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, OFFICE OF GENERAL COUNSEL
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
No. 15-cv-00615
The Hon. Tanya S. Chutkan

BRIEF FOR THE APPELLEE

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GLOSSARY OF ABBREVIATIONS

AC 21	American Competitiveness in the Twenty-first Century Act of 2000
APA	Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*
App.	Joint Appendix
Br.	Appellant's Replacement Opening Brief
DHS	U.S. Department of Homeland Security
FY	Fiscal Year
H-1B	Nonimmigrant visa or status allowing employers to temporarily employ foreign workers in a specialty occupation under 8 U.S.C. § 1101(a)(15)(H)(i)(b).
H-4	Nonimmigrant visa or status for dependents of H temporary workers under 8 U.S.C. § 1101(a)(15)(H).
H-4 Rule	Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015), 8 C.F.R. §§ 214, 274a
INA	Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*
INS	U.S. Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act of 1986
Save Jobs	Save Jobs USA (Appellant)
USCIS	U.S. Citizenship and Immigration Services

INTRODUCTION

This Court should affirm the district court's summary judgment rejecting Save Jobs USA's challenge to the H-4 Rule, "Employment Authorization for Certain H-4 Dependent Spouses," 80 Fed. Reg. 10,284 (Feb. 25, 2015), a rule that the Department of Homeland Security (DHS) issued in 2015 to extend, to certain H-4 dependent spouses of H-1B specialty occupation workers seeking to become lawful permanent residents, the opportunity to apply for temporary employment authorization.

As the district court held, Save Jobs lacked standing to challenge the rule. *See* Appendix (App.) 100. Save Jobs's claims of standing, as the district court recognized, were "'overly speculative'" and relied on an implausible "'chain of allegations.'" *Id.* (quoting *Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016). In particular, Save Jobs never established how its members, who work only in the information-technology sector, would clearly or immediately be harmed by the H-4 Rule—which affords employment authorization eligibility across a far broader range of economic sectors. Instead, Save Jobs pressed a capacious and boundless view of competitor standing that would allow anyone to challenge an agency action that may result in more people entering the U.S. job market as a whole, in any occupation. The district court was right to grant summary judgment to DHS.

The Court need not and should not go any farther than that. If the Court disagrees with the district court and holds that Save Jobs has standing, however, the Court should vacate and remand rather than address the question whether DHS lacked statutory authority to issue the H-4 Rule. The district court did not decide that question, and the Court should not do so in the first instance—particularly because the agency has taken the affirmative steps necessary toward publishing a notice of proposed rulemaking to remove H-4 dependent spouses from the class of aliens eligible for employment authorization. If a final rule is issued that effectively rescinds the changes made by the H-4 Rule, this case will be moot. If it is not mooted, the Court can take up the issue at an appropriate time.

The district court's judgment should be affirmed.

STATEMENT OF JURISDICTION

Save Jobs invoked 8 U.S.C. § 1331 in alleging that the district court had jurisdiction over its complaint. That court issued its summary-judgment order on September 27, 2016, App. 111, and a timely notice of appeal was filed the next day. D. Ct. ECF No. 38 (Sept. 28, 2016); *see also* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Three issues are presented for review:

I. Did the district court correctly hold that Save Jobs lacked standing to challenge the H-4 Rule?

II. Did the district court abuse its discretion when it excluded extra-record evidence submitted regarding Save Jobs's standing when that evidence post-dated Save Jobs's APA claims?

III. If the Court concludes that Save Jobs has standing to challenge the H-4 Rule, should it remand to the district court for further proceedings, where the district court did not definitively resolve the question of agency authority and where a pending rulemaking may render this case moot?

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

This case arises from a rulemaking that authorized the dependent spouses of certain nonimmigrants to temporarily work in the United States. The rulemaking addressed work authorization for certain H-4 nonimmigrants—the dependent spouses of H-1B nonimmigrants, who are themselves authorized to be admitted to the United States to work here temporarily.

Under 8 U.S.C. § 1101(a)(15)(H), DHS is authorized to admit foreign workers into the United States to engage in certain types of work. An H-1B nonimmigrant (named after the governing provision within section 1101(a)(15)(H)) is someone who is admitted temporarily to the United States to perform services in a "specialty

occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b); *see id.* § 1184(i)(1)(A)–(B) (outlining occupational requirements for H-1B temporary specialty occupation workers). The number of workers who may be issued H-1B visas to enter the United States or who otherwise may be provided H-1B nonimmigrant status is capped, with limited exceptions, at 65,000 new workers each fiscal year, with a limited exemption for H-1B workers who have earned a master's or higher degree from a U.S. institution of higher education, until the number exempted exceeds 20,000. *See id.* § 1184(g)(1)(A)(vii), (5)(C). If U.S. Citizenship and Immigration Services (USCIS) approves an employer's H-1B petition, DHS may admit the worker in H-1B status for an initial period of up to three years. 8 C.F.R. § 214.2(h)(9)(iii)(A). USCIS may extend a worker's H-1B status for up to three more years for a total authorized stay in H-1B status of six years (with exceptions not relevant here). 8 U.S.C. § 1184(g)(4); 8 C.F.R. § 214.2(h)(15)(ii)(B)(1).

The dependent spouse and minor children of H-1B temporary workers may be admitted to the United States as H-4 nonimmigrants. *See* 8 U.S.C. § 1101(a)(15)(H); 8 C.F.R. § 214.2(h)(9)(iv). The H-1B worker's spouse and children may be admitted in H-4 status subject to the same period of admission as the H-1B worker. *See* 8 C.F.R. § 214.2(h)(9)(iv).

In general, at the end of the alien worker's six-year period in H-1B status, the worker and dependents must leave the United States and remain abroad for at least

a year before seeking to reenter in the same status. *See* 8 C.F.R. § 214.2(a)(h)(13)(iii). U.S. employers were thus hampered by the departure of skilled H-1B workers after six-years of productive employment, with long delays in those same persons returning to the United States, disrupting the efforts of U.S. companies seeking to transition temporary H-1B workers into permanent positions through the employment-based immigrant visa-petitioning process. *See* S. Rep. No. 106-260 at 22 (Apr. 11, 2000).

Congress responded in 2000 in the American Competitiveness in the Twenty-first Century Act of 2000 ("AC 21"). *See, e.g.*, AC 21, Pub. L. No. 106-313, §§ 104(a), 106(a)–(b), 114 Stat. 1251 (2000), as amended by section 11030A of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273 (2002). To "limit[] the disruption to American businesses," Congress provided "transitional protection" for H-1B workers in the immigrant visa backlog because the departure of these workers at the six-year mark would "disrupt[] projects and American workers." S. Rep. No. 106-260 at 22 (Apr. 11, 2000). AC 21 permits certain H-1B workers to extend their status beyond the six-year limit if they are the beneficiary of a permanent labor certification application or immigrant employment-based petition and otherwise meet the requirements of AC 21.[1] For instance, an alien

[1] Under the Immigration and Nationality Act (INA), a company seeking to permanently employ an alien worker in the United States in certain employment-

worker may obtain an extension of H-1B status in one-year increments if he or she is the beneficiary of a pending or approved alien labor certification application (submitted to the Department of Labor), or the beneficiary of a pending or approved Form I-140 Immigrant Petition for Alien Worker (submitted to USCIS) if 365 days or more have passed since the filing of the labor certification application or I-140 petition. *See* AC 21 § 106(a)–(b), as amended; *see also* 8 C.F.R. § 214.2(h)(13)(iii)(D). An alien worker can also obtain an extension of H-1B status in three-year increments if he or she is the beneficiary of an approved I-140 petition, but is unable to adjust status (to lawful-permanent-resident status) because of oversubscription in the employment-based immigrant visa classification sought. *See*

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based immigrant preference classifications generally must follow three steps. *See Matovski v. Gonzales*, 492 F.3d 722, 726–27 (6th Cir. 2007). First, the employer must file a labor certification application with the Department of Labor on behalf of the alien for the permanent job being offered. *See* 8 U.S.C. § 1182(a)(5); 20 C.F.R. pt. 656. That agency may approve the labor certification if the employer complied with the required recruitment procedures and there are no qualified, able, and willing U.S. workers in the area of intended employment to fill the position the company is offering the alien. *See* 8 U.S.C. § 1182(a)(5)(A)(i), (D); 20 C.F.R. § 656.24(b). Second, the employer must submit an I-140 petition to USCIS on behalf of the prospective alien beneficiary. *See* 8 U.S.C. § 1154(a)(1)(F); 8 C.F.R. § 204.5(c), (k)(4), (*l*)(1). Third, if the immigrant petition is pending or approved, the alien worker may then apply to adjust status to that of lawful permanent resident if an immigrant visa is immediately available. *See* 8 U.S.C. § 1255(a). In some situations, an alien worker can file his or her I-485 application concurrently with the company's filing of an I-140 petition on his or her behalf. *See* 8 C.F.R. § 245.2(a)(2)(i)(B). USCIS, however, cannot approve an I-485 application unless the alien worker is the beneficiary of an approved, valid visa petition. *See id.* §§ 245.1(c) & (g), 245.2(a)(5)(ii); *see also Matovski*, 493 F.3d at 727; 8 C.F.R. § 245.2(a)(5)(ii).

AC 21 § 104(c); 8 C.F.R. § 214.2(h)(13)(iii)(E). These one- or three-year extensions also apply to an H-1B worker's H-4 dependent spouse or child. *See* 8 C.F.R. § 214.2(h)(9)(iv).

In 2014, DHS published a proposed rule to extend employment authorization to the population of H-4 dependent spouses of H-1B workers with either an I-140 petition approved on their behalf or an H-1B extension granted under AC 21 § 106(a)–(b). *See* Employment Authorization for Certain H-4 Dependent Spouses, 79 Fed. Reg. 26,886-901 (DHS). The proposed rule sought to reduce the possibility that H-1B employer businesses would suffer disruption as a result of H-1B workers' prematurely leaving the United States—the concern Congress sought to address in AC 21. *See id.* at 26,891. The rule therefore proposed to amend 8 C.F.R. §§ 214.2(h)(9)(iv) and 274a.12(c) to extend eligibility for employment authorization to H-4 dependent spouses of the above-mentioned classes of H-1B workers who are seeking employment-based lawful permanent residence. 79 Fed. Reg. at 26,892.

On February 25, 2015, DHS issued a final rule permitting temporary employment authorization for a group of H-4 dependent spouses. Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284–312 (Feb. 25, 2015). To issue the rule, the then-Secretary invoked 6 U.S.C. § 112 (authorizing the Secretary to issue regulations necessary to administer and enforce the immigration laws), together with 8 U.S.C. §§ 1103(a) ("charging the Secretary with

the administration and enforcement of [the Immigration and Nationality Act (INA)] and all other laws relating to the immigration and naturalization of aliens"), 1184(a) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe ...."), and 1324a(h)(3)(B) (describing the Secretary's power to make employment authorizations). *See* 79 Fed. Reg. at 26,887, 26,891; 80 Fed. Reg. at 10,285, 10,294. The final rule accelerated the timeframe in which accompanying dependents of intending immigrants would become eligible to apply for the same employment authorization that they would otherwise be able to apply for if their H-1B spouse had a pending I-485 adjustment-of-status application. *See* 80 Fed. Reg. at 10,285; 8 C.F.R. § 274a.12(c)(9). In doing so, the final rule emphasized the need to minimize the disruption to U.S. businesses and to reduce the financial and personal burdens on H-1B workers and their unemployed H-4 dependent spouses stuck in lengthy immigrant visa backlogs. The final rule stated that it would "support the U.S. economy, as the contributions H-1B nonimmigrants make to entrepreneurship and research and development are expected to assist overall economic growth and job creation." 80 Fed. Reg. at 10,285. DHS noted that it received "nearly 13,000 public comments," with an "overwhelming percentage" (~85 percent) supporting the proposal. *Id.* at 10,287. The H-4 Rule became effective on May 26, 2015. *Id.* at 10,284.

II. Factual and Procedural Background

Appellant Save Jobs USA is an organization whose members are former technology workers at Southern California Edison. App. 33. These members allegedly lost their jobs and were replaced by foreign workers authorized to work in the United States in H-1B status. App. 85–93. Rather than challenging the H-1B program, however, Save Jobs filed this suit against the H-4 Rule. Save Jobs alleged that its members will face more competition from foreign workers as a result of the H-4 Rule, which (as explained above) authorizes a subset of H-4 nonimmigrants to apply for employment authorization—specifically, those H-4 nonimmigrants whose spouses are H-1B nonimmigrants who are currently on the path toward lawful permanent residence.

To support its standing, Save Jobs submitted the affidavits of members D. Stephen Bradley, Brian Buchanan, and Julie Gutierrez. App. 85–93. Each was an employee at Southern California Edison who worked in the information-technology field. Their affidavits all stated that between April and July 2014, they were each fired and replaced with H-1B nonimmigrants employed by Tata Consultancy Services, an Indian information-technology company. *See id.* But their affidavits never state: (1) with which employers the members have applied for jobs; (2) the employers' job locations; (3) whether potential employers sought to hire individuals with many years of experience; or (4) whether any of the members would

relocate to another location in the country to accept any level of employment, including the entry-level and training opportunities. *See id.*

Save Jobs filed suit on April 23, 2015, more than a month before the H-4 Rule took effect, and moved for preliminary injunctive relief that same day. *See* App. 31. Save Jobs brought four claims: (I) that the H-4 Rule exceeded DHS's authority under the INA, App. 39; (II) that the H-4 Rule "ignor[ed] statutory labor protections" for U.S. workers, *id.* at 40; (III) that the H-4 Rule is arbitrary and capricious under the Administrative Procedure Act (APA) because the H-4 Rule improperly "reversed" Congress's "longstanding policy of not allowing H-4 [nonimmigrants] to work in the United States," *id.*; and (IV) that the H-4 Rule is arbitrary and capricious under the APA because DHS "fail[ed] to gauge the effect of more foreign workers on domestic workers," *id.* at 41.

The district court denied Save Jobs's preliminary-injunction motion on the ground that Save Jobs had not established harm. *See* 105 F. Supp. 3d 108, 115 (D.D.C. 2015). The court explained that "[t]here is no clear indication when additional competition may occur" and that Save Jobs had "not shown that the Rule will have any imminent impact on H-1B visa holders." *Id.* "Because the Rule only applies to spouses of H-1B visa holders that have already begun seeking legal permanent resident status," the court continued, "these H-1B holders have likely already been in the U.S. for some time. There is no evidence that the Rule will

imminently add to or impact the overall pool of H-1B visa holders, meaning Save Jobs has not presented sufficient proof [of] … harm … .”

The parties filed cross motions for summary judgment. On summary judgment, Save Jobs pressed four theories for why it suffered an injury in fact sufficient to confer Article III Standing: “(1) the rule creates increased competition for jobs [for Save Jobs’s members] from H-4 visa holders; (2) the rule creates increased competition for jobs [for Save Jobs’s members] from H-1B visa holders; (3) the rule confers a benefit on [Save Jobs’s] members’ H-1B competitors; and (4) the rule deprives [Save Jobs’s] members of statutory protections from foreign labor.” App. 101.

In September 2016, the district court granted summary judgment to DHS (and denied Save Jobs’ cross-motion for summary judgment). *See* 210 F. Supp. 3d 1 (D.D.C. 2016) (App. 95–110). As relevant here, the court held that Save Jobs lacked Article III standing. *See* App. 101–06; *see also id.* at 100–01, 106–08 (concluding that DHS failed to respond to Save Jobs’s associational-standing argument, and that it would satisfy zone-of-interests requirements if it had established Article III standing). The court rejected each of Save Jobs’ theories of standing. First, the court rejected, as “bare speculation,” Save Jobs’s theory that it had standing because the H-4 Rule “might introduce new competitors into the market for tech jobs.” *Id.* at 102, 103; *see also id.* at 101–03. The court explained that “only a subset of H-4 visa

holders will be eligible to apply for and then attain" employment authorization, that even then those visa holders will be in "the entire U.S. labor market," and that any such harm to Save Jobs' members was thus only speculative. *Id.* at 102. Second, the court rejected, for "reasons substantially similar" to those for rejecting Save Jobs's first theory, Save Jobs' theory that the rule would increase competition from H-1B visa holders. *Id.* at 103; *see also id.* at 103–04. The court explained that Save Jobs had "failed to demonstrate an increase in competition from H-1B visa holders," and had instead shown only that "the H-4 Rule might simply contribute to keeping H-1B visa holders" applying for lawful-permanent-resident status—a fact that would not show that Save Jobs's members faced increased competition. *Id.* at 103. The court also added that the number of H-1B specialty-occupation workers expected per year "concern[ed] existing *statutory* limitations, which are not impacted by the H-4 Rule" and thus "the source of [Save Jobs's purported] injury is unrelated to the H-4 Rule … given that Congress sets the quotas for the [H-1B] program, not DHS." *Id.* at 103–04. Third, the court concluded that DHS's "goal of relieving economic uncertainty and personal anxiety in H-1B workers' families" did not "amount[] to" conferring a benefit on Save Jobs's members' competitors of the sort that would cause them an injury in fact. *Id.* at 105; *see id.* at 104–05. Fourth, the court rejected Save Jobs's argument that the H-4 Rule stripped it of statutory labor protections in a way that supplied it with standing. *Id.* at 105; *see also id.* at 105–06. The court

concluded that Save Jobs had again not established a concrete "instance[] of harm" and that Save Jobs' argument concerned zone-of-interests issues rather than standing. *Id.* at 105.

The district court also excluded several pages of material that Save Jobs had included in an appendix to its summary-judgment motion. *See id.* at 98–99. The appendix contained (1) charts, tables, and data illustrating H-1 visa petitions that were filed and approved; (2) quotations from the administrative record; (3) a magazine article; (4) job postings; and (5) a printout of a website. *See id.* at 43–85. The material that was excluded all post-dated Save Jobs' complaint, and the district court held that the material did not "establish any injury." *Id.* at 99.

Finally, although the district court disposed of the case on grounds of standing, it commented in *dicta* on Save Jobs's four APA claims. *See id.* at 110 ("Given Plaintiff's lack of standing in this case, the court makes no final determination on the merits of Plaintiff's APA claim."); *see also id.* at 108–10. The court remarked that the INA provides a broad delegation of authority for DHS to set rules on employment authorization in 8 U.S.C. § 1103 (delegating enforcement of the INA to the Attorney General and now DHS) and 8 U.S.C. § 1324a(h)(3) (providing authority to issue employment authorization documents). *Id.* at 108–10. The court noted that the agency's longstanding statutory interpretation had never been altered by Congress, *id.* at 108, and indicated that the agency's thorough consideration of

the relevant factors in its decisionmaking showed that it was not "arbitrary, capricious, or manifestly contrary to the INA," *id.* at 109.

Save Jobs filed a notice of appeal. In April 2017, DHS moved to hold this appeal in abeyance based on the agency's intention to commence rulemaking to rescind the H-4 Rule. This Court granted motions on this basis until December 2018, then set a new briefing schedule.

On February 20, 2019, DHS submitted to the Office of Information and Regulatory Affairs a Notice of Proposed Rulemaking to remove H-4 dependent spouses from the class of aliens eligible for employment authorization. *See* https://www.reginfo.gov/public/do/eoDetails?rrid=128839&fbclid=IwAR1nF2lWLCcbRTDXfoOHiTfv7jfklrGd6owzhKH2bUAiWgwra6R5hzNQOwk (last visited Apr. 1, 2019). That Office is reviewing the proposed rule. *See id.*; Exec. Order No. 12866 § 6(b), 58 Fed. Reg. 51735 (Oct. 4, 1993). Its review of the notice of proposed rulemaking is the final step in the clearance process before the proposed rule may be signed by the Secretary of Homeland Security and sent to the Office of the Federal Register for technical review and publication in the *Federal Register*.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's judgment for DHS.

I. The district court correctly held that Save Jobs lacks standing to challenge the H-4 Rule. The court was right to reject all of Save Jobs's theories of

standing because Save Jobs could not demonstrate that the H-4 Rule harmed its members' competitive prospects. Other than the prospect of a statistically insignificant increase in the number of legally authorized workers in the job market as a whole, Save Jobs presented no evidence to support a conclusion that those authorized workers will actually seek employment in the same industry as Saves Jobs's members. Save Jobs thus failed to "demonstrate that [its members are] *direct* and *current* competitor[s]" with beneficiaries of the H-4 Rule, "whose bottom line may be adversely affected by the challenged government action." *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014) (emphases added). The Court can and should affirm the district court's decision on this ground alone.

II. The district court reasonably excluded Save Jobs's extra-record evidence relating to the effect of the H-4 Rule. "[T]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed," and a plaintiff may not rely on documents created after the filing of the lawsuit. *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1141–42 (D.C. Cir. 2011). The district court appropriately excluded Save Jobs's extra-record evidence, which post-dated the complaint.

III. If this Court concludes that Save Jobs has standing to proceed, it should vacate the decision below and remand for further proceedings. The Court should not resolve the issue of DHS's statutory authority to promulgate the H-4 Rule

without the district court doing so first. This is especially true where, as here, the agency is in the process of publishing a proposed rule that, if finalized, would rescind the challenged rule, which would moot this appeal and case.

STANDARDS OF REVIEW

This Court reviews district-court rulings on a party's standing *de novo*. *Equal Rights Ctr.*, 633 F.3d at 1138. The plaintiff bears the burden of establishing that the court has subject-matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). This Court reviews the exclusion of evidence on summary judgment for an abuse of discretion. *See, e.g.*, *Lane v. District of Columbia*, 887 F.3d 480, 485 (D.C. Cir. 2018). In APA cases, courts may consider only what was actually before the agency at the time of its decision. *See IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997). Courts must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

ARGUMENT

I. This Court Should Affirm the District Court's Decision Because Save Jobs Lacks Standing to Challenge the H-4 Rule.

The district court correctly concluded that Save Jobs lacks standing to challenge the H-4 Rule. *See* App. 99–108. Save Jobs's arguments to the contrary (*see* Br. 11–27) lack merit. Save Jobs challenges a rule on behalf of members who previously held information-technology jobs, yet the rule on its face does not affect them. Rather, the H-4 Rule affects and benefits H-1B nonimmigrants' dependent

family members by providing them with employment authorization to accept work in *any* job, if they choose to seek employment. As the district court held, Save Jobs thus "failed to demonstrate more than a possibility that DHS's H-4 Rule might introduce new competitors into the market for tech jobs." App. 102.

To establish standing, a plaintiff must show that it suffered an actual (or will suffer an imminent) injury that is both particularized and "concrete." *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016). And this Court's jurisprudence is particularly firm where, as here, the injury asserted depends on the independent actions of third-parties—like employers or employees subject to a regulation—who are not parties to the litigation. *See Arpaio v. Obama*, 797 F.3d 11, 23 (D.C. Cir. 2015) ("Because of the generally contingent nature of predictions of future third-party action, we have remained sparing in crediting claims of anticipated injury by market actors …."). Save Jobs fails to satisfy this burden because its alleged injuries all suffer from the same fundamental problem: they "stack[] speculation upon hypothetical upon speculation, which does not establish an 'actual or imminent' injury." *Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015).

A. The District Court Correctly Concluded That Save Jobs Lacks Standing To Challenge The H-4 Rule Based On Speculative Increased Competition From H-4 Dependents

The district court correctly rejected Save Jobs's first theory of standing (*see* Br. 12–18)—that Save Jobs has competitor standing because the H-4 Rule allows

more H-4 nonimmigrants to work in the U.S. job market. App. 101–03. This theory rests on the speculative, non-imminent possibility that some H-4 dependents with work authorization *may* at some point compete with Save Jobs's members. *See id.*

To establish competitor standing, a plaintiff must show that the challenged rule has "the clear and immediate potential" to cause third parties to compete with its members. *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1997). Under this "clear and immediate" standard, Save Jobs "must demonstrate that it is a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action." *Mendoza*, 754 F.3d at 1013. The increase in competition and the corresponding alleged injury must be "imminent," not "speculative." *Compare La. Energy*, 141 F.3d at 367 (injury must be "imminent"), *and Sherley v. Sebelius*, 610 F.3d 69, 73–74 (D.C. Cir. 2010) (same), *with KERM, Inc. v. FCC*, 353 F.3d 57, 60 (D.C. Cir. 2004) (no standing if "[no] evidence" of "lost advertising revenues" and petitioner only "vaguely assert[ed] ... that it competes with" a third party); *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (no standing where action "is, at most, the first step in the direction of future competition"); *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001) (no standing when "some vague probability" of increased competition and "still lower probability" of injury to plaintiff from competition). Put another way, the injury alleged must be "certainly impending," *Nat'l Treas.*

Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996), and not just a party "imagin[ing] circumstances [where] it could be affected by the agency's action." *N.W. Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986) (Bork, J.). And when standing depends "on the independent actions of third parties," as it does here, a plaintiff may not ask for courts to just "acknowledge a chain of causation firmly rooted in the basic law of economics," but must instead demonstrate such causation. *New World Radio*, 294 F.3d at 172; *accord Arpaio*, 797 F.3d at 21.

Under these standards, Save Jobs's claims of harm fall in the "imagined" and "speculative" category and fail to demonstrate an "imminent increase in competition." Its members Bradley, Buchanan, and Gutierrez allege the same claims: they are "IT Specialists" or otherwise in the computer field, they have many years of experience (16, 18, and 20), they are unemployed former workers of Southern California Edison, they are looking for jobs generally, and they *believe* H-4 dependents will become additional competitors. *See* App. 85–93. The speculative nature of these allegations is highlighted by the members' failure to allege, let alone provide evidence, that they face the requisite "imminent increase in competition" for competitor standing. Their affidavits fail to specify facts regarding: (1) specific employers and titles of jobs sought; (2) details of specific companies' vacancy announcements (such as job locations); (3) specific educational, skills, and experience required and whether they satisfied those requirements; and (4) whether

any companies' advertising positions that they applied for actually filled the positions with H-4 dependents holding employment authorization documents. *See id.*; *see also Mendoza*, 754 F.3d at 1013.

It is entirely uncertain whether H-4 dependents would apply specifically for, or be qualified to perform, the information-technology jobs for which Save Jobs's members are in competition. As the district court put it, Save Jobs "failed to demonstrate more than a possibility that DHS's H-4 Rule might introduce new competitors into the market for tech jobs." App. 102. And that simply will not do. As this Court has explained, "[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). The only factual support offered for the relevant proposition is out-of-record hearsay statements that are themselves speculative and were excluded below. *See* Br. 17–18; *see also* App. 103 ("there is simply no evidence that the H-4 Rule was targeted at the tech field"). In such situations, where allegations of injury "cannot be described as true or false," injury is far too speculative to support standing. *Fla. Audubon Society v. Bentsen*, 94 F. 3d 658, 668 (D.C. Cir. 1996) (en banc).

The same fault lies with Save Jobs's reliance on a "DHS estimate[] that 179,600 aliens could be added to the job market … in the first year alone and 55,000 every year thereafter." Br. 16. *Some* H-4 dependents *may* apply for work

authorization; some of those H-4 nonimmigrants *may* at some point receive authorization; some of those H-4 nonimmigrants *may* then apply for jobs; and some even smaller sub-set *may* apply for information-technology-related jobs in Southern California. But what Save Jobs needed to show is that some yet smaller subset of those will—not simply *may*—apply for the same jobs that individuals with 16, 18, and 20 years of experience like Save Jobs's members are applying to. Then, and only then, may the H-4 dependents be said to be in *direct* and *current* competition with them. Because that is not the case, Save Jobs's theory of standing rests on the sort of "protracted chain of causation" that "fails" "because of the uncertainty … and because of the number of speculative links that must hold … to connect the challenged acts to the asserted particularized injury." *Fla. Audubon*, 94 F.3d at 670.

To avoid this reasoning, Save Jobs points to this Court's decision in *Washington Alliance of Technology Workers v. DHS* ("*Washtech*"), 892 F.3d 332 (D.C. Cir. 2018). *See* Br. 13. *Washtech*, however, underscores that there must be a connection between the alleged competitors and the specifically affected job market. *Washtech* held that information-technology workers' allegations of competitor standing should not be dismissed if they alleged that they intended to seek new employment in a field where an agency rule would increase alien workers competing in the same job market. 892 F.3d at 340. That holding does not support Save Jobs's standing. First, *Washtech* involved an appeal of a motion to dismiss, where courts

"may rely on 'mere allegations' rather than 'specific facts' to establish standing," *id.*, whereas Save Jobs bore the burden to establish its standing with facts at summary judgment. Second, Washtech alleged that DHS's 2016 F-1 student OPT-STEM (optional practical training in science, technology, engineering, and mathematics) employment authorization rule would harm their members in their own specific job market. *Id.* And the district court was required to assume as true allegations that Washtech members applied for jobs with employers who in fact hired OPT students instead of its members. As this Court found, Washtech's members were "participating in the STEM labor market in competition with OPT workers," *id.* (quotations and alteration marks omitted), and the challenged rule allegedly "increased the labor supply *in the STEM job market*," *id.* (emphasis added). Here, however, Save Jobs fails to tie the H-4 Rule to the information-technology job market, relying instead upon guesswork and speculation.

Save Jobs argues that more H-4 dependents will participate in the general job market and that some of these H-4 dependents may eventually take positions that could qualify as H-1B specialty occupation jobs, with some of those specialty occupations possibly in information technology. *See* Br. 16–17. But Save Jobs never explains how these possibilities tie to its members, when their affidavits do not discuss: (1) with which employers those members have applied for jobs; (2) the employers' job locations; (3) whether potential employers sought to hire individuals

with many years of experience; or (4) whether any of Save Jobs's members would relocate to another location in the country to accept any level of employment, including the entry-level and training opportunities included in the evidence that Save Jobs argues should not have been excluded (assuming for the moment that those are even properly before the Court or relevant). App. 85–93. This approach "stacks speculation upon hypothetical upon speculation," *Turlock*, 786 F.3d at 24, and is far removed from the sort of competitor standing this Court has previously allowed.

In an attempt to avoid this problem, Save Jobs broadens its argument to the entire U.S. job market. *See* Br. 16–17. But that effort fails—it converts Save Jobs' complaint into a generalized grievance that cannot establish competitor standing. *Compare* Br. 16–17 ("Because the H-4 Rule allows aliens to compete in the entire U.S. labor market, the[re is] … *an injury in fact to anyone in the United States labor market* from the H-4 rule." (emphasis added)), *with Utd. Presbyterian Church v. Reagan*, 738 F.2d 1375, 1382 (D.C. Cir. 1984) (Scalia, J.) (standing did not exist where the grievance consisted of "generalized, amorphous injuries due to ... the conduct of the Executive" (citations omitted)).

In short, Save Jobs failed to show that the H-4 Rule will specifically affect its members' own information-technology job market such that H-4 nonimmigrants

will take jobs that its members would otherwise accept. The district court was correct to hold that it failed to establish standing on this basis.

B. The District Court Correctly Concluded That Save Jobs Lacks Standing To Challenge The H-4 Rule Based On Speculative Increased Competition From H-1B Workers

The district court also rejected Save Jobs's next argument for standing that "the H-4 Rule would also increase the number of their H-1B competitors." Br. 18; *see also id.* at 18–20. The district court was right to do so because Save Jobs's claimed injury is not traceable to the H-4 Rule. *See* App. 103–05.

Save Jobs failed to establish standing on these grounds because it did not demonstrate that its members are personally harmed by the presence of H-1B workers who remain in the United States along with their H-4 spouses who may hold employment authorization. As the district court recognized, *see* App. 103–04, the number of H-1B visas that may be allocated each year is already capped by Congress and has been oversubscribed for many years preceding the H-4 Rule. *See* Pub. L. No. 101-649, 104 Stat. 4978 § 205(a) (1990). Thus, as the district court put it, "[w]hile Plaintiff's members allege past injury from being replaced by H-1B visa holders at their previous employment, the source of that injury is unrelated to the H-4 Rule," and "if in future years the H-1B program is again oversubscribed, Plaintiff offers no evidence that this will be due to the H-4 Rule, nor why the court should

consider this an injury at all given that Congress sets the quotas for the [H-1B] visa program, not DHS." App. 104.

The district court's analysis on this point is correct because the H-1B program has been oversubscribed for more than a decade.[2] *See Walker Macy LLC v. USCIS*, 243 F. Supp. 3d 1156, 1163–64 (D. Or. 2017). In fact, the statutory limits generally capping the number of H-1B workers admissible to the United States, *see* 8 U.S.C. § 1184(g)(1)(A), have been reached every year since 2004, and in some instances, USCIS has received enough petitions projected as needed to reach the numerical allocations within the first few days that employers are permitted to file H-1B cap petitions. *See Walker Macy*, 243 F. Supp. 3d at 1163–64. Similarly, the exemption from the cap for 20,000 individuals with U.S. advanced degrees has been reached every year since 2006. *See Walker Macy*, 243 F. Supp. 3d at 1163. By congressional design, then, the entry of a limited number of H-1B nonimmigrants each fiscal year has become a permanent fixture within the U.S. labor market.

In short, Save Jobs never showed how the H-4 Rule would or could increase the number of H-1B workers for Save Jobs's members to compete with when the

[2] The H-1B cap has been hit before the end of the fiscal year since fiscal year (FY) 1997, except for FYs 2001, 2002, and 2003, when Congress temporarily raised the cap to 195,000.

district court was provided with nothing to show that the H-4 Rule would have any effect on DHS's already over-subscribed and statutorily capped H-1B program.

C. The District Court Correctly Concluded That Save Jobs Lacks Standing To Challenge The H-4 Rule Based On Speculative Benefits To H-1B Workers

The district court was also right to reject Save Jobs's theory (*see* Br. 20–21) that it had standing because the H-4 Rule confers a benefit on H-1B nonimmigrants who are the competitors of Save Jobs's members, which would purportedly result in "more [H-1B nonimmigrants] remain[ing] in competition" with Save Jobs's members, Br. 20. *See* App. 104–05.

As the district court explained, "the goal of relieving economic uncertainty and personal anxiety in H-1B workers' families [does not] amount[] to an injury to Plaintiff's members." *Id.* at 105. Although Save Jobs claims that the H-4 Rule harms its members by inducing H-1B nonimmigrants who might otherwise leave the United States to remain, Br. 18–20, that theory also fails to acknowledge, as the district court recognized, the over-subscription of the H-1B program. Save Jobs's traceability problems are compounded by their failure to acknowledge that individuals in the United States maintaining valid H-1B nonimmigrant status are required by statute to be sponsored by an employer, and by definition are *already employed*. *See* 8 C.F.R. § 214.2(h)(1)(i). H-1B nonimmigrants *currently employed* and tied by the terms of their nonimmigrant classification to that employer cannot,

without more evidence that they are seeking new jobs in the same market as Save Jobs's members (*see supra*), be treated as direct and current competitors with those members. *Mendoza*, 754 F.3d at 1013–14. Even if Save Jobs could present evidence that the H-4 Rule is causing H-1B nonimmigrants who would otherwise leave to remain within the United States, those nonimmigrants are by definition (given the criteria for H-4 nonimmigrant employment authorization eligibility) staying to apply for permanent residence. And it is *that* application for permanent residence (rather than the H-4 Rule) that makes them part of the *domestic* labor pool of U.S. workers—not "alien competitors." Br. 19.

Were Save Jobs permitted to have standing on this expansive basis, it would have standing to challenge the entry of *any* worker, domestic or foreign, into the labor pool. That, of course, cannot serve as the basis for standing in a case alleging increased competition from foreign labor. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013) (rejecting "boundless theory of standing" because "[t]aken to its logical conclusion, [plaintiff's] theory seems to be that a market participant is injured [] whenever a competitor benefits from something allegedly unlawful"). Instead, Save Jobs must demonstrate that its members are in fact in *direct* and *current* competition with H-4 nonimmigrants with work authorization, *see supra* at 18–21, but it can point only to generic arguments that the H-4 Rule "confers benefits on [its] H-1B competitors," Br. 20, and cites no competitor-standing cases that hold that the

"benefits" at issue here (that is, "reduc[ing] the economic burdens and personal stresses that H-1B nonimmigrants and their families may experience during the transition from nonimmigrant to [lawful permanent resident] status," 80 Fed. Reg. at 10,285) have ever been cognizable economic injuries.

The only case Save Jobs cites for its theory that the H-4 Rule creates competitor standing because it might incentivize H-1B workers to remain working within the United States, *Sea-Land Services v. Dole*, 723 F.2d 975 (D.C. Cir. 1983), concerned economic subsidies provided to a shipping company that "operate[d] vessels upon some of the [same] trade routes" as the plaintiff shipping company, *id.* at 977–78. That is nothing like this case, where Save Jobs contends that incentivizing a subset of H-1B nonimmigrants in various industries will in some way hurt information-technology workers even if they wish to operate in entirely different competitive job markets with completely different labor requirements. *See* Br. 20 (arguing that "aliens in H-1B status … remain[ing] in the United States" is an injury in fact). Regardless, Save Jobs presented no evidence that H-1B workers who might otherwise leave the country are staying because of the H-4 Rule—rather than other provisions of the INA itself that permit them to remain in the United States until their I-485 application is adjudicated. *See id.* Without this, Save Jobs cannot demonstrate that its alleged injuries are "certainly impending" rather than speculative. *Nat'l Treas.*, 101 F.3d at 1427.

D. The District Court Correctly Concluded That Save Jobs Lacks Standing To Challenge The H-4 Rule Based On Perceived Diminutions Of Statutory Labor Protections

The district court also correctly rejected Save Jobs's final theory of standing (*see* Br. 21–23) based on perceived diminutions of statutory labor protections. App. 105–06. This theory was too speculative to establish standing.

To start, as the district court held, this labor-protections theory was based on the same sort of speculation discussed above regarding how more H-4 nonimmigrants will directly harm Save Jobs or its members. *Id.* at 106 ("While Plaintiff[] may be correct in speculating that H-4 visa holders will seek tech jobs in competition with its members, there is simply no evidence before the court to show that that will happen."); *see supra* at 17–24 (citing authorities establishing that standing cannot be established based on speculation). Separately, Save Jobs's argument for standing based on a loss of "statutory protections" is misguided because the question of what statutorily protected interests exist, Br. 21–22, is a merits question, *see Sherley*, 610 F.3d at 72 (noting how the "requirement of a protected competitive interest … goes to the merits of a plaintiff's claim, not to his Article III standing"). In other words, whether Save Jobs has a meritorious statutory claim that the H-4 Rule conflicts with the INA's visa-specific labor protections is not an issue of Article III standing, but simply an attempt to jump to the merits of Save Jobs's INA claims. *See id.*; *see also Steel Co. v. Citizens for a Better Env't*,

523 U.S. 83, 92 (1998) ("The question whether a federal statute creates a claim for relief is not jurisdictional."); *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 617–18 (D.C. Cir. 2006) (statutes may "not bestow standing on plaintiffs who claimed no 'particularized' injury, but only a generalized interest shared by all citizens in the proper administration of the law"). And even were that not the case, the purported labor protections that Save Jobs invokes, 8 U.S.C. §§ 1182(a)(5)(A) and (n), expressly do not apply to H-4 nonimmigrants, so competitor standing cannot rest on those provisions. *See* 8 U.S.C. § 1182(a)(5)(A) (discussing labor certifications by the Department of Labor); *id.* § 1182(n) (discussing labor-condition applications and prevailing wages).

Save Jobs attempts to get around these points by relying on this Court's decision in *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718 (D.C. Cir. 1996), for the proposition that labor-protective arrangements may themselves provide standing. Br. 21. But this misses the mark because that case arose in the context of labor-protective arrangements governing unions and the Interstate Commerce Commission, a unique body of administrative law wholly inapplicable here. *See* 101 F.3d at 724. Even assuming that "labor protective arrangement" cases might apply here, there must in fact be a "labor protective arrangement" before such an arrangement can serve as the basis for standing. *See, e.g.*, *id.* Save Jobs has identified no such arrangement.

A similar problem pervades Save Jobs's argument based on *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493 (1996). Save Jobs seeks to use that case to suggest that in this Circuit, where "a statutory provision reflects a legislative purpose to protect a competitive interest, the protected competitor has standing to require compliance with that provision." Br. 21 (quoting 91 F.3d at 1497). But in that case, the plaintiff challenged Food and Drug Administration regulations governing the approval of new generic drugs. This Court concluded that Bristol-Myers Squibb had standing to sue because introducing a new drug into the same market created more competition, and "it is no answer to say that the FDA is merely permitting a competitive product to enter the market and leaving the purchasing decision to the consumer." 91 F.3d at 1499. This analysis hinged on the statute being designed to protect drug companies from generic competition—far removed from how the INA has developed to protect American labor in specific circumstances. *See* 52 Fed. Reg. at 46,093 (citing Congressional and Administrative News, 82nd Congress, Second Session, 1952, v. 2, p. 1750).

In particular, unlike the statute at issue in *Bristol-Myers*, the INA does not seek solely to protect the interests claimed by Save Jobs in keeping out "alien competitors" and placing "restrictions on their employment," Br. 4, but was designed to balance such interests against the myriad interests applicable to our complex immigration system, including the economic desire to attract foreign workers. *See*

e.g., H.R. Rpt. No. 110-862 at 132–33 ("The Committee is concerned that the current cap on nonimmigrant specialty worker (H-1B) visas negatively affects the nation's ability to remain internationally competitive in the applied sciences and high-technology industries. The Committee also notes the importance of ensuring that U.S. workers are not unfairly displaced or otherwise disadvantaged by H-1B visa holders."). Indeed, Save Jobs's suggestion that the INA is meant to protect its members from *all* H-4 nonimmigrants who may be eligible for employment authorization, Br. 22, misconstrues the provisions they cite, 8 U.S.C. §§ 1182(a)(5)(A) and 1182(n). By their terms, neither statutory provision applies to H-4 dependent spouses of H-1B nonimmigrants. Section 1182(a)(5)(A) is an inadmissibility provision applicable only to aliens applying for admission as an *immigrant* described under 8 U.S.C. § 1153(b)(2) or (3) (as employment-based immigrants) or at the time of adjudication of an alien's application for adjustment of status to lawful permanent residence as such an immigrant. *See id.* § 1182(a)(5)(D) (relating to aliens who "apply [as] immigrants seeking admission or adjustment of status"). And section 1182(n) applies only to H-1B nonimmigrants. *See id.* ("No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification …."). Given that H-4 nonimmigrants are not H-1B nonimmigrants, these statutory protections remain unchanged by the rule and cannot

give rise to competitor standing to challenge it. The district court properly rejected this theory of standing under the INA.

II. The District Court Correctly Excluded Save Jobs's Extra-Record Evidence.

Save Jobs contends that it should have been allowed to supplement the administrative record with materials that post-dated its complaint in its "Appendix A." *See, e.g.*, Br. 24–27; App. 43–84. But the district court correctly excluded Save Jobs's extra-record evidence.

Standing is determined "as of the time the suit commences." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009). That is the rule because courts must "ensure[] that a litigant alleges such a *personal stake* in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Chamber of Commerce of the United States v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) (emphases added). Although a plaintiff can and should produce additional facts to support its standing as litigation progresses, "a plaintiff may not supplement the record with materials that post-date the complaint in order to establish standing." App. 98 (citing *Tracie Park v. Forest Serv. of the U.S.*, 205 F.3d 1034, 1037–38 (8th Cir. 2000)). Thus, in *Equal Rights Center*, this Court held, on appeal from summary judgment, that "existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed," and found no standing

because the plaintiff relied only on documents created after the filing of the lawsuit, and no "document set[] forth specific facts demonstrating [that the plaintiff] suffered an injury in fact that was actual or imminent at the time it filed suit." 633 F.3d at 1141–42.

This case should be treated no differently. Given these settled rules, the district court reasonably excluded Save Jobs's extra-record material that post-dated the complaint. Appendix A contains third-party hearsay materials such as a magazine article; job postings; and a printout of a website, "H4 Visa, A Curse," all of which post-dated the filing of the complaint. For example, the advertisements at pages 13–26 of Save Jobs's "Appendix A" are dated between May 27, 2015 and August 21, 2015—that is, between one and four months after the complaint was filed. Similarly, the blog cited at pages 27–39 is dated "8/20/15, 1:54 PM," and contains information on its face that post-dates the complaint by four months. The district court ultimately considered materials that predated the complaint but excluded those that post-dated the complaint. App. 99.

Save Jobs attempts (*see* Br. 26) to avoid this Court's case law on such post-complaint materials by citing *Scahill v. District of Columbia*, 909 F.3d 1177 (D.C. Cir. 2018), which rejected a district court's Rule 12(b)(6) dismissal and refusal to allow plaintiffs leave to amend at that threshold stage—concluding that "a plaintiff may cure a standing defect under Article III through an amended pleading alleging

facts that arose after filing the original complaint." *Id.* at 1184. The result in *Scahill* was driven by materially different circumstances, however—it was a non-APA case in a pleading-stage posture. *Id.* The present APA case involves Save Jobs's effort to supplement the administrative record to establish Article III injury based on the time when it filed its motion for summary judgment, rather than the time when it filed its complaint. Save Jobs's focus on post-complaint materials and argument that anyone can have standing to sue if a governmental action "would allow competition" with other people misses the point that no one had standing at the time the suit was filed because all of Save Jobs's members' supposed harms are based on speculation (discussed above). The district court here was right to exclude that material.

III. The Court Should Not Address Save Jobs's Statutory-Authority Argument At This Time.

If this Court concludes that Save Jobs has standing to challenge the H-4 Rule, the proper course would be to vacate the decision below and remand so that the district court can first fully address Save Jobs's statutory-authority argument. Save Jobs presses the Court to decide that issue now, Br. 27–50, but strong reasons counsel against doing so. The case was decided below on a specific threshold determination—Save Jobs's lack of Article III standing. *See* App. 110. And the district court emphasized that it was not making a "final determination on the merits of Plaintiff's APA claim[s]." *Id.*

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Bowie v. Maddox*, 642 F.3d 1122, 1131–32 (D.C. Cir. 2011) (declining to address an issue not addressed by the district court because "this court's normal rule is to avoid such consideration" (quotation marks omitted)). This is the "general rule" because appellate courts do not typically review and decide issues that were not fully developed or reviewed below. *See Singleton*, 428 U.S. at 120 (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). In *District of Columbia v. Air Florida, Inc.*, for example, this Court applied the "normal rule" of declining to address a legal issue that was presented to, but not decided by, the district court. 750 F.2d 1077, 1078 (D.C. Cir. 1984). That case "present[ed] a number of complex issues which should first be developed in the District Court," *id.* at 1085, and "deserve[d] to be considered … where the parties … [would] ha[ve] a full opportunity to present … arguments, and the District Court … [could] pass on, the question[s]" at issue, *id.* at 1086. It is therefore well-settled that this Court ordinarily would not opine on the substantive legal challenge that Save Jobs now makes without first affording the district court another opportunity to resolve it.

Moreover, strong reasons counsel against addressing Save Jobs's statutory authority argument. A notice of proposed rulemaking is expected to shortly be issued that would propose to remove H-4 dependent spouses from the class of aliens

eligible for employment authorization. If proposed and finalized, the new rule is expected to rescind the H-4 Rule being challenged and moot this case. *See, e.g.*, *Am. Fed'n of Gov't Employees, AFL-CIO v. OPM*, 821 F.2d 761 (D.C. Cir. 1987) (challenge to certain provisions that were previously in effect "but have since been superseded by new regulations, is quite obviously moot"); *Save Our Cumberland Mtns., Inc. v. Clark*, 725 F.2d 1422, 1432 n.27 (D.C. Cir. 1984) ("There is no question that a case can be mooted by promulgation of new regulations or by amendment or revocation of old regulations."); *accord Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 251 F.3d 1007, 1011 (D.C. Cir 2001) ("The old set of rules, which are the subject of this lawsuit, cannot be evaluated as if nothing has changed. A new system is now in place. We therefore must vacate this aspect of the district court's decision as moot."). This provides extra reason for this Court to follow its normal rule and decline to decide an issue of statutory authority that was not fully resolved below.

CONCLUSION

This Court should affirm the district court's summary judgment.

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RULE 32 CERTIFICATION

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

1. This brief contains 9,088 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2019, I electronically filed the foregoing with the Clerk of Court by using the appellate CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

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