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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' SUPPLEMENTAL BRIEF

QUESTION PRESENTED

To what extent should courts accord deference under *Chevron U.S.A., Inc.* ***v.*** *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to "interim final" (rather than "final") agency rules and regulations?

SHORT ANSWER

Chevron deference is frequently accorded to less-than-final regulations. The question of *Chevron*'s "step-zero" hinges on whether an agency has been delegated authority via statute in a particular area of law, and whether the agency's ruling, regulation, or action was in furtherance of that statutory authority. Similarly, the question of whether a ruling or regulation is the "stuff" of *Chevron*-level deference does not depend on the formality involved in the agency's actions, but on whether that ruling or regulation was intended to bind both the agency and third parties, and whether such action was undertaken with a lawmaking pretense. *See, e.g.*, *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009); *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007).

ARGUMENT

Usually, where an agency is interpreting a statute that Congress has authorized it to administer, a district court's review should follow the familiar *Chevron* two-step analysis. *See, e.g.*, *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1169 (9th Cir. 1997). Under that familiar framework, if legislation is clear and speaks directly to a question at issue, then that is the end of the matter. *Chevron*, 467 U.S. at 842–43. "If, however, 'the statute is silent or ambiguous with respect to the specific issue,' [courts] proceed to step two and ask if the agency's action is 'based on a permissible construction of the statute.'" *Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1086 (9th Cir. 2016) (quoting *Chevron*, 467 U.S. at 843).

If so, the court must defer to it. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* ("*Brand X*"), 545 U.S. 967, 980 (2005). But as the Ninth Circuit has explained, "[t]he *Chevron* framework can apply only if two initial conditions are met: (1) Congress has delegated the power to that agency to pronounce rules that carry the force of law and (2) the interpretation for which deference is sought was rendered pursuant to that authority." *Tibble v. Edison Int'l*, 711 F.3d 1061, 1071 (9th Cir. 2013); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).[1] In this case, there is no question whatsoever that 8 C.F.R. § 214.2(h)(8)(ii)(D),[2] as a final rule that was originally promulgated by the former Immigration and Naturalization Service ("INS"), should survive the "step zero" analysis. *See, e.g.*, *Perez*, 816 F.3d at 1086 n.3 (9th Cir. 2016) (concluding that the Department of Labor's 2011 final rule regarding tip pooling, 29 C.F.R. § 531.52 (2011), "[wa]s sufficient to satisfy the *Chevron* step zero inquiry" (citing *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013))). The question presented asks whether the same can be said for 8 C.F.R. § 214.2(h)(8)(ii)(B) (establishing the H-1B lottery system).

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[1] *See also Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1217 (9th Cir. 2015) (re-characterizing *Chevron* as involving a "three-step inquiry [for] reviewing an agency's interpretation of a statute that it is entrusted to administer"). Legal scholars were the first to coin the colloquial references to "*Chevron* Step Zero"—seeing it as a threshold question of whether *Chevron* deference even applies at all. *See generally* Cass R. Sunstein, "*Chevron* Step Zero," 92 Va. L. Rev. 187 (2006); Thomas W. Merrill & Kristin E. Hickman, "*Chevron*'s Domain," 89 Geo. LJ. 833, 836 (2001).

[2] This final rule was originally promulgated in 1991, and explains that cap-subject temporary worker visa petitions filed *after* a fiscal year's cap has 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." 8 C.F.R. § 214.2(h)(8)(ii)(D) (prior to the H-1B Visa Reform Act of 2004, this regulation was 8 C.F.R. § 214.2(h)(8)(ii)(E)).

I. The Interim-Final Rule Establishing The H-1B Lottery System Satisfies "*Chevron* Step Zero."

Under the Ninth Circuit's "*Chevron* step zero" framework, a court may proceed to the normal *Chevron* "two-step" inquiry if (1) Congress has delegated the power to that agency to pronounce rules that carry the force of law and (2) the interpretation for which deference is being sought was rendered pursuant to that authority. *See Tibble*, 711 F.3d at 1071; *Mead*, 533 U.S. at 226–27. But there is no genuine debate about either of these issues here. This is because the Department of Homeland Security ("DHS") has been delegated substantial authority to issue immigration rules that carry the force of law. [3]

Indeed, Congress' delegation to DHS includes broad powers to enforce the INA, as well as direct authority to issue rules governing nonimmigrants (the relevant category of aliens in Plaintiffs' Second Amended Complaint). *See* 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens[.]"); *id.* § 1103(a)(3) ("[The Secretary of Homeland Security] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the INA]."); *id.* § 1184(a)(1) ("The admission to the United States of any alien as a nonimmigrant shall be for

[3] Section 1517 of the Homeland Security Act of 2002 makes clear that DHS has authority to implement and interpret the Immigration and Nationality Act ("INA") in these contexts. *See* 6 U.S.C. § 557 (2012) (noting that any reference to the Attorney General in a provision of the INA describing functions of the Attorney General were transferred 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 H-1B visa

such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, ... such alien will depart from the United States."). DHS's launch of the H-1B lottery system through 8 C.F.R. § 214.2(h)(8)(ii)(B) was done as an exercise of this delegated authority. As a practical matter, the agency must be able to establish its own internal "fil[ing]" system to process visa petitions for the purposes of 8 U.S.C. § 1184(g)(3) ("Section 1184(g)(3)"). Creating its own filing system for the volume of petitions it is tasked with digesting falls squarely within the ambit of §§ 1103(a)(3) and 1184(a)(1). And 8 C.F.R. § 214.2(h)(8)(ii)(B) invokes these statutes in listing its sources of authority. *See* 73 Fed. Reg. 15,388, 15,394 (Mar. 24, 2008); *cf. also Tibble*, 711 F.3d at 1071 (asking whether the agency action in question was "rendered pursuant to [its delegated] authority").

II. *Chevron* Deference Applies To More Than Just Final Rules.

As discussed at oral argument, 8 C.F.R. § 214.2(h)(8)(ii)(B) was published in the *Federal Register*, with DHS providing the public with a post-publication comment period. *See* 73 Fed. Reg. at 15,389. And as also mentioned at oral argument, other courts have given *Chevron* deference to similar interim-final rules. *See, e.g.*, *Kempthorne*, 492 F.3d at 467 ("Although publication in the [*Federal Register*] is not in itself sufficient to constitute an agency's intent that its pronouncement have the force of law, where, as here, that publication reflects a deliberating agency's self-binding choice, as well as a declaration of policy, it is further evidence of a

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petitions to DHS and its sub-components. *See* 6 U.S.C. § 271(b)(1).

Chevron-worthy interpretation." (citation omitted)). Nevertheless, Plaintiffs now argue that no *Chevron* deference is due to 8 C.F.R. § 214.2(h)(8)(ii)(B) because, as an interim final rule, DHS has not yet responded to any public comments or made revisions before publishing 8 C.F.R. § 214.2(h)(8)(ii)(B) as a final rule in the *Federal Register*. But to arrive at that conclusion, the Plaintiffs have misunderstood (or overlooked) past Supreme Court's decisions.

The core argument on this issue is ultimately rooted in *Christensen v. Harris County*, 529 U.S. 576, 586 (2000), where the Court held that an agency opinion letter was due no *Chevron* deference because it did not constitute the official exercise of delegated authority to enforce the Federal Labor Standards Act ("FLSA") against a particular employer. In that case, employees had sued their employer for alleged violations of the FLSA and sought to rely on the opinion letter to the employer from the Acting Administrator of the Wage and Hour Division of the Labor Department that stated that in the absence of an agreement with the employees, employers could not require employees to use compensatory time. The Court observed:

> [W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.

Id. at 587.

In retrospect, *Christensen* was an easy case—an opinion letter is simply not the same thing as a full-fledged, finalized regulation. But neither the Supreme Court nor the Ninth Circuit have read *Christensen* as limiting *Chevron* deference to *only* finalized rulemakings or formal adjudications. *See, e.g.*, *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 830 n.5 (9th Cir. 2012) (en banc) ("Consistent with *Mead* and *Barnhart*, we have determined that some agency interpretations advanced through means other than formal rule-making or adjudication are

entitled to *Chevron* deference."); *Davis v. EPA*, 348 F.3d 772, 779 n.5 (9th Cir. 2003) ("The mere fact that the EPA engaged in informal agency adjudication of California's waiver request does not vitiate the *Chevron* deference owed to the agency's interpretation of [a Clean Air Act provision]."); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002) ("*Chevron* deference is due even though HUD's Policy Statements are not the result of formal rulemaking or adjudication."); *see also Gila River Indian Cmty. v. United States*, 776 F. Supp. 2d 977, 990 (D. Ariz. 2011).

The next year in *Mead*, the Court addressed a somewhat similar issue, but was this time dealing with thousands of splintered tariff decisions coming through letters from the then-United States Customs Service (now operating as U.S. Customs and Border Protection, another sub-component of DHS). 533 U.S. at 221 ("We agree that a tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law[.]"). As Justice Scalia later explained for the Court: "*Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking." *City of Arlington*, 133 S. Ct. at 1874. Still, the *Mead* Court acknowledged that in the absence of full-scale, notice-and-comment or administrative formality, there may well be very good reasons for according *Chevron* deference where an agency action has the force of law: "[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure … does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Id.* at 231 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995)).

The Court completed the "step zero" trilogy the very next year in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). At issue there was a social security regulation specifying that a

claimant for disability benefits did not have an "impairment" unless he or she had a problem that would be expected to last for at least twelve months. This rule had been adopted after notice-and-comment procedures, and the Court might have simply emphasized that fact. Instead, the Court acknowledged that the agency had previously reached its interpretation through *less formal means*—but said that the use of those means did *not* eliminate *Chevron* deference. On the contrary, the Court read *Mead* to say that *Chevron* deference would depend on "the interpretive method used and the nature of the question at issue." *Id.* at 122. In the key sentence, the Court added:

> the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Id. Every one of the *Barnhart* factors mentioned weigh in favor of DHS here.

The Supreme Court case law on whether *Chevron* deference may be accorded to less-than-final regulations is clear: it can and frequently shall. Indeed, it is not even very unusual within the Ninth Circuit. *See, e.g.*, *Davis v. EPA*, 348 F.3d 772, 779 n.5 (9th Cir. 2003) (giving *Chevron* deference to agency interpretation that was not a product of any kind of formal process); *Navajo Nation v. Dep't of Health & Human Servs.*, 285 F.3d 864, 871–72 (9th Cir. 2002) (according *Chevron* deference even though "the Secretary's letter [was] … a final, albeit informal, adjudication on the merit"), *aff'd on other grounds*, 325 F.3d 1133 (9th Cir. 2003) (en banc). Indeed, as this district court has previously explained, "[t]he fact that an agency reaches its interpretation 'through means less formal than "notice and comment" rulemaking does not automatically deprive that interpretation of the judicial deference otherwise due.'" *Trout*

Unlimited v. Lohn, 645 F. Supp. 2d 929, 946 (D. Or. 2007) (quoting *Barnhar*t, 535 U.S. at 221); *see also Airlines for Am. v. Transp. Sec. Admin.*, 780 F.3d 409, 413 (D.C. Cir. 2015) (according *Chevron* deference to a TSA interim final rule requesting comment).

Unlike *Christensen*'s case-specific opinion letter, or the tariff-classification rulings at issue in *Mead* (which was not binding as to third parties), the H-1B lottery system was clearly designed "with a lawmaking pretense in mind" and was always intended to have "the force of law." *Mead*, 533 U.S. at 233; *accord Marmolejo-Campos*, 558 F.3d at 909 ("[W]e have held that the Board's precedential orders, which bind third parties, qualify for *Chevron* deference because they are made with a 'lawmaking pretense.'" (quoting *Mead*)). As such, *Chevron* deference is appropriate despite any of its procedural deficiencies. Moreover, a ruling against according *Chevron* deference for interim-final rules would incentivize agencies to go straight to a final rule whenever (as was the case when DHS was originally confronted with overwhelming H-1B petitions) they might invoke a "good cause" or procedural-rule exception, rather than voluntarily accepting post-promulgation comments. Here, the agency decided not to go that route with the creation of the H-1B lottery system, and allowed for such public input. Regardless of Plaintiffs' many policy disagreements with that system, Congress has entrusted the agency to make its own decisions as to how to process the hundreds of thousands of H-1B petitions it receives each fiscal year. The fact that an interim-final, rather than final, rule is now in dispute does not change the legal deference a court should accord to the rulemaking. To do otherwise would "render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*." *City of Arlington*, 133 S. Ct. at 1874.

CONCLUSION

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

Respectfully submitted this 6th day of January 2017.

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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 2,646 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 January 6, 2017, I electronically filed the foregoing DEFENDANTS' SUPPLEMENTAL BRIEF 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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