees as Niskanen focuses different issues before the Court. Amici American Immigration Council and American Immigration Lawyers Association's brief will seek to provide the historical background on the complex network of statutory, regulatory, and sub-regulatory provisions addressing noncitizen work authorization. In contrast, Niskanen's brief focuses on original research, and a separate brief is necessary in order to clearly distinguish these two important perspectives.

5. Niskanen's brief plus Amici American Immigration Council and American Immigration Lawyers Association brief are less than 6,500 words and, therefore, a separate brief is not an attempt to by-pass the length requirement.

WHEREFORE, leave to file the attached Brief *Amicus Curiae* in Support of Appellees should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2021, I electronically filed the foregoing Motion of Niskanen Center for Leave to File an Amicus Curiae Brief in Support of Appellees with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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EXHIBIT A

ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5028

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
No. 16-cv-1170
The Hon. Reggie B. Walton

**BRIEF OF AMICUS CURIAE NISKANEN CENTER
IN SUPPORT OF APPELLEES**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenor, and *Amici*

All parties, intervenors, and *amici curiae* before this Court and that appeared before the district court are listed in the Brief for the Appellees (“Appellees’ Brief”), Document No. 1902180.

B. Rulings Under Review

The district court order under review appears in the certificate to Appellees’ Brief, p. iv.

C. Related Cases

All related cases appear in the certificate to Appellees’ Brief, p. v.

CORPORATE DISCLOSURE, AND AUTHORSHIP, AND SEPARATE BRIEFING STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Niskanen Center is a 501(c)(3) nonprofit advocacy-based organization, with no parent corporation and no publicly traded stock whose general purpose is to promote an open society.

Pursuant to Rule 29(a)(4)(E), counsel for amicus Niskanen Center state that they authored this brief in whole, and no party, counsel for any party, or any other person contributed money that was intended to fund preparing or submitting the brief.

Pursuant to Circuit Rule 29(d), Amicus certify that this separate *amicus* brief is necessary and does not duplicate any other brief that may be submitted. Amicus Niskanen Center seeks to assist the Court by offering insight from Niskanen's original research on the Optional Practical Training Program ("OPT"), which suggests that the OPT positively contributes to the open society and the social and economic well-being of the United States, to the benefit of native-born Americans.

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Exec. Office of the Pres., President's Council of Advisors on Science and Technology, Engage to Excel: Producing One Million Additional College Graduates With Degrees in Science, Technology, Engineering, and Mathematics, (February 2012), <https://bit.ly/2kCnd7p>10

Jeremy L. Neufeld, Optional Practical Training (OPT) and International Students After Graduation, Niskanen Center (March 2019).....1, 2, 3, 5, 7, 8, 10

Madeline Zavodny, International Students, STEM OPT and the U.S. STEM Workforce, National Foundation for American Policy, (March 2019).....4, 5

Tracking International Students in Higher Education: A Progress Report Hearing Before the Subcomm. On 21st Century Competitiveness and the Subcomm. On Select Educ. of the U.S. House of Representatives Comm. on Educ. and the Workforce, 109th Cong. 109-5 (2005) <https://bit.ly/31JWrSg>7

GLOSSARY OF TERMS

Department of Homeland Security	DHS
Freedom of Information Act	FOIA
Niskanen	Amicus Niskanen Center
OPT	Optional Practical Training Program
Science Technology Engineering Mathematics	STEM
Student Exchange Visitor Information Center	SEVIS
Washtech	Washington Alliance of Technology Workers/NG-CWA Local 37083 (Plaintiff-Appellant)

STATEMENT OF INTEREST, IDENTITY OF AMICUS CURIAE, AND SOURCE OF AUTHORITY TO FILE

The Niskanen Center (“Niskanen”) is a nonpartisan 501(c)(3) think tank that works to promote an open society: a social order that is open to political, cultural, and social change; open to free inquiry; open to individual autonomy; open to the poor and marginalized; open to commerce and trade; open to people who may wish to come or go; open to different beliefs and cultures; open to the search for truth; and a government that protects these freedoms while advancing the cause of open societies around the world. Niskanen therefore strongly believes that immigration channels that open doors to the best and the brightest of the world are programs worth defending.

Our original research on Optional Practical Training Program (“OPT”) suggests that the OPT positively contributes to the open society and the social and economic well-being of the United States. In 2017, Niskanen obtained data from the Student Exchange Visitor Information System (SEVIS) on over 1.7 million OPT participants through a Freedom of Information Act (FOIA) request. Niskanen analyzed this data, in conjunction with geographic data on economic and demographic variables obtained from the Local Area Unemployment Statistics Program, the American Community Survey, and the U.S. Patent and Trademark Office to determine the economic effects of the OPT program on native workers, on

innovation, wages, and to report on the scale and growth of the program, educational attainment of participants, and their fields of study. Jeremy L. Neufeld, Optional Practical Training (OPT) and International Students After Graduation, Niskanen Center (March 2019) (“OPT Study”).¹ Parts of Niskanen’s analysis are described below, which will assist the Court with the issues in this case.

ARGUMENT

I. THE OPT PROGRAM DOES NOT INJURE NATIVE WORKERS.

The district court found that Plaintiff-Appellant Washington Alliance of Technology Workers (“Washtech”) had demonstrated a concrete injury-in-fact because the OPT program:

“allow increased competition against” Washtech’s members, *Sherley*, 610 F.3d at 72, such that its members’ “bottom line[s] may be adversely affected by the challenged government action[,]” *Mendoza*, 754 F.3d at 1013. And, by establishing that DHS’s regulations “have the clear and immediate potential” to subject Washtech’s members to increased workforce competition in the STEM labor market, *La. Energy & Power Auth.*, 141 F.3d at 367, Washtech has demonstrated that its members suffer a concrete injury-in-fact.

JA at 14 (emphasis in original). Washtech further alleges that “the 2016 OPT Program Rule aggravated the injury by increasing the STEM extension from 17 months to 24 months.” Appellant’s Brief at 6, 9. Niskanen’s research demonstrates

¹ Niskanen’s OPT Study is attached to this brief in an addendum; *available at*: https://www.niskanencenter.org/wp-content/uploads/old_uploads/2019/03/OPT.pdf (Last accessed June 18, 2021).

otherwise—Washtech members cannot be injured because the OPT simply does not injure native workers. *See* OPT Study at 1, 5-6.²

A. The OPT Program Does Not Increase Competition with Foreign Workers.

The evidence demonstrates that the OPT does not increase competition between native and foreign workers. OPT Study at 1, 5-6. Using the geographic variation of OPT participants in the labor market, and exploiting a natural experiment afforded by the promulgation of the STEM extension, Niskanen's study found that OPT workers do *not* compete with highly educated natives and that increased competition is *not* visible in the job market.

There are more workers, yes, but there are also no deleterious effects on natives from the presence of foreign workers. The study finds that natives are no more likely to be unemployed, no more likely to see reduced wages, and no less likely to participate in the labor force. On the contrary, the study finds that foreign workers tend to complement natives with educational attainment similar to Washtech workers—at both the bachelor's and graduate level—and an increase in earnings in the region (including for natives) where OPT participants are employed. OPT Study at 1, 5-6.

² Niskanen's OPT Study is attached to this brief in an addendum.

Niskanen's findings are buttressed by a study by the National Foundation for American Policy, which likewise found a *negative* association between the scale of OPT and unemployment. Madeline Zavodny, International Students, STEM OPT and the U.S. STEM Workforce, National Foundation for American Policy, (March 2019) ("STEM OPT paper")³. The study further found this negative association holds when looking at science, technology, engineering, and mathematics ("STEM") fields specifically, including math and computer science. As the study found, "there is no evidence that foreign students participating in the OPT program reduce job opportunities for U.S. workers. Instead, the evidence suggests that U.S. employers are more likely to turn to foreign student workers when U.S. workers are scarcer." STEM OPT paper P. 1.

These findings are unsurprising as whether the OPT program increases competition cannot be known *a priori* because claims about new workers "competing" with natives are essentially claims about whether those workers are *substitutes* for natives. Substitution is *less* likely in the face of shortages, as exist in the STEM fields. And complementarity is *more* likely in high-skilled fields which feature highly specialized degrees, collaborative team work, agglomeration effects,

³ Available at <https://nfap.com/wp-content/uploads/2019/03/International-Students-STEM-OPT-And-The-US-STEM-Workforce.NFAP-Policy-Brief.March-2019.pdf> (Last accessed June 18, 2021).

and spillover effects from innovation, all of which are common in STEM. OPT Study at 5-6.

It may be theoretically possible that an alien replaces some native, but it is also theoretically possible that an alien complements that native, making them more productive. Which scenario is the case is ultimately an empirical question. The empirical results from the OPT Study and STEM OPT paper indicate that with OPT, the latter is case. OPT Study at 1, 5-6; STEM OPT at 1-3, 14-17.

II. THE OPT PROGRAM DOES NOT DEPRIVE WASHTECH MEMBERS OF STATUTORY LABOR PROTECTIONS.

Washtech alleges that the OPT was created in a vast conspiracy to circumvent H-1B quotas or protections for native workers. *See* Appellee Br. at 4-6, 35. This is absurd, and the two statutory programs have very different rules, requirements, and protections.

First, F-1 students participating in OPT as part of their educational experience are subject to different eligibility requirements than H-1B, contra the claim by Washtech that “the statutory H-1B visa program and the OPT program apply to the *same class of workers*: college graduates.” Appellant Br. at 4 (emphasis added). Each program has different rules, which affords different kinds of protection. For instance, H-1Bs are not restricted to training relating to their field of study, and F-1 OPT recipients are not restricted to specialty occupations. H-1Bs may be anywhere in their careers, but F-1 OPT recipients *must be* recent graduates.

Second, the H-1B is not the *exclusive* visa for college educated labor, which also includes other visas such as the J visa or TN-1, for instance. All of these visas have different admissions and eligibility requirements, and protections for natives. Some may not be available to any given college graduate interested in working in the United States, but the examples demonstrate that visa categories often have some overlap. That any given alien may be eligible for an H-1B does not mean that the H-1B is the only option available to them—a feature of the framework that Congress designed and intended for.

Washtech further insinuates that the *only* reason OPT was created was to circumvent H-1B quotas, and *but for* OPT, workers under OPT would be subject to and have to go through the requirements of H-1B. Appellant Br. at 2-3, 4-6, 35. OPT F-1 students are no more subject to the H-1B cap on the “number of such workers” than are H-1B recipients subject to OPT’s shorter duration of employment, its non-renewability, or its necessary relevance to the recipient’s field of study.

III. THE OPT PROGRAM PROVIDES SIGNIFICANT ECONOMIC BENEFITS BY DRIVING INNOVATION AND GROWTH.

A. The OPT Program Helps Coordinate The Recruitment And Retention Functions Of F-1 And H-1B.

The OPT program provides invaluable experience to graduates seeking on-the-job training as a capstone in their educational experience. For many international students, work experiences are an integral part of their education, providing the

opportunities necessary to turn classroom experiences into useful knowledge that the student is more likely to retain and put into practice. It in no way detracts from the pedagogical function of OPT to note that the program serves other important functions as well. Notably, in addition to its educational purpose, OPT serves as a vital link between the F-1 and H-1B visa programs. OPT Study at 2.

As stated by the DC district court, “F-1 and H-1B are integrally related...F1 and H-1B perform the interlocking task of recruiting students to pursue a course of study in the United States and retaining at least a portion of those individuals to work in the American economy.” *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014).

In his 2005 testimony on the impact of SEVIS before Congress, Dr. C. D. Mote, Jr., president of the University of Maryland at College Park, explained why the interlocking task of recruitment and retention was vital to American interests:

undue restrictions that hinder our ability to recruit outstanding talent from other nations threaten our technical and economic strengths and also our diplomatic efforts as well... To remain competitive in the coming decades, we must continue to embrace the most capable students and scholars of other countries. Our security and quality of life depend on it.

Tracking International Students in Higher Education: A Progress Report Hearing Before the Subcomm. On 21st Century Competitiveness and the Subcomm. On Select Educ. of the U.S. House of Representatives Comm. on Educ. and the Workforce, 109th Cong. 109-5 (2005) <https://bit.ly/31JWrSg>.

DHS justified the STEM extension, recognizing the “waiting room” function of OPT and connecting it to labor market conditions:

Many employers who hire F-1 students under the OPT program eventually file a petition on the students' behalf for classification as an H-1B worker...Because the H-1B category is greatly oversubscribed, however, OPT employees often are unable to obtain H-1B status within their authorized period of stay in F-1 status, including the 12-month OPT period, and thus are forced to leave the country. The inability of U.S. employers, in particular in the fields of science, technology, engineering and mathematics, to obtain H-1B status for highly skilled foreign students and foreign nonimmigrant workers has adversely affected the ability of U.S. employers to recruit and retain skilled workers and creates a competitive disadvantage for U.S. companies.

8 CFR § 214 and 274a (2008).

To that end, and operating as it does at the intersection of F-1 and H-1B, the OPT program has been successful in its role in recruiting candidates for retention. OPT can accurately be described as the largest high-skilled worker recruitment program in the country, bringing over 200,000 new high-skilled foreign workers into the labor market each year, compared to only about 180,000 new H-1B visas issued each year. OPT Study at 3.

However, because OPT is nonrenewable and lasts for a relatively short duration, the H-1B program still contributes more high-skilled workers at any one time. And however successful OPT is at recruitment, retention is ultimately reliant on the H-1B, of which only 85,000 can be awarded per year to those not employed by universities and other cap-exempt employers. In this way, OPT is limited to

expanding the pool of potential guest workers (and a larger applicant pool naturally makes for better hires) but does not generally increase the number of guest workers or influence retention, which is constrained by the relative scarcity of H-1B visas.

B. OPT Increases Human Capital and Innovation.

The original STEM extension was justified on the grounds that it better coordinates the recruitment and retention functions of both programs, with the attention on STEM because:

Many employers who hire F-1 students under the OPT program eventually file a petition on the students' behalf for classification as an H-1B worker...Because the H-1B category is greatly oversubscribed, however, OPT employees often are unable to obtain H-1B status within their authorized period of stay in F-1 status, including the 12-month OPT period, and thus are forced to leave the country. The inability of U.S. employers, in particular in the fields of science, technology, engineering and mathematics, to obtain H-1B status for highly skilled foreign students and foreign nonimmigrant workers has adversely affected the ability of U.S. employers to recruit and retain skilled workers and creates a competitive disadvantage for U.S. companies.

8 CFR § 214 and 274a (2008).

This justification remains just as pertinent today. OPT provides valuable human capital to the U.S. labor force, and DHS's special attention to STEM is in line with the conclusions of government agencies which have highlighted the specific shortages of labor faced by the private sector in the STEM labor market. Notably, the President's Council of Advisors on Science and Technology concluded that

“Economic projections point to a need for approximately 1 million more STEM professionals than the U.S. will produce at the current rate over the next decade if the country is to retain its historical preeminence in science and technology.” Exec. Office of the Pres., President’s Council of Advisors on Science and Technology, Engage to Excel: Producing One Million Additional College Graduates With Degrees in Science, Technology, Engineering, and Mathematics, (February 2012), <https://bit.ly/2kCNd7p>.

And the Bureau of Labor Statistics concluded that “A comprehensive literature review, in conjunction with employment statistics, newspaper articles, and our own interviews with company recruiters, reveals a significant heterogeneity in the STEM labor market: the academic sector is generally oversupplied, *while the government sector and private industry have shortages* [emphasis added].” Bureau of Labor Statistics, STEM crisis or STEM surplus? Yes and yes, (2015) <https://bit.ly/2iiJ5eg>.

STEM also is justified by its important role in driving innovation and economic growth. The OPT Study investigated the role OPT and the STEM extension specifically, had on patenting, a proxy for innovation, and found that by making teams more productive and contributing to technological diffusion, every two OPT students led to a state producing about one additional patent. OPT Study at 5.

CONCLUSION

For the reasons given herein, the Court should dismiss and remand Washtech's appeal for lack of standing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

[X] this brief contains 2,348 words.

[] this brief uses a monospaced type and contains [*state the number of*] lines of text.

2. This brief document complies with the typeface and type style requirements because:

[X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 365*] in [*14pt Times New Roman*]; or

[] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: June 18, 2021

/s/ Megan C. Gibson

Megan C. Gibson

*Counsel for Amicus Curiae
Niskanen Center*

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2021, I electronically filed the foregoing Brief of Amicus Curiae Niskanen Center in Support of Appellee with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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