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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' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Oral Argument Requested

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Despite Plaintiffs' many arguments that the history of 8 U.S.C. § 1184(g)(3) is clear, or their repeated characterization of a statute for *immigrant* (as opposed to temporary, nonimmigrant) visas as "nearly identical," nothing will change the fact that this case centers on what Section 1184(g)(3) does or does not say.[1] According to Plaintiffs, "[t]he central issue in this case … is whether the agency can distribute limited visa numbers in a manner other than in accordance with petition filing date, on a random computer[-]generated basis." Pls.' Resp. to Defs.' Mot. for Sum. J. (hereinafter, "Plaintiffs' Response" or "Pls.' Resp.") (ECF No. 33) at 2. But framing the case in that manner misleads the Court by masking how Plaintiffs are challenging *two* regulations: (1) what United States Citizenship and Immigration Services ("USCIS") must do with H-1B petitions when it has determined that the statutorily mandated H-1B visa caps for each fiscal year have been exhausted[2] and (2) how USCIS must process hundreds of thousands of H-1B petitions received all at once.

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[1] 8 U.S.C. § 1184(g)(3) reads, in its entirety, as follows:

> Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status. If an alien who was issued a visa or otherwise provided nonimmigrant status and counted against the numerical limitations of paragraph (1) is found to have been issued such visa or otherwise provided such status by fraud or willfully misrepresenting a material fact and such visa or nonimmigrant status is revoked, then one number shall be restored to the total number of aliens who may be issued visas or otherwise provided such status under the numerical limitations of paragraph (1) in the fiscal year in which the petition is revoked, regardless of the fiscal year in which the petition was approved.

[2] *See* 8 C.F.R. § 214.2(h)(8)(ii)(D) (nonimmigrant visa petitions received after a fiscal year's visa cap have already 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").

Plaintiffs contend that Section 1184(g)(3)'s plain language, as well as the history of the Immigration and Nationality Act of 1952 ("INA") and the Immigration Act of 1990 ("IMMACT"), straightforwardly disallow USCIS's random-selection process ("lottery") for fairly sorting through the hundreds of thousands of petitions that USCIS often receives within the first five available business days to select which 65,000 H-1B petitions will be processed for each coming fiscal year. *See* 8 C.F.R. § 214.2(h)(8)(ii)(B) (hereinafter, "H-1B lottery system"). Moreover, Plaintiffs argue that Section 1184(g)(3)'s language requires USCIS to accept *all* filings regardless of whether a fiscal year's visa cap has already been exhausted. But these assertions are counter to the doctrines of judicial deference mandated by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Ninth Circuit's related jurisprudence, *see, e.g.*, *Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016), *reh'g en banc denied*, — F.3d —, 2016 WL 4608148 (9th Cir. Sept. 6, 2016), or even the lower level of deference articulated by the Court in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Here, Section 1184(g)(3) is completely silent regarding "the precise question[s]," *Chevron*, 467 U.S. at 842, of (1) mandating a "waiting list" for H-1B petitions when visa caps for a fiscal year are exhausted and (2) how USCIS must process hundreds of thousands of H-1B petitions received on the first potential day for the agency to receive them. USCIS's interpretations on these "precise question[s]," *id.*, prevent the absurdity of having a years-long waiting list for temporary, nonimmigrant workers, as well as the harsh results of applying a strict "mail-intake" rule to simultaneously (or nearly at the same time) received petitions. They are, therefore, perfectly reasonable under either a *Chevron* or *Skidmore* approach and are, in fact, valid statutory interpretations under either the prior-construction or legislative-acquiescence

canons. The Court should therefore deny Plaintiffs' claims in their entirety, acknowledge the validity of both 8 C.F.R. §§ 214.2(h)(8)(ii)(B) and (D), affirm the non-receipt of Plaintiffs' H-1B petitions, and grant summary judgment in favor of Defendants.

I. *Chevron*'s Step One.

In their thirteen-page explanation of how Section 1184(g)(3)'s language is unambiguous, Plaintiffs address (1) the history of the INA prior to enactment of the statutory visa caps or, indeed, Section 1184(g)(3)'s conception; (2) how, despite Section 1184(g)(3)'s silence regarding any sort of waiting list for temporary nonimmigrant visa petitions, the subsection actually commands the same interpretation as a statute with an explicit waiting list meant for immigrants who intend to migrate to and permanently live within the United States; (3) how the H-1B lottery system for temporary nonimmigrant specialty occupation workers must be administered in the same manner as U-visas for victims of crimes (and their immediate family members), where USCIS (in its discretion) has chosen to use a waiting list; and (4) how Section 1184(g)(3) was actually designed to be a mail-intake rule requiring USCIS to treat simultaneously received H-1B petitions unequally. Regardless of Plaintiffs' laundry list of policy disagreements, however, there is nothing in Plaintiffs' arguments to suggest that through Section 1184(g)(3) "Congress has directly spoken to the precise question[s] at issue" regarding either a waiting list or simultaneous submissions of visa petitions. *Chevron*, 467 U.S. at 842.

A. Plaintiffs' Citation to Legislative History Does Not Support Their Waiting-List Approach

In their discussion regarding the IMMACT's legislative history, Plaintiffs again conflate nonimmigrants (*temporary* alien workers) with immigrants (*permanent* alien workers),

specifically citing to the INA's 1952 language of how immigrant visas were to be processed. Pls.' Resp. at 2. Plaintiffs have repeatedly used the word "identical" regarding this subsection (the present 8 U.S.C. § 1153(b)) while ignoring how a system designed for immigrant visa petitions reasonably might vary a great deal from a system designed for nonimmigrant visa petitions. To avoid acknowledging this mismatch, Plaintiffs use the IMMACT's Conference Report[3] as the proverbial "case cracker"[4] to suggest that despite the absence of any congressional language mandating the creation of a waiting list for H-1B visa petitions, Congress was "keenly aware of the exact mechanics … for immigrant admissions" and thus, actually "intended the continuous monitoring of admissions to occur through a wait list" for nonimmigrant temporary workers such as H-1B visa recipients. Pls.' Resp. at 2–5. But this suggestion for "continuous monitoring" does not and need not compel USCIS to maintain a waiting list.

Indeed, Plaintiffs' interpretation of the Conference Report ignores how the Conferees' suggestion is already included within the *current* version of Section 1184(g)(3). IMMACT was amended in 2000 with language to specifically accomplish the "monitoring" that was originally envisioned—making sure that the statutory cap was not to be exceeded while simultaneously being fair for petitioners who may have been shut out of a scarce slot through fraud.[5] Plaintiffs'

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[3] H.R. Rep. No. 101-955, at 125–26 (1990) (Conf. Rep.).

[4] *See My Cousin Vinny* (20th Century Fox 1992).

[5] *See* Section 1184(g)(3) ("If an alien who was issued a visa or otherwise provided nonimmigrant status and counted against the numerical limitations of paragraph (1) is found to have been issued such visa or otherwise provided such status by fraud or willfully misrepresenting a material fact and such visa or nonimmigrant status is revoked, then one number shall be restored to the total number of aliens who may be issued visas or otherwise provided such status under the numerical limitations of paragraph (1) in the fiscal year in which the petition is revoked, regardless of the fiscal year in which the petition was approved.").

Response conveniently omits this aspect of Section 1184(g)(3)'s *actual* legislative history, choosing instead to argue that the "overall statutory scheme" is incompatible not with 8 C.F.R. § 214.2(h)(8)(ii)(D) (automatically rejecting petitions after the cap has been reached), but with the separate issue of 8 C.F.R. § 214.2(h)(8)(ii)(B) (setting up the H-1B lottery system) and the logistical problem of overwhelming demand with simultaneous submissions of H-1B petitions. When reviewing Congress' amendment to Section 1184(g)(3), however, it is apparent that even this statutory change did not mandate the years-long waiting list that would immediately ensue if the Plaintiffs' proposed interpretation were implemented.[6]

B. Plaintiffs' Policy Arguments for a Waiting List and No Lottery Do Not Comport with Chevron *and Its Progeny*

Similarly, none of Plaintiffs' cited legislative history or arguments against the H-1B lottery system resolves the statutory silence of Section 1184(g)(3) regarding either whether a waiting list explicitly required by Congress or what to do to fairly process an overwhelming number of visa petitions received simultaneously. As explained in both Defendants' Motion to Dismiss (ECF No. 32), at 17, and Defendants' Response to Plaintiffs' Motion to Dismiss (ECF No. 34), at 5–7, the Ninth Circuit's decisions in *Perez* and *S.J. Amoroso Construction Co. v. United States* control the *Chevron* "step one" analysis: "Without language in the statute so precluding [the agency's challenged interpretation], it must be said that Congress has not spoken to the issue." 981 F.2d 1073, 1075 (9th Cir. 1992). Although "plaintiffs urge the Court not to find the whole statutory scheme ambiguous" in their argument against the H-1B lottery system, Pls.

[6] In fact, if Congress believed it had accomplished such a change through this amendment in 2000, then the congressional changes to the H-2B program accomplished by the REAL ID Act of 2005 would be completely inexplicable. *See infra*, at p. 15.

Resp. at 5, they admit that there is an "absence of a specific wait[-]list provision in [Section] 1184(g)." Pls. Resp. at 5. It is equally true that congressional silence on the precise manner in which USCIS should handle the petitions it receives every April for each coming fiscal year[7] (which, in high demand years such as 2016, can number in the hundreds of thousands) should not prohibit the agency from promulgating reasonable regulations of how to fairly administer the H-1B program.

Indeed, it is a bedrock principle of administrative law that under *Chevron*'s first step, the issue is not whether Congress legislated in the general area or around its periphery, but whether the relevant INA provision is "precisely directed to the question." *Chevron*, 467 U.S. at 843; *accord Mayo Found. For Med. Educ. & Res. v. United States*, 562 U.S. 44, 52 (2011) ("We begin our analysis with the first step of the two-part framework announced in *Chevron* and ask whether Congress has 'directly addressed the precise question at issue.'" (internal citation omitted)).[8] If not, it is for agencies such as USCIS "to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. ("Brand X ")*, 545 U.S. 967, 980 (2005). In this case, and as this district court has previously explained:

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[7] *See, e.g.*, 8 U.S.C. § 1182(n); 20 C.F.R. § 655.730(b).

[8] This is what the Supreme Court meant in *Chevron* when it spoke of "the precise question at issue." 467 U.S. at 842; *see also id.* at 865–66 ("In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases.… [I]t is entirely appropriate for th[e Executive] branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

> When Congress includes specific language in one section of a statute but omits it in another section of the same statute, the court presumes that Congress acted intentionally in the exclusion. *Russello v. United States*, 464 U.S. 16, 23 (1983). Some courts have altered this presumption as it applies to cases applying the *Chevron* analysis. *There, the courts presumed that Congress intended to leave the agencies discretion to fill gaps*.

Co v. USCIS, 2010 WL 1742538, at *4 (D. Or. Apr. 23, 2010) (emphasis added) (internal citations omitted).

There is simply nothing in Section 1184(g)(3) about a waiting list or to prevent USCIS from administering a fair processing system to receive H-1B petitions. And where, as here, there is a statutory gap on that precise question, it is not for Plaintiffs to provide the Court with a more "perfect" statutory interpretation. *See Chevron*, 467 U.S. at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."). It is similarly not for the Court to substitute what it or Plaintiffs believe to be a reasonable statutory interpretation (even if arguably better in the Court's view), so long as USCIS's interpretation is not contrary to the statute, arbitrary, or capricious. USCIS must administer Section 1184(g)(3) in a fair and constitutional manner while continuing to balance the different statutory concerns found within other provisions of the INA. The agency does not administer a "game of chance," but a system that was set up to have fairness in how they process hundreds of thousands of visa petitions for a temporary duration. Conflating permanent, immigrant visa petitions with temporary, nonimmigrant petitions does nothing to address the "everyday realities" that *Chevron* spoke to.

C. Plaintiffs' Contention that Section 1184(g)(3) Legislates USCIS's Mailroom is Baseless

Continuing with their non-justiciable policy disagreements with the manner that USCIS has chosen to administer Section 1184(g)(3) for the hundreds of thousands of H-1B petitions regularly filed in early April, Plaintiffs lament USCIS's requirements for certified labor data prior to each petition's submission. *See* Pls.' Resp. at 6–8. And, of course, Plaintiffs once again incorrectly characterize the visa-bulletin system for permanent immigrant visas, developed pursuant to an explicit waiting list required under its relevant statute (8 U.S.C. § 1153(e)), as "mirror[ing]" Section 1184(g)(3) for temporary nonimmigrant workers, which of course never mentions a waiting list. *See id*. at 9, 11–13. The bottom line is that these complaints are simply further policy disagreements—the kind that *Chevron* specifically warned against. As the Ninth Circuit recently put it: "Even if we believe the agency's construction is not the *best* construction, it is entitled to 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *Perez*, 816 F.3d at 1086 (quoting *Chevron*, 467 U.S. at 844); *see also Brand X*, 545 U.S. at 980 ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

First, USCIS may reasonably require that the hundreds of thousands of petitions they receive have up-to-date, certified labor information, as required by 8 U.S.C. § 1101(a)(15)(H)(i)(b). There is simply nothing in the statute that commands USCIS do otherwise. Even if the Court were to conclude that the statute is silent on this issue, Ninth Circuit

case law allows for agencies to make appropriate regulations to fill that gap. *See Perez*, 816 F.3d at 1088 (holding that a statutory sub-section's silence authorized the Department of Labor ("DOL") to promulgate regulations interpreting and administering that section). In fact, USCIS's approach to requiring such certified information when each H-1B petition is filed is appropriate given that the IMMACT was amended multiple times to provide *more* protections for U.S. workers. *See, e.g.*, American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, Div. C., Title IV, §§ 411–415 (Oct. 21, 1998); *cf. also Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1290–92 (N.D. Fla. 2016) (ruling that it was reasonable for DHS to require a labor certification showing no adverse effect to U.S. workers as a precondition to filing an H-2B petition).

Contrary to Plaintiffs' position, not only does 8 U.S.C. § 1101(a)(15)(H)(i)(b) plainly require a certified Labor Condition Application ("LCA") at the time a petition is filed with USCIS, but various provisions in 8 U.S.C. § 1182(n) (designed to protect U.S. workers), including 8 U.S.C. §§ 1182(n)(1)(E)(i) and (n)(2)(C)(iii) (requiring petitioning employers to attest that they have not, and will not, displace U.S. workers within a 90 day period beginning 90 days before and ending 90 days after the date of filing *of any visa petition supported by* the LCA) do so, as well. To read the statutory scheme otherwise would overlook these protections for U.S. workers, and only force the already strained government agencies (here, both DOL and USCIS) to process more paperwork between the petitioning employers and those two agencies, making

the process even more grueling and take longer for jobs that are, by definition, temporary and for a limited duration.[9]

Second, contrary to Plaintiffs' emphasis on filing days, Congress' use of the words "in the order in which petitions are filed" simply does not mean that the 101st Congress ever envisioned regulating the Immigration and Naturalization Services' ("INS") or USCIS's mailroom. *See* Pls.' Resp. at 8, 10–12 ("Congress did intend an orderly 'mail intake' process."). It is understandable that Plaintiffs would be frustrated by a system with a scarce number of visas and where the demand for that scarcity is overwhelming. USCIS, however, is not responsible for this overwhelming demand—they must regulate and administer the statutory framework that Congress delegated to them. When the demand for H-1B visas began regularly exceeding the 65,000 fiscal-year cap, the INS reasonably decided that they would stop accepting petitions that were received after that year's cap had already been reached.[10] And when this demand became so

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[9] Plaintiffs attempt to minimize the details that must be included in each LCA for an H-1B temporary work visa under 8 U.S.C. § 1101(a)(15)(H)(i)(b). *See* Pls.' Resp. at 6–8. Crucially, however, a petitioning employer seeking to employ an H-1B nonimmigrant must state that it will pay the H-1B nonimmigrant the required wage rate under the regulations, which is defined as "the greater of the actual wage rate ... or the prevailing wage." 20 C.F.R. § 655.731(a). The actual wage is the rate paid by that employer to all other individuals with similar experience and qualifications for the particular position. 20 C.F.R. § 655.731(a)(1). The prevailing wage rate is determined by one of three sources: an Office of Foreign Labor Certification National Processing Center determination, an independent authoritative source, or "[a]nother legitimate source of wage information." 20 C.F.R. § 655.731(a)(2)(ii). Both will vary over time and if Plaintiffs' interpretation were adopted, might require regular updating and back-and-forth between hundreds of thousands of petitioners, the DOL, and USCIS.

[10] *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 and returning petitions once a fiscal year's cap has been reached).

overwhelming that the cap would be reached on the very first available filing day, USCIS reasonably decided that it should establish a more fair system of processing the simultaneously received petitions. *See* 73 Fed. Reg. 15389 (Mar 19, 2008).[11] Plaintiffs claim that this system is unfair because it is "blind luck," but fail to recognize the unfairness that could result from their own proposed (and judicially-imposed) policy reforms. Pls. Resp. at 11. For example, Plaintiffs ignore that the petitions are received by USCIS at two separate processing centers, one in Vermont and one in California. Plaintiffs also ignore that the petitions received by USCIS's mail rooms may not always be packaged separately from one another. That is, some petitioning employers bundle several petitions together in the same, single "package" to USCIS's mailroom. Plaintiffs' simplistic interpretation of "in the order in which petitions are filed" is completely silent regarding the (un)fairness in treating those same petitions differently from one another, or the "next" package of petitions—which may be from a smaller business petitioning for only one visa—and which may have arrived on the same delivery truck, but, for various reasons have been unloaded and opened after the other packages.

Aside from the waiting list issue addressed above, Plaintiffs' entire response says virtually nothing regarding Congress' silence on the two specific issues Plaintiffs complain about (the waiting list and the H-1B lottery system for simultaneously received petitions). Consequently, it is not terribly surprising that Plaintiffs' argument boils down to picking and choosing which aspects of other visa programs they would prefer (such as the waiting list approaches used for backlogged immigrant visa categories). But these proposals are not for a

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

court to force upon the agency. *See, e.g.*, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Defense Council*, 435 U.S. 519, 549 (1978) (noting how a reviewing court may not "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good"). If Congress desires that an H-1B waiting list be maintained, it can and will specifically require such expressly in the statute. The lack of such express language in the H-1B context means that, while it has the authority to maintain a wait list, USCIS is not required to do so. *See Perez*, 816 F.3d at 1088–89.

II. *Chevron*'s Step Two and *Skidmore* Deference.

Plaintiffs then turn their attention to *Chevron*'s second step: where courts must determine if the agency's interpretation is reasonable. *See Chevron*, 467 U.S. at 843–44. As the Ninth Circuit has explained, "[t]his is a generous standard, requiring deference 'even if the agency's reading differs from what the court believes is the best statutory interpretation.'" *Perez*, 816 F.3d at 1089 (quoting *Brand X*, 545 U.S. at 980). Plaintiffs' arguments that USCIS' regulations are entitled to no deference whatsoever completely ignore "this … generous standard." *Id.*

Despite Plaintiffs' past representations at oral argument and in their past briefing that they are not "alleg[ing] a 'mere procedural violation'" of the APA or a "policy-based facial challenge," Pls.' Resp. in Opposition to Defs. Mot. to Dismiss at 11 (ECF No. 15), it appears as if they make those exact arguments when challenging the validity of the H-1B lottery system and the notice and comment rulemaking they now claim was sub-standard. Pls.' Resp. at 14. In the face of Defendants' statute of limitations arguments many months ago, Plaintiffs specifically stated that this was a case about the adverse application of the challenged rules to the Plaintiffs. *See* Pls.' Resp. in Opposition to Defs. Mot. to Dismiss at 11. Thus, "under the *Wind River*

[*Mining Corp. v. United States*, 946 F.2d 719 (9th Cir. 1991)] rule the [G]overnment is not permitted to avoid [P]laintiffs' challenge to the [H-1B] lottery merely because the regulation itself was issued before the adverse application of the regulation was applied to [P]laintiffs' cases." *Id.* Plaintiffs prevailed on their opposition to Defendants' statute of limitations arguments in their Motion to Dismiss based on these representations. Consequently, they are judicially estopped from making arguments to the exact opposite effect now. *See, e.g.*, *Davis v. Wakelee*, 156 U.S. 680, 689 (1895) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477, at 553 (2d ed. 2002) ("[A] party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.").

In the Ninth Circuit, district courts may "invoke[]judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and loose with the courts.'" *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)). In denying Defendants' statute of limitations arguments, this Court accepted Plaintiffs' representations that it was not making any procedural challenge to 8 C.F.R. § 214.2(h)(8)(ii)(B) beginning in 2008 and "Defendants conceded their statute of limitations motion, recognizing that Plaintiffs are alleging a substantive challenge to" that rule.

Tenrec, Inc. v. USCIS, 2016 WL 5346095, at *12 (D. Or. Sept. 22, 2016). Yet Plaintiffs now argue against the procedural validity of that very same rule: "That was over eight (8) years ago, and there is no sign of a final rule setting out the public comments from the 2005 and 2008 request for comment…. The interim rule …. [S]hould not be provided full *Chevron* deference in the first place." Pls.' Resp. at 15. These are clearly inconsistent positions that Plaintiffs should not be allowed to now benefit from.

Finally, regardless of whether Plaintiffs' arguments regarding the procedural validity of the H-1B lottery system are estopped, both 8 C.F.R. §§ 214.2(h)(8)(ii)(B) and (D) are entirely reasonable. This is because they perfectly straightforward approaches to the problems of (1) dealing with excessive petitions within a fiscal year once the cap has been exhausted and (2) establishing a reasonably fair system to process petitions that are received and exceed that same cap within the same, narrow window of time. Plaintiffs may have many different ideas of what systems may be more fair, but even if "there is absolutely no indication … that Congress intended the agency to subject H-1B petitions to such a selection process," Pls.' Resp. at 16, that is not what matters under *Chevron*'s second step. *See Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1169 (9th Cir. 1997) ("When relevant statutes are silent on the salient question, we assume that Congress has implicitly left a void for an agency to fill. We must therefore defer to the agency's construction of its governing statutes, *unless that construction is unreasonable*." (emphasis added)). Indeed, legacy INS and USCIS' lengthy and thorough experience in administering and processing H-1B petitions is what led them, over time, to both reject Plaintiffs' never-ending waiting list approach, and establish the H-1B lottery system once faced with an overwhelming number of petitions filed on the very first available day.

III. Prior Construction and Legislative Acquiescence

Plaintiffs' arguments regarding Congress' implicit ratifications and acquiescence to both the lack of any waiting list, as well as the H-1B lottery system, are meritless. Nothing will change the fact that both issues (in one form or another) have existed for over a decade. Indeed, Congress specifically legislated around 8 C.F.R. §§ 214.2(h)(8)(ii)(D) in their changes to the H-2B program. *See* REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231; *see also* 51 Cong. Rec. S1261-02 (Feb. 10, 2005) (statement of Sen. Mikulski). And despite objections that arose around the H-1B lottery system, none of the many amendments Congress has made to the INA has done anything to change USCIS's approach. The simple fact is that there have been numerous attempts to change the H-1B system for well over a decade, and none of the proposals to alter that program has proven successful. "That sequence [of inaction] suggests that Congress implicitly ratified" the H-1B lottery system that Plaintiffs now challenge. *Tualatin Valley Builders Supply, Inc. v. United States*, 522 F.3d 937, 942 (9th Cir. 2008) (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 599–602 (1983)); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) (stating that courts may consider whether Congress was aware of agency's interpretation and refrained from acting to revise or repeal it).

CONCLUSION

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

Respectfully submitted this 2nd day of December 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 4,755 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 December 2, 2016, I electronically filed the foregoing DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO 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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