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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

TENREC, INC., et al.

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al.,

Defendants.

Case No. 3:16-cv-00995-SI

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Oral Argument Requested

Under Federal Rule of Civil Procedure 56, Defendants United States Citizenship and Immigration Services ("USCIS") and USCIS Director Leon Rodriguez, in his official capacity, hereby move this Court for summary judgment. The grounds for this motion are set forth in the

accompanying memorandum of points and authorities.[1]

Respectfully submitted this 21st day of October 2016.

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[1] In accordance with LR 7-1(a), undersigned counsel for Defendants represents that he conferred with Plaintiffs' counsel on the relief sought by this motion and learned as a result that Plaintiffs dispute the grounds of this motion and intend to oppose it.

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DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Oral Argument Requested

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs (petitioners Tenrec, Inc. and Walker Macy, LLC, along with their H-1B petitions' beneficiaries, Mr. Sergii Sinienok and Ms. Xiaoyang Zhu, respectively) seek to overturn the United States Citizenship and Immigration Services' ("USCIS") longstanding interpretation of 8 U.S.C. § 1184(g)(3) (hereinafter, "Section 1184(g)(3)"). Plaintiffs essentially argue that the Section 1184(g)(3)'s language of "Aliens who are subject to the numerical limitations of [H-1B visas] shall be issued visas (or otherwise provided nonimmigrant status) *in the order in which petitions are filed for such visas or status*"[1] compels an interpretation that H-1B visa petitions can *never* be rejected—regardless of whether such visas are even available for the corresponding fiscal year—and a waiting list must be maintained for such filings. *Id.* (emphasis added). Since Section 1184(g)(3)'s enactment in 1990, however, neither the now-defunct Immigration and Naturalization Service ("INS"), USCIS, nor Congress have *ever* interpreted that language to provide for such "rolling" consideration of petitions. In fact, Section 1184(g)(3) is ambiguous on both the precise question of how to handle the hundreds of thousands of petitions USCIS receives each year, as well as what to do with petitions for slots that are no longer statutorily available within the fiscal year. In such circumstances, USCIS has appropriately interpreted and applied Section 1184(g)(3). The Court should therefore deny Plaintiffs' claims in their entirety, affirm the validity of 8 C.F.R. § 214.2(h)(8)(ii)(B), affirm the rejection of Plaintiffs' H-1B petitions, and grant summary judgment in favor of Defendants.

[1] Notably, the same operative language also applies to numerical limitations for H-2B nonagricultural workers, "having a residence in a foreign country which [they] has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country[.]" 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *see also id.* § 1184(g)(1).

STATUTORY AND REGULATORY BACKGROUND

I. The History Of The H-1B Nonimmigrant Visa Classification.

The last major employment-based immigration revisions to the Immigration and Nationality Act ("INA") occurred a little over twenty-five years ago with the enactment of the Immigration Act of 1990 ("IMMACT"). Pub. L. No. 101–649, 104 Stat. 4978. The ideas underlying the IMMACT stemmed from the 1981 recommendations of the Select Commission on Immigration and Refugee Policy (also known as "the Hesburgh Commission"). The Hesburgh Commission recommended many reforms, some of which were enacted in the Immigration Reform and Control Act of 1986 ("IRCA"). Pub. L. No. 99–603, 100 Stat. 3445.

The IMMACT expanded the usage of the H nonimmigrant visa category for temporary workers. These visas have existed since 1952, but IRCA subdivided the category as follows: (1) H-1 visas were for individuals of "distinguished merit and ability," such as professionals, artists, athletes, entertainers, and prominent business people who lacked professional credentials; (2) H-2A visas were for temporary workers coming to perform agricultural labor or services, while the H-2B category was for foreign nationals entering the United States to perform temporary nonagricultural labor or services for which no qualified U.S. workers could be found; and (3) the H-3 classification was available for foreign trainees. Unions were concerned about allowing H-1 nonimmigrants to work in the United States without any prior labor market test for determining the availability of qualified U.S. workers. They were especially concerned about foreign nurses and entertainers, who constituted about half of all H-1 admissions. Congress partially responded to those concerns by enacting the Immigration Nursing Relief Act of 1989 ("INRA"), Pub. L.

No. 101–238,[2] which placed foreign nurses into a new H-1A category for a five-year period, while the other H-1 visa recipients were reclassified as H-1B. The INRA also required employers to attest that hiring foreign nurses would not adversely affect the wages and working conditions of U.S. nurses, and that they would be paid at the same rate. Congress included a similar attestation requirement for H-1B employers in the IMMACT, while narrowing the visa category by moving foreign nationals with "extraordinary ability" in the sciences, arts, education, business, or athletics to a new "O" nonimmigrant visa category and performing artists, entertainers, and internationally recognized athletes to a new "P" category. Finally, it is important to note how the IMMACT also capped the annual number of new cap-subject H-1B petition approvals at 65,000 per fiscal year ("FY").[3] And this yearly cap on H-1B visas came about only as a result of political compromise—with the number of H-1B visas used per year inevitably growing over time. The cap has been met prior to the end of the fiscal year since FY 1997.[4]

According to 8 U.S.C. § 1184(a)(1), "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe[.]"[5] And pursuant to further statutory restrictions, any employer seeking to

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[2] *See* 8 U.S.C. §§ 1101(a)(15)(H)(i)(a), 1182(m). The INRA allowed hospitals and other medical facilities to secure H-1A visas for foreign nurses to work in the United States. The program ended in 1997 and was replaced by 8 U.S.C. § 1101(a)(15)(H)(1)(c), but some of the provisions of this unique program now apply to other H visas. *See generally Alden Mgmt. Servs., Inc. v. Chao*, 532 F.3d 578 (7th Cir. 2008) (Easterbrook, C.J.) (discussing some of the INRA's background).

[3] *See* Pub. L. No. 101-649, 104 Stat. 4978 § 205(a) (1990).

[4] Except for FY2001, 2002, and 2003 when Congress temporarily raised the cap to 195,000,

[5] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), 6 U.S.C. § 557 (2012), any reference to the Attorney General in a provision of the INA describing functions of

employ an alien as an H-1B nonimmigrant temporary worker is required to file a petition with USCIS "after consultation" with other appropriate agencies of the federal government, such as the Department of Labor ("DOL"). 8 U.S.C. § 1184(c)(1). In this way, the IMMACT also changed the definition of an H-1B nonimmigrant such that to qualify for classification as an H-1B nonimmigrant, the Secretary of Labor must determine and certify to USCIS that the intending employer "has filed" with the Secretary of Labor an application under section 1182(n)(1)—commonly referred to as a Labor Condition Application ("LCA"). *See* 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n); *see also* 20 C.F.R. § 655, subparts H and I.

Thus, an alien may not be admitted or provided H-1B nonimmigrant status unless the employer "has filed" an LCA that, among other things, requires employers to make four attestations: (1) the employer will pay the H-1B worker, during the period of authorized employment, wages that are at least the same wage as similarly employed U.S. workers or the prevailing wage for the occupational classification in the area of employment; (2) the employer will provide the H-1B worker working conditions that will not adversely affect the working conditions of similarly employed U.S. workers; (3) there is no strike or lockout in the occupational classification at the place of employment; and (4) the employer, at the time of filing the LCA, has provided adequate notice of the filing of the application at the place of employment. *See* 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.731–734.

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the Attorney General were transferred from her, or other Department of Justice official, to the Department of Homeland Security, as such references to the Attorney General "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012). Thus, after the INS's dissolution in 2003, Congress delegated the authority to adjudicate visa petitions to USCIS. *See* 6 U.S.C. § 271(b)(1).

The IMMACT's changes did not, however, quell the controversy surrounding H visas. In 1998 Congress amended the law by adding a $500 fee for each H-1B worker sponsored by an employer—a provision that would fund training and scholarship programs intended to help U.S. workers close skills gaps, thus reducing the need for H-1B workers. *See American Competitiveness and Workforce Improvement Act of 1998* ("ACWIA"), Pub. L. No. 105-277 §§ 412–13, 112 Stat. 2681, 2981-642 to -650 (1998).[6] The same law temporarily increased the H-1B cap to 115,000 for FYs 1999 and 2000, as well as a cap of 107,500 for FY 2001, because both the H-1B cap was continuously being exhausted, as well as the expected increase in demand for foreign professionals to help U.S. companies deal with their computer systems for the "Y2K" "millennium bug."

The ACWIA also included several measures intended to improve protections for U.S. and H-1B nonimmigrant workers. For example, the statute created additional requirements for certain U.S. employers deemed to be "H-1B dependent" and those that have willfully failed to comply with their LCA obligations or who have misrepresented material facts in an LCA. *See* 8 U.S.C. § 1182(n)(1)(E)–(G), (n)(3)(A).These U.S. employers are also required to attest that they will not displace U.S. workers to fill a prospective position with an H-1B nonimmigrant worker, and that they made good-faith attempts to recruit qualified U.S. workers for the prospective H-1B position. *Id.* Another provision of ACWIA enhanced the penalties for employer violations of their LCA obligations, as well as for any willful misrepresentations made in LCAs. *See* 8 U.S.C. § 1182(n)(2)(C). These enhancements included increased monetary penalties, as well as

[6] *See generally* Jung S. Hahm, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests under the New H-1B Visa Program*, 85 Cornell L. Rev. 1673, 1675–76 (2000).

temporary prohibitions on the approval of certain types of petitions, such as H-1B petitions and employment-based immigrant visa petitions (a penalty commonly known as "debarment"). *Id.* Overall, the severity of the penalty for any employer depends upon DOL's assessment of the seriousness of each employer's violation. *See* 8 U.S.C. § 1182(n)(2)(C)(i)–(iii).

Just two years later, Congress modified the H-1B program to further respond to employer pressures—temporarily increasing the H-1B cap to 195,000 for FYs 2001, 2002, and 2003. *See American Competitiveness in the Twenty-first Century Act of 2000* (commonly referred to as the "AC21"), Pub. L. No. 106-313, § 106(d), 114 Stat. 1251 (2000). AC21 also exempted universities and nonprofit research institutions from the H-1B cap and doubled the fee (to $1,000 per sponsored employee) to increase funding for the retraining of U.S. workers. For FY 2004 and thereafter, the H-1B cap returned to 65,000.

The H-1B Visa Reform Act of 2004 ("H-1B Visa Reform Act"), enacted as part of the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. J, tit. IV (2004), added an exemption from the H-1B cap of 20,000 for H-1B beneficiaries with advanced U.S. degrees. *See* 8 U.S.C. § 1182(p)(4). The H-1B Visa Reform Act also made permanent and increased the ACWIA fee to fund the retraining of U.S. workers to $1,500 for companies with 26 or more full-time equivalent employees, reduced the fee to $750 for smaller companies, and added another $500 anti-fraud fee while simultaneously expanding DOL's investigative authority over LCAs.

II. H-1B Visas Since 2004.

After the H-1B cap reverted to 65,000 for FY 2004 and thereafter, the annual caps began to be reached earlier and earlier. For FY 2007, the limit was reached in the first two months.[7] In FY 2008, the 65,000 cap was reached on the very first day.[8] In FY 2010 and FY 2011, the number of H-1B petitions decreased because of the recession, but the quota was still reached before the end of each applicable fiscal year.[9] In 2013, and for the first time since the FY 2008 filing season, H-1B statutory limit was reached within the first week of the filing period and a lottery was again used to select from an overfilled pool of applications (172,500 H-1B petitions during the first week).[10] For each fiscal year since 2014, USCIS has received a sufficient number of H-1B cap-subject petitions to meet the annual numerical cap within the first week of the applicable filing period.[11]

Based on what occurred in 2007, where the FY 2008 cap was reached on the very first filing day (USCIS received H-1B petitions totaling nearly twice the 65,000 cap on Monday,

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[7] *See Press Release*, U.S. Citizenship and Immigration Services, "USCIS Reaches H-1B Cap," June 1, 2006, *available at* https://www.uscis.gov/sites/default/files/files/pressrelease/FY07H1Bcap_060106PR.pdf.

[8] *See USCIS Update*, U.S. Citizenship and Immigration Services, "USCIS Reaches FY 2008 H-1B Cap," Apr. 3, 2007, *available at* https://www.uscis.gov/sites/default/files/files/pressrelease/H1BFY08Cap040307.pdf.

[9] *See, e.g., Press Release*, U.S. Citizenship and Immigration Services, "USCIS Reaches FY 2010 H-1B Cap," Dec. 22, 2009, *available at* https://www.uscis.gov/archive/archive-news/uscis-reaches-fy-2010-h-1b-cap; *see also Press Release*, U.S. Citizenship and Immigration Services, "USCIS Reaches FY 2011 H-1B Cap," Jan. 27, 2011, *available at* https://www.uscis.gov/news/uscis-reaches-fy-2011-h-1b-cap.

[10] *See Press Release*, U.S. Citizenship and Immigration Services, "USCIS Reaches FY 2014 H-1B Cap," Apr. 8, 2013, *available at* https://www.uscis.gov/news/uscis-reaches-fy-2014-h-1b-cap.

[11] *See, e.g., Press Release*, U.S. Citizenship and Immigration Services, "USCIS Reaches FY 2017 H-1B Cap," Apr. 7, 2016, *available at* https://www.uscis.gov/news/news-releases/uscis-

April 2, 2007), USCIS wanted, among other things, "to avoid unfairness to potential victims of a slow mail service." Ilona Bray, *U.S. Immigration Made Easy* 392 (17th ed. 2015). USCIS also wanted to relieve some of the pressure employers felt to file all cap-subject H-1B petitions on one day and the resulting logistical challenges that it created for mail courier services and USCIS's mailroom. The agency consequently expanded the "lottery" system, originally implemented in 2005,[12] to accept petitions in years of excessive demand over the course of the first five days of the applicable filing period to fairly determine which H-1B petitions would proceed for adjudication. 8 C.F.R. § 214.2(h)(8)(ii)(B); *see also Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation*, 73 Fed. Reg. 15,389 (Mar. 24, 2008). The extraordinarily large number of cap-subject H-1B visa petitions received makes it impossible to ensure the various provisions contained in 8 U.S.C. § 1182(n) are not frustrated and to allocate H-1B visas in the manner Plaintiffs demand—that is, that all petitions be "received" by USCIS and a waiting list maintained. Indeed, the selection of petitions would be almost completely arbitrary and inequitable (with petitions mailed and delivered to USCIS *at precisely the same time* being treated in an entirely unequal manner based on what occurs within a mail room), as well as the extreme logjam that would immediately ensue—causing USCIS to adjudicate requests to "temporar[ily]" employ H-1B workers in employment that would not commence for at least several years for positions that, in the meantime, may have already been filled.

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reaches-fy-2017-h-1b-cap.

[12] *See Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004*, 70 Fed. Reg. 23775 (May 5, 2005).

Under the current system, if the H-1B numerical limit is exceeded during the first five business days that those petitions can be filed, then USCIS may randomly select by computer-generated selection the "number of petitions deemed necessary to generate the numerical limits of approvals." 8 C.F.R. § 214.2(h)(8)(ii)(B). This process creates a system that is fundamentally fairer than the happenstance of what occurs if petitions were "received" solely in the order in which they arrive in the mail room, and provides, just as it has done since the 1990s, that USCIS will reject any H-1B petitions received after the H-1B numerical limit has already been met. *See* 8 C.F.R. § 214.2(h)(8)(ii)(B). This process also adheres to the statutory language in 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c)(1) regarding the order in which eligibility for classification as an H-1B nonimmigrant is to be determined: (1) filing of an LCA, (2) certified to DHS in support of an H-1B petition, and before an alien may be issued a visa or otherwise provided status as an H-1B nonimmigrant.

III. Legislative Efforts To Change The H-1B Visa Process.

As discussed above, Congress temporarily increased the number of visas allotted under the H-1B visa program with ACWIA's passage in 1998. *See Title IV of Division C of the Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999*, Pub. L. No. 105-277, § 411, 112 Stat. 2681 (1998). Although ACWIA did not specifically address the INS's policy of rejecting petitions once the numerical limitation for that fiscal year was reached, *see* former 8 C.F.R. § 214.2(h)(8)(ii)(E) (1998), its legislative history frequently referred to the INS's adjudication process and the shortages the agency was experiencing earlier and earlier each year. *See* S. Rep. No. 12741-04 (1998) (Conf. Rep.) ("[Foreign workers] must go through a fairly onerous process to get one of the 65,000 'H-1B' temporary worker visas allotted by the INS. Unfortunately, last year our companies hit the 65,000 annual limit at the end of August.

This year that limit was hit in May."); H. Rep. No. 105-657, at 19 (1998) ("It is in the nation's interest that the quota for H–1B aliens be temporarily raised. First, unless Congress acts, employers will not be able to employ new H–1B nonimmigrants until the beginning of fiscal year 1999 (October 1, 1998). This delay would be extremely detrimental to large numbers of employers. If a university wanted to use the H–1B program to hire an alien as a professor or a teaching assistant, the alien could not start work until October, a month after most academic years begin.").

At the same time, Congress wanted to balance the desire to bring in more H-1B temporary workers with the goal of protecting American workers from losing jobs. That is why ACWIA added a non-displacement attestation provision. *See id.* ACWIA also added a recruitment requirement for certain petitioners—forcing petitioning employers to "at least make an attempt to locate qualified American workers before petitioning for foreign workers under the H– 1B program." *Id.* These recruitment and displacement provisions are significant to this case since they reinforce the order in which eligibility for classification as an H-1B nonimmigrant will be determined (specifically, *after* an LCA is certified and submitted to USCIS in support of an H-1B petition).

Two years later with AC21, Congress again dealt with the issue of university professors and was still very much aware of the agency's adjudication process for H-1B visas. Indeed, the Senate committee report plainly acknowledges the agency's policy of rejecting petitions filed after the cap had been reached. S. Rep. No. 106-260, at 2, 9 (2000). ("According to the INS, when pending applications are factored in, we have already hit the fiscal year 2000 cap even though we are only 6 months into the new fiscal year."). Still, Congress once again ratified the INS's process of not receiving additional cap-subject H-1B petitions after the numerical limit

had been reached for that fiscal year, but decided to "exempt from the cap visas obtained by universities, research facilities, and those obtained on behalf of graduate degree recipients to help keep top graduates and educators in the country." *Id.* at 10. Congress ultimately believed this exemption from the H-1B numerical limits in 8 U.S.C. § 1184(g)(1), as interpreted and administered by INS, was necessary because universities are on a "different hiring cycle from other employers," "often do not hire until the [H-1B visa] numbers have been used up," and how it would be impractical for educators to begin teaching classes after the beginning of the fiscal year in October, echoing the same concerns when ACWIA was passed. *Id.* at 22.

Moreover, subsequent to USCIS's initial introduction of the H-1B-petition lottery in 2005, Congress has consistently rejected bills designed to eliminate the lottery system. This was, of course, most notable with congressional inaction on the "Immigration Driving Entrepreneurship in America Act of 2011" (H.R. 2161), the "Border Security, Economic Opportunity, and Immigration Modernization Act of 2013" (S. 744), and the Immigration Innovation Act of 2013 (S. 169)." Similar efforts to do away with the lottery are still being considered (though none has made it out of committee) before the current Congress. *See, e.g.*, "H-1B and L-1 Visa Reform Act of 2015" (S. 2266); "American Jobs First Act of 2015" (S. 2394); "Protecting American Jobs Act" (S. 2365); "Immigration Innovation Act of 2015" (S. 153). And even though these bills contain provisions to eliminate the lottery in favor of alternatives that prioritize the order for USCIS to select petitions based on factors such as the beneficiary's education level or offered wage, none proposes statutory amendments to preclude USCIS from continuing to interpret and administer 8 U.S.C. 1184(g)(3) in the same manner it has done since the 1990s—rejecting petitions filed after the numerical cap has been reached. *See* former 8 C.F.R. § 214.2(h)(8)(ii)(E) (1998). Indeed, S. 2266, for example, proposes specifically

states that aliens subject to the H-1B cap shall be issued visas or provided status "in a manner and order established by the Secretary [of Homeland Security] by regulation."

STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), a court may only set aside a final agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this deferential standard, a court reviews the agency's decision to determine if it "articulated a rational connection between the factual findings and its decision." *See Fence Creek Cattle Co. v. Forest Serv.*, 602 F.3d 1125, 1132 (9th Cir. 2010). Under the "arbitrary and capricious standard, the standard is narrow and the court should not substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Courts may resolve APA challenges by summary judgment. *See Nw. Motorcycle Ass'n v. U.S. Dep't Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994).

"[I]n a case involving review of a final agency action under the [APA] ... the standard set forth in Rule 56[a] does not apply because of the limited role of a court in reviewing the administrative record." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006) (citations omitted); *see also Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769–70 (9th Cir. 1985). Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review. *Mainella*, 459 F. Supp. 2d at 90 (citations omitted).

Section 706(1) of the APA grants federal courts the power to "compel agency action unlawfully withheld or unreasonably delayed." *See Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). This provision does not give federal courts license to

compel agency action whenever the agency is withholding or delaying an action a court thinks the agency should take. *Id*. Instead, federal courts' ability to compel agency action is carefully circumscribed to where an agency has ignored a specific legislative command. *Id*. A federal court's ability to compel agency action under 5 U.S.C. § 706(1) is subject to two constraints:

(1) It is limited to "discrete" actions, such as rules, orders, licenses, sanctions, and relief; and

(2) The purportedly withheld action must not only be "discrete," but also "legally *required*" in the sense that the agency's legal obligation is so clearly set forth that it could traditionally have been enforced through a writ of mandamus.

Id. (emphasis in original); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 879 (1990) (litigants cannot seek wholesale improvement of a program by court decree). In sum, a claim under 5 U.S.C. § 706(1) can only proceed where an agency failed to take a *discrete* agency action that it is *required to take*. *Hells Canyon*, 593 F.3d at 932.

ARGUMENT

I. USCIS's Interpretation Of Section 1184(g)(3) Is Reasonable And Entitled To Judicial Deference.

In this case, Plaintiffs argue that the H-1B lottery system of runs afoul of the APA because Section 1184(g)(3)'s language "shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status" is clear and requires USCIS to accept *all* filings—even after the numerical limitation for that fiscal year has been reached[13]—and to maintain a waiting list. Plaintiffs compare the language in Section 1184(g)(3) for *temporary nonimmigrant* workers to similar language in the *immigrant* visa

[13] *Contra* 8 C.F.R. § 214.2(h)(8)(ii)(D) (noting how petitions handled after a fiscal year's cap has been reached "shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year").

context of Section 1153(e) and note that such visas employ a priority date and waiting list approach to allocate immigrant visas.[14] Thus, according to Plaintiffs, since those sections' statutory language is similar, Congress must have intended a similar approach in the H-1B context. Plaintiffs further argue that Section 1184(g)(3) makes no mention of any lottery, and therefore, according to Plaintiffs, USCIS's promulgation of 8 C.F.R. § 214.2(h)(8)(ii)(B) must be *ultra vires*.

Of course, Plaintiffs' Complaint fails to mention how Congress specifically provides for a waiting list approach in the immigrant-visa context. *See* 8 U.S.C. § 1153(e)(3) and (g). There is no such language in Section 1184(g)(3) in the nonimmigrant temporary-worker context. This suggests that Congress did not intend for such a waiting list to exist, yet Plaintiffs' demand that such a waiting list be implemented. The immigrant visa waiting list is published monthly in the State Department Visa Bulletin, where those who are waiting in line for a numerically-limited visa can see when they will be able to obtain a visa number. In crafting the non-immigrant H-1 and H-2 classification rules, Congress did not include any language regarding lists, which strongly suggests that they did not intend for any such lists to exist.

More importantly, Plaintiffs Complaint omits both the overall statutory scheme that limits H-1B visas, as well as Section 1184's inherent ambiguity given the manner in which H-1B eligibility is determined, status provided, and visas issued consistent with the various mandates set forth in the statute. And finally, Plaintiffs completely overlook how, in today's world, several postal and other courier trucks attempt to deliver tens (possibly hundreds) of thousands of H-1B

[14] *See generally Zixiang Li v. Kerry*, 710 F.3d 995, 1000–01 (9th Cir. 2013) (holding, among other things, that USCIS had no duty to approve applications for adjustment of status for immigrant applicants in priority-date order, as well as no specific duty to create or maintain any particular system for monitoring priority dates).

petitions to In an effort to ensure the various U.S. worker protection provisions in 8 U.S.C. § 1182(n) are appropriately administered, USCIS has reasonably interpreted the inherent ambiguity of Section 1184(g)(3), to allow, when needed, a lottery process to ensure H-1B petitions in years of excessive demand are selected for processing in a fair and equitable manner.

Figuring out what is a fair and equitable implementation of statutes in the real world is a common problem for all agencies, and is precisely why *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) was handed down by the Supreme Court over three decades ago. In the Ninth Circuit, "[w]hen Congress has explicitly or implicitly left a [statutory] gap for an agency to fill, and the agency has filled it, [courts] have no authority to re-construe the statute … [they] can only decide whether the agency's interpretation reflects a plausible reading of the statutory text." *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 492–93 (9th Cir. 2007) (en banc). In this case, USCIS has articulated policies to address the statutory gaps concerning (A) what to do with petitions received after a fiscal year's cap has been reached and (B) how to equitably handle hundreds of thousands of H-1B petitions received within the same narrow window of time. And under *Chevron*, this Court must approach these policies "with the deference that must be accorded to an agency's interpretation of the statute it administers." *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1268 (9th Cir. 2001).

A. Applying Chevron*'s "Step One" to Section 1184(g)(3)*

As both 8 C.F.R. § 214.2(h)(8)(ii)(B) & (D) are entitled to *Chevron* deference, the Court must first examine the statute to determine whether its language "unambiguously" answers the question at issue, *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 471, n.4 (2001), that is, whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, the *Chevron* analysis ends. If not (that is, when "the statute is silent or ambiguous" on

the "precise question at issue"), however, courts will proceed to *Chevron*'s "Step Two" to decide whether the agency's interpretation "is based on a permissible construction of the statute." *Id*. at 843; *Renteria–Morales v. Mukasey*, 551 F.3d 1076, 1081 (9th Cir. 2008). In this case, Section 1184(g)(3) is silent as to how the phrase "issued visas (or otherwise provided nonimmigrant status) in the order in which [H-1B] petitions are filed for such visas or status" should be put in practice.

i. There is a Statutory Gap Regarding Waiting Lists

Turning first to the issue of whether petitions received after a fiscal year's cap has been reached must be placed on a waiting list, Plaintiffs' position ignores the process petitioners must go through in order to secure an H-1B visa—specifically, those aspects of the process that are designed to protect U.S. workers. First, Plaintiffs' emphasis on the statutory language omits any distinction between visa issuance and a nonimmigrant's change of status. Since status may be provided to an individual present in the United States upon approval of a change-of-status petition, but a visa may be issued only after the alien applies for a visa and obtains an appointment from a U.S. consulate abroad (where appointment availability and processing times vary considerably), it is impossible and would lead to an absurd result to read Section 1184(g)(3) in the strict manner that Plaintiffs propose.

Take, for example, Plaintiffs' emphasis on Section 1184(g)(3)'s "in the order in which petitions are filed." If that reading were to control throughout the visa or change-of-status process (as the surrounding words within the statute suggest—"shall be issued visas (or otherwise provided nonimmigrant status)"), USCIS would not be capable of holding all pending H-1B change-of-status petitions simply because an alien who is the beneficiary of an H-1B petition filed on an earlier date runs into a delay in obtaining approval of a change-of-status

application. The exact same could be said for the State Department's role in this process—as different consulates all over the world would have absolutely no way of following the words of Section 1184(g)(3) as strictly as Plaintiffs suggest in their issuance of H-1B visas. Sometimes, "[l]iteralness may strangle meaning." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946).

Nor is Section 1184(g)(3) unambiguous simply because some of its words may be similar to Section 1153(e). This is especially true where, as here, Section 1153(e) and (g) have specific language including a waitlist, whereas no such language exists with Section 1184(g)(3). *See* 8 U.S.C. § 1153(e)(3) (explaining how "[*w*]*aiting lists* of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State" (emphasis added)). Indeed, because Section 1184(g)(3) is literally silent regarding any such waiting list, that is enough by itself for this Court to find ambiguity under *Chevron*'s Step One. *See Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1088, 1090 (9th Cir. 2016) (holding that where a statute is silent on a precise issue, there was sufficient ambiguity to provide the Department of Labor with authority to promulgate regulations interpreting the statute, and that their regulation was reasonable under *Chevron*); *see also Zixiang Li v. Kerry*, 710 F.3d 995, 1000 (9th Cir. 2013) (holding that even 8 U.S.C. § 1153(e) was "*silent* about the order in which USCIS must approve applications for adjustment of status" (emphasis added)).

The bottom line is that Section 1184(g)(3) has no discussion whatsoever about any H-1B petition waiting list. Plaintiffs are simply trying to have this Court read one in. But "[w]hatever temptations the statesmanship of policymaking might wisely suggest, [statutory] construction must eschew interpolation and evisceration. [The judge] must not read in by way of creation." Felix Frankfurter, *Some Reflection on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533

(1947). As Justice Brandeis put the point: "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926).

ii. There is an Ambiguity Regarding Simultaneous Submissions

Another problem with Plaintiffs' interpretation of Section 1184(g)(3) is its assumption that the subsection should be read as if Congress enacted an orderly "mail-intake" process where each petition is received in the mail, time-stamped, the agency accepts the petitioner's nonrefundable filing fees, and where, once the visa caps have been exhausted, with any remaining petitions left in an orderly line. But that orderly line might create a multi-year bottleneck overnight, as Plaintiffs' interpretation of Section 1184(g)(3) fails to consider other relevant statutory provisions and would clearly frustrate the plain language and intent of the Act. This is because the information contained within each petition—such as information regarding the prevailing wage at the time of filing—would either be too speculative or would become stale for purposes of establishing eligibility regardless of how long it may take for an H-1B nonimmigrant to get to the "front of the line" to be eligible to be provided a visa or a change in his status.

And any suggestion of a post-filing LCA would itself be *ultra vires* and would clearly frustrate statutory intent—most notably 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c)(1). Section 1101(a)(15)(H)(i)(b) defines an H-1B nonimmigrant as one who, "the Secretary of Labor determines and certifies to [USCIS] that the intending employer *has filed* with the Secretary an application under section 212(n)(1)." 8 U.S.C. § 1101(a)(15)(H)(i)(b) (emphasis added). Section 1184(c)(1) states that a determination of eligibility for H-1B status will be made, "*after consultation* with appropriate agencies of the Government, upon petition of the importing employer." 8 U.S.C. § 1184(c)(1) (emphasis added). This language clearly

prevents LCAs from being filed with USCIS post-adjudication and would thereby undermine the protections Congress placed into the statute to prioritize the interests of U.S. workers. It is here where context matters when interpreting whether particular statutory words or phrases are ambiguous in real life:

> Whether a statutory term is unambiguous … does not turn solely on dictionary definitions of its component words. Rather, '[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.' Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.

Yates v. United States, 135 S. Ct. 1074, 1081–82 (2015) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (internal citations omitted).

The problem tackled by the *Yates* Court is essentially the same in this case—as Plaintiffs' simplistic interpretation of Section 1184(g)(3) does not comport with other relevant provisions of IMMACT or the real world.[15] Section 1184(g)(3) was never intended to be a mail-intake rule as Plaintiffs suggest, and Congress was silent on the precise manner in which USCIS should handle the hundreds of thousands of petitions it receives every April.[16] Instead of speaking to the precise issue of how to handle each H-1B petition, Congress provided USCIS with a "general outline … and … the authority to develop policy and to fill in the details." *Navajo Nation v. Dep't of*

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[15] *See* O. W. Holmes, Jr., *The Common Law* 5 (M. Howe ed. 1968) ("The life of the law has not been logic; it has been experience."); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979) (paraphrasing Justice Holmes); *United States v. Ray*, 920 F.2d 562, 568 & n.7 (9th Cir. 1990) (same).

[16] Current regulations preclude an LCA or H-1B petition from being filed more than 6-months before the date of intended employment. *See e.g.* 20 C.F.R. § 655.730(b). These protections, based in part on 8 U.S.C. § 1182(n), would be completely undermined if H-1B petitions were filed at least several years before the date the alien is actually authorized to commence his employment.

Health & Human Servs., 285 F.3d 864, 873 (9th Cir. 2002). "An agency thus has freedom to develop policy in implementing the outline, subject only to staying within Congress's grant of authority." *Id.* at 873–74.

Indeed, years of experience have borne out how H-1B petitions will *not* be filed and delivered to USCIS in an orderly or sequential manner. Instead, it is not uncommon for USCIS to receive enough H-1B petitions to meet the statutory cap on the *very first filing day* for the coming fiscal year. This means that postal and other courier companies' trucks full of petitions will be lined up outside of USCIS mail rooms, with nothing but blind luck to determine "the order in which [H-1B] petitions are filed." It is likewise a certainty that each petition's required information regarding the availability of U.S. workers and the prevailing wages for each position of employment within a geographical region will eventually become stale. The supply of U.S. workers and the prevailing wages for a particular job will inevitably change with inflation and the whims of each particular labor market. Moreover, *nothing* in Section 1184(g)(3) addresses what to do with H-1B petitions after a fiscal year's caps have already been reached. Which is why, since the 1990s, the INS and USCIS have consistently refused and returned such petitions after the caps are exhausted—prompting Congress to create exemptions in AC21 for non-profits, universities, or other institutions of higher learning. *See* 8 U.S.C. § 1184(g)(5)(A) & (B).

Simply put, before the caps are exhausted, there is nothing in the statute that clearly suggests that Congress intended for arbitrary luck or those willing to pay for premium mail delivery to be given preferential treatment under Section 1184(g)(3). And for petitions received after the caps are exhausted, there is nothing in the statute (at all) that suggests a waiting list process is required (that is, that Congress intended for petitions with out-of-date information should be given preferential treatment over petitions filed for the next fiscal cycle). These are the

inevitable gaps that Congress left for USCIS to fill. *See Chevron*, 467 U.S. at 843 ("'The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974))). And in the Ninth Circuit, "there is a distinction between … statutory commands and … statutory silence." *Or. Rest. & Lodging*, 816 F.3d at 1088–90 ("conclud[ing] that [the statute]'s clear silence as to employers who do not take a tip credit … left room for the DOL to promulgate the 2011 rule" and was entitled to *Chevron* deference).

B. Applying Chevron*'s "Step Two" to Section 1184(g)(3)*

With regard to *Chevron*'s second step, "[i]f the agency's interpretation is a reasonable one, then it prevails whether or not there is another interpretation consistent—even more consistent—with the statute." *Hawaii v. FEMA*, 294 F.3d 1152 (9th Cir. 2002). For many of the same reasons discussed above, USCIS's promulgation of 8 C.F.R. § 214.2(h)(8)(ii)(B) (regulating the processing of hundreds of thousands of H-1B petitions the agency receives each year) is an eminently reasonable interpretation of a program that must be fair and not provide for preferential treatment. Although the Plaintiffs' interpretation of creating a (seemingly) never-ending waiting list would allow, in Plaintiffs' opinion, for petitions to be adjudicated "in … order," it ignores that the regulation is actually intended to address how USCIS should handle placing the hundreds of thousands of H-1B petitions in order. The lottery process is designed to create a level playing field, where duplicative petitions are disallowed and the arbitrariness of faster mail delivery will not unfairly exclude ordinary petitioning employers.[17] In short, USCIS's

[17] Consider the case where two petitioning employers are standing side-by-side at the same post office when they mail their petitions to USCIS. Nevertheless, the U.S. Postal Service winds

interpretation of the Section 1184(g)(3) "is one reasonable possibility, and therefore is entitled to deference under *Chevron*." *Navajo Nation*, 285 F.3d at 870.

C. Even if Chevron *Does Not Apply, USCIS's Interpretation of Section 1184(g)(3) Would Still Be Entitled to Deference*

Even if this Court were to disagree and hold that *Chevron* deference should not apply, 8 C.F.R. § 214.2(h)(8)(ii)(B) and USCIS's handling of H-1B petitions would still be "entitled to a measure of deference" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In the Ninth Circuit, Courts have applied this standard of review to many different administrative interpretations of agency's authorizing statutes. *See Reno v. Koray*, 515 U.S. 50, 55 n.2 and 61 (1995) (affording *Skidmore* deference to Bureau of Prisons program statement interpreting Congress's use of the phrase "official detention"); *Sacora v. Thomas*, 628 F.3d 1059, 1066 (9th Cir. 2010) (applying *Skidmore* deference in reviewing whether BOP memorandum and program statement were consistent with authorizing statute); *Tablada v. Thomas*, 533 F.3d 800, 806 (9th Cir. 2008) (applying *Skidmore* deference to BOP program statement interpretation of statute where BOP conceded its regulation was invalid); *see also Ruby v. Thomas*, 2011 WL 1549205, at *3 (D. Or., Apr. 21, 2011).

The regulation in question here stems from decades of experience, and should at least be given some deference for the thoroughness and experience that prompted the INS and USCIS to

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up taking those petitions to USCIS such that one is "received" after the other. Simple fairness should dictate that those petitions be treated equally. Plaintiffs' interpretation would eliminate that possibility—creating potential due process and equal protection problems in the process. The canon of constitutional avoidance counsels against such an interpretation. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593–94 (2012) ("The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below.").

create such an approach for rejecting petitions filed with the agency after the caps have been filled and establishing a lottery to select cases in limited instances. Under *Skidmore*, "'[t]he weight [accorded to an administrative] judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (quoting *Skidmore*, 323 U.S. at 140). "*Mead* adds as other relevant factors the 'logic[] and expertness' of an agency decision, the care used in reaching the decision, as well as the formality of the process used." *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1068 (9th Cir. 2003) (en banc) (quoting *Mead*, 533 U.S. at 228, 235), *amended in part by*, 360 F.3d 1374 (9th Cir. 2004).

Analyzed in light of *Skidmore* and *Mead*, USCIS' policies of interpretation regarding what Section 1184(g)(3) should mean and how to handle H-1B petitions in practice are reasonable and sufficiently persuasive. As outlined above, USCIS's interpretations harmonize other controlling statutory provisions within the INA[18] and takes into account policy goals set forth by Congress. They are also consistent with the relevant legislative history as stated in

[18] *See, e.g.*, Section 102 of AC21 ("In the case of any alien on behalf of whom a petition for status under section 101(a)(15)(H)(i)(b) is filed before September 1, 2000, and is subsequently approved, that alien shall be counted toward the numerical ceiling for fiscal year 2000 notwithstanding the date of the approval of the petition."); Section 1184(g)(7) ("Any alien who has already been counted, within the 6 years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once."); and Section 1184(m) ("A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a).").

various committee reports. This is why deference "is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)). This case is no different—Plaintiffs' position risks disrupting a system that handles hundreds of thousands of petitions with foreign nationals' information, and in some instances, permits foreign nationals to remain present in the United States and engage in employment. USCIS, along with the Departments of Labor and State, must all work together to make this system work. Adopting Plaintiffs' interpretation would not just affect what USCIS must do—but would undermine existing DOL and DOS rules, processes, and procedures that have been in place for years as part of the overall process to determine eligibility for H-1B classification and issuance of any associated H-1B visa stamp.

II. USCIS Is Interpreting Section 1184(g)(3) Correctly.

Alternatively, even if this Court were to conclude that no amount of judicial deference is owed to 8 C.F.R. § 214.2(h)(8)(ii)(B), USCIS's approach is still correct under Supreme Court's case law regarding statutory interpretation. Plaintiffs buttress the plain-language argument discussed above by pointing to similar language in the INA discussing immigrant visas, or USCIS processing of I-140 immigrant petitions.[19] Using these as a parallel, if there are no *immigrant* visas left in the category filed, those petitions are put in line by order of the date they were received. And this is how Plaintiffs believe USCIS should handle H-1B *non-immigrant*

[19] *See* 8 U.S.C. § 1153(e).

temporary worker petitions—accept them throughout the year and place those petitions filed after the cap has been met in line for next year's cap.[20] *Contra* 8 C.F.R. § 214.2(h)(8)(ii)(D).

But Plaintiffs' interpretation completely ignores the fundamental purpose of the visa caps for each fiscal year, as well as the purpose of the H-1B classification, which is to fill a temporary and urgent need for specialty occupation workers and to do so in a manner that will not undermine the wages and working conditions of U.S. workers. It also ignores how Congress, for over two and a half decades, has *never* had a problem with USCIS's approach of not receiving any more H-1B petitions once the cap has been reached.[21] Under such circumstances, courts "must turn to the broader structure of the Act," *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015), and to its "object and policy[] to ascertain the intent of Congress." *United States v. Real Prop. Located at 475 Martin Lane, Beverly Hills, Cal.*, 545 F.3d 1134, 1141 (9th Cir. 2008) (quoting *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999)); *see also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). Here, that broader structure was intended not just to provide a process for petitioning employers, but includes the later amendments to the INA designed to support U.S. workers.

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[20] This approach also ignores the INA's distinction between immigrant petitions (who are petitioning for long-term permanent residence) for "green cards" and non-immigrant petitions that are temporary (that is, limited to a finite period of time and purpose.).

[21] *See, e.g.*, former 8 C.F.R. § 214.2(h)(8)(ii)(E) (1998) ("If the total numbers available in a fiscal year are used, new petitions and the accompanying fee shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year."); *see also Fiscal Year 1998 Numerical Limitation Reached for H-1B Nonimmigrants*, 63 Fed. Reg. 25,870 (May 8, 1998) (describing the process for rejecting an returning petitions once a fiscal year's cap has been reached).

A. Congress Has Already Ratified USCIS's Regulation of Rejecting Petitions After a Fiscal Year's H-1B Visa Cap Has Been Reached

Although the core of Plaintiffs' interpretation is based on a limited part of Section 1184(g)(3)'s language—repeatedly emphasizing the phrase "in the order in which [H-1B] petitions are filed" in isolation—"[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983); *see also Albertson's, Inc. v. Comm'r*, 42 F.3d 537, 545–46 (9th Cir. 1994). And this type of reasoning is not anomalous. It is why, for example, a plurality of the Court recently ruled that a fish was not actually a "tangible object" for the purposes of 18 U.S.C. § 1519. *Yates*, 135 S. Ct. at 1086–88. In *Yates*, the Court interpreted a provision of the Sarbanes-Oxley Act that criminalized the destruction or concealment of "any record, document, or tangible object" to obstruct a federal investigation. And despite the fact that a fish is indeed a tangible object, the Court nevertheless ruled that that term was solely meant to include objects used to record or preserve information—not fish. *Id.*

In this case, there is ample legislative history to indicate that Plaintiffs' strict reading is, much like *Yates*, an incorrect interpretation of Section 1184(g)(3). Rather than disagree or change the agency's approach of rejecting and returning petitions received after the caps are reached, Congress implicitly adopted that approach and interpretation when they specifically chose to amend Section 1184(g) in AC21 without changing the language "in the order in which petitions are filed for such visas or status," even though Congress was well-aware that INS had been rejecting petitions after each fiscal year's numerical limitations had been reached under

former 8 C.F.R. § 214.2(h)(8)(ii)(E) (1998).[22] Put another way, instead of using the amendments as an occasion to overrule the agency's regulation, Congress chose to allow the agency's interpretation while tinkering within that very same subsection of the statute—making clear in the process that they knew what would happen with H-1B petitions received after the cap had already been met.

And this exact same pattern of legislating around the agency's approach and interpretation of Section 1184(g)(3) was repeated with the passage of the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231. In that legislation, Congress was forced to change the H-2B system because of the agency's approach, which disadvantaged employers whose needs would be in a later season of the fiscal year. *See* 51 Cong. Rec. S1261-02 (Feb. 10, 2005) (statement of Sen. Mikulski) ("I do want to note one bright stop [sic] in the immigration landscape of this bill. That is the provision that addresses the shortage of H-2B visas for temporary, seasonal workers. The cap for H-2B visas was reached just 3 months into the 2005 fiscal year, in January, which meant that employers in Northern States, such as Wisconsin whose tourism, landscaping, and other seasonal industries get started later in the year, have been unable to hire workers using H-2B visas."). Whereas the system for H-2B visa petitions before 2005 was analogous to the H-1B system challenged in this case, the REAL ID Act changed the H-2B system such that the total number of aliens who enter the United States pursuant to H-2B visas or who are accorded H-2B nonimmigrant status during either the first or last 6 months of a fiscal year is now limited to 33,000 (totaling 66,000 for the entire fiscal year). *See* 8 U.S.C. §§

[22] *See* S. Rep. No. 106-260, at 9 (2000) ("In 2000, INS announced on March 17 that no new applications will be accepted for H-1B visas as it believes it already has received a sufficient number to reach the 115,000 ceiling.").

1184(g)(1)(B); (g)(10). Thus, once the H-2B numerical limitation for the first half of the fiscal year is met, USCIS will only accept H-2B petitions with a start date in the second half of the fiscal year.

This legislative history fundamentally alters the manner in which the statutory text must be read[23] and is fully in line with the "rule of statutory construction that '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' or when it 'adopts a new law incorporating sections of a prior law.'" *United States v. Winkles*, 795 F.3d 1134, 1140 (9th Cir. 2015) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978)). As Justice Scalia and Professor Garner's treatise on statutory interpretation explains, "[i]f a word or phrase has been ... given a uniform interpretation ..., a later version of that act perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012). This is known as the "prior-construction canon," and applies "even to well-established agency interpretations…. [W]henever the … administrative interpretation antedates the enactment[.]" *Id.* at 324 (citing *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986); *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974)).

Indeed, past Supreme Court decisions were unanimous on interpreting congressional ratification of decades of consistent administrative interpretation:

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[23] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2519–20 (2015) ("When it amended the F[air]H[ousing]A[ct], Congress was aware of th[ese prior statutory interpretations]. And with that understanding, it made a considered judgment to retain the relevant statutory text…. Against this background understanding in the legal and regulatory system, Congress' decision in 1988 to amend the FHA while still adhering to the operative language in [sections] 804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the [interpretations] finding disparate-impact liability.").

> Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, *especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.* Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press[.]

Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380–82 (1969) (citations omitted) (emphasis added) (upholding the FCC's now-defunct, but still controversial, "fairness doctrine"). Section 1184(g)(3) bears out a very similar legislative history—all of which indicates that Congress specifically ratified USCIS's approach of *not* creating a perpetual waitlist as Plaintiffs' now demand.

B. Congress Has Acquiesced To USCIS's Lottery Regulation

Since its inception in early May 2005, USCIS's lottery H-1B lottery has been extremely controversial. *See, e.g.*, *Rubman v. USCIS*, 800 F.3d 381, 384–85 (7th Cir. 2015) (a Freedom of Information Act case explaining how the H-1B program has been controversial). Yet in spite of this widespread attention and controversy, as well as the multiple bills that have been proposed for reforming the H-1B program discussed above, Congress has never once chosen to alter or change USCIS's H-1B lottery system. The Court's decision in *Bob Jones University v. United States* is instructive under such circumstances of congressional acquiescence. 461 U.S. 574 (1983).

In *Bob Jones*, the Court examined an Internal Revenue Service ("IRS") revenue ruling denying tax-exempt status to educational institutions with racially discriminatory policies. Prior to the IRS's change of policy, "Bob Jones University had long enjoyed tax-exempt status because it always operated exclusively for educational purposes." William N. Eskridge, Jr., et al., *Legislation and Statutory Interpretation* 300 (2d ed. 2006). Nevertheless, the Court upheld the IRS's regulation and pointed to congressional inaction on a number of bills introduced to overturn the IRS ruling as evidencing Congress's "prolonged and acute awareness of so important an issue." *Bob Jones*, 461 U.S. at 601. As Professor Eskridge explains, "Congress had granted the IRS rulemaking authority to elaborate on the requirements of the Internal Revenue Code" and "deferred to the agency's approach" because Congress "declined to report even one of the thirteen bills introduced to override the IRS's position" out of committee. Eskridge, *Legislation and Statutory Interpretation* at 302. In short, a history of congressional awareness and silence on a controversial regulatory interpretation will often sway courts faced with such statutory ambiguity. *See United States v. Rutherford*, 442 U.S. 544 (1979) (finding acquiescence, and pointing to congressional hearings as evidencing congressional awareness of a Food and Drug Administration policy); *Menominee Tribal Enters. v. Solis*, 601 F. 3d 669, 672 (7th Cir. 2010) (Posner, J.) (noting how, "[o]ccasionally … a court will treat a failure to disapprove a submitted regulation as … evidence of congressional approval of the regulation"); *cf. also Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 514 (2d Cir. 1973) (Friendly, J.).

Much like *Bob Jones*, this case involves a controversial regulation that has both widespread congressional awareness and a long history of congressional inaction. Indeed, Congress has consistently rejected bills designed to eliminate the lottery system. This was, of

course, most notable with congressional inaction on the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 (S. 744) and the Immigration Innovation Act of 2013 (S. 169), but similar efforts to do away with the lottery have continuously been considered and (just like *Bob Jones*) failed to make their way out of committee. *See, e.g.*, H-1B and L-1 Visa Reform Act of 2015 (S. 2266); American Jobs First Act of 2015 (S. 2394); Protecting American Jobs Act (S. 2365); Immigration Innovation Act of 2015 (S. 153). Consequently, Congress's "nonaction here is significant" and is "evidence of Congressional approval" for USCIS's approach. *Bob Jones*, 461 U.S. at 600, 601. Simply put, *Bob Jones* is on all fours with this case and should control.

C. Section 1184(g)(3) is Substantively Different From Section 1153(e)

As previously discussed, Plaintiffs argue that the H-1B program must be administered like the immigrant visa program because the relevant language for both programs is similar. Nevertheless, this argument fails to mention how Section 1153(e)(3) states that "[w]aiting lists of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State." There is no parallel language about waiting lists in Section 1184(g)(3). The conspicuous omission of "waiting lists" in Section 1184(g)(3) is instructive. As this Court has previously noted, "[u]nder the doctrine of *expressio unius est exclusio alterius*, the absence of [a] term" such as "waiting lists" "is telling." *Higley v. Flagstar Bank, FSB*, 910 F. Supp. 2d 1249, 1259 (D. Or. 2012) (Simon, J.). That doctrine "as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions." *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991). In this case, Congress was well aware of the concept of a "waiting list" for certain visas or a change in status, but has *never* inserted any such language

into Section 1184(g)(3). "Accordingly, a court may presume that the omission is intentional." *Higley*, 910 F. Supp. 2d at 1261. Rather than adopt the statute that Plaintiffs would like this Court to create, Congress' omission reflects an intent that waiting lists are not mandatory for the H-1B program, but are left to the USCIS's discretion.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that this Court should grant their motion for summary judgment.

Respectfully submitted this 21st day of October 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 10,101 words, including headings, footnotes, and quotations, but excluding the caption, signature block, and any certificates of counsel.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2016, I electronically filed the foregoing DEFENDANTS' MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court for the District of Oregon by using the CM/ECF system, in accordance with Local Rule 5-1. Notice of this filing will be sent out to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

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