UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EVELYN GOMEZ, KARLA ALVARADO PINEDA, and GILBERTO LANDAVERDE GARCIA, on behalf of themselves and all other similarly situated,

Plaintiffs,

v.

UR JADDOU, in her official capacity as Director of United States Citizenship and Immigration Services; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

No. 21 Civ. 9203 (ALC)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2737
Fax: (212) 637-2702
Email: lucas.issacharoff@usdoj.gov

LUCAS ISSACHAROFF
Assistant United States Attorney
– Of Counsel –

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Administrative Decisions

Rules

Defendants Ur Jaddou, in her official capacity as Director of U.S. Citizenship and Immigration Services ("USCIS"), USCIS, and the United States Department of Homeland Security ("DHS"), by their attorney Damian Williams, United States Attorney for the Southern District of New York, submit this memorandum of law in support of their motion to dismiss Plaintiffs' Complaint ("Compl.") (ECF No. 1) pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

PRELIMINARY STATEMENT

Plaintiffs in this litigation seek relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, from an agency action which has not occurred, based on an interpretation which has not yet been applied to their cases, and in advance of that interpretation's reconsideration.

The interpretation set forth in an adjudication by USCIS's Administrative Appeals Office ("AAO") in *Matter of Z-R-Z-C-* and adopted by the agency (hereinafter, the "*Z-R-Z-C-* Interpretation"), preserves the status quo ante for Temporary Protected Status ("TPS") beneficiaries when they undertake USCIS-approved travel outside the United States. Subsequent to the *Z-R-Z-C-* Interpretation, under Executive Order 14012, President Biden directed the Department of Homeland Security to review existing immigration regulations and policies and remove barriers to "fair, efficient adjudications"—a directive that encompasses the *Z-R-Z-C-* Interpretation. Pursuant to that directive, USCIS and DHS are currently undertaking a review of the *Z-R-Z-C-* Interpretation.

Plaintiffs, who have pending applications for adjustment of status to lawful permanent resident, have not been subject to a final adjudication and, given the ongoing review of the *Z-R-Z-C-* Interpretation, may never have that interpretation applied to their applications. They nevertheless seek to short-circuit both the adjudication process and the agency's review process

and urge the Court to pass judgment on the merits of an interpretation because it might someday be applied to their applications. The Court should reject this invitation and dismiss the complaint—without prejudice to Plaintiffs' bringing suit in the event that their adjudications are denied—for three reasons.

First, judicial review under the APA is only available for "final agency actions." 5 U.S.C. § 704. Plaintiffs claim that the *Z-R-Z-C-* Interpretation itself constitutes a final agency action. But, with respect to their individual adjudications, because the interpretation is subject to ongoing review, *Z-R-Z-C-* neither constitutes the consummation of an agency decisionmaking process nor determines any rights or obligations of regulated parties. Thus, no final agency action has occurred, and the Court should dismiss the complaint.

Second, even accepting Plaintiffs' framing of this case as a direct challenge to the *Z-R-Z-C-* Interpretation, Plaintiffs lack standing to bring this suit precisely because their applications are still pending. Plaintiffs bear the burden to prove that they meet the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1993). Yet Plaintiffs cannot demonstrate that they have actually suffered, or imminently will suffer, any concrete and particularized injury. Accordingly, Plaintiffs lack standing to bring their suit and the Court lacks subject matter jurisdiction under Article III.

Finally, Plaintiffs' challenge to the interpretation is unripe. The ripeness doctrine exists specifically to ensure that courts do not interfere with the agency decisionmaking process while it is playing out as well as to ensure that courts do not become involved with questions of agency interpretation before any concrete effects interpretation are felt by plaintiffs. The *Z-R-Z-C-* Interpretation is neither appropriate for judicial review at this time nor has it imposed a hardship

upon Plaintiffs; the interpretation is under active reconsideration and Plaintiffs' adjudications are all still pending. Plaintiffs' challenge is therefore unripe.

For these reasons, the complaint should be dismissed without prejudice and judicial review should await USCIS's actually applying a legal position to Plaintiffs' applications.

BACKGROUND

I. Statutory Background

Under the Immigration and Nationality Act, a nonimmigrant who is eligible for lawful permanent residence may seek adjustment of status without the need to depart the United States and obtain an immigrant visa through the consular process. A prerequisite to such application is that the person seeking an adjustment of status have been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a).[1]

In the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), Congress established Temporary Protected Status ("TPS"). TPS is a temporary immigration status granted to eligible nationals of a country designated for TPS by the Secretary based on statutory criteria. Noncitizens who entered the United States without inspection may be granted TPS if they meet the eligibility requirements. During the TPS designation period, TPS recipients are eligible to remain in the United States, may not be removed, and are authorized for employment so long as they maintain TPS. Congress also created a mechanism by which a TPS recipient could "travel abroad with the prior consent of the Attorney General" (now the Secretary of Homeland Security). 8 U.S.C. § 1254(f)(3).

[1] In addition to having been inspected and admitted or paroled, an applicant for adjustment of status under 8 U.S.C. § 1255(a) must meet other eligibility requirements. An adjustment applicant must be physically present in the United States, be eligible to receive an immigrant visa (and such visa is immediately available), be admissible to the United States, and merit the favorable exercise of discretion. 8 U.S.C. § 1255(a).

The following year, in the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 ("MTINA"), § 304(c), Pub. L. No. 102-232, 105 Stat. 1733 (1991), Congress enacted a provision addressing the consequence of travel abroad by TPS recipients. MTINA provided that a TPS recipient who obtains prior authorization and travels abroad and returns to the United States in accordance with that authorization "shall be inspected and admitted in the same immigration status the alien had at the time of departure." *Id.*

II. The *Z-R-Z-C-* Interpretation

Plaintiffs seek to challenge how to interpret the foregoing provisions when a TPS recipient receives prior authorization to travel abroad and returns pursuant to that authorization for purposes of adjustment of status under 8 U.S.C. § 1255(a). To date, USCIS and its predecessor, the Immigration and Naturalization Service ("INS"), used advance parole documents as the mechanism to authorize TPS travel. Between 1990 and 2020, many USCIS and INS offices viewed the subsequent return on parole from such a trip as satisfying the "inspected and admitted or paroled" requirement of 1255(a). *See* 8 C.F.R. § 244.15; *Matter of Z-R-Z-C-*, Adopted Decision 2020-02, 2020 WL 5255637 ("*Matter of Z-R-Z-C-*"), at *9 n.11 (citing USCIS Policy Manual Vol. 7: Adjustment of Status, Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section A.5, Temporary Protected Status [7 USCIS-PM B.3(A.5)] ("For purposes of adjustment eligibility, it does not matter whether the TPS beneficiary was admitted or paroled. In either situation, once the alien is inspected at a port of entry and permitted to enter to the United States, the alien meets the inspected and admitted or inspected and paroled requirement.")). The agency's interpretation was that such an inspection and admission or parole satisfied the adjustment of status requirement of 8 U.S.C. § 1255(a). *Id.* In the years during which this was the INS/USCIS interpretation, many TPS beneficiaries successfully became lawful permanent residents ("LPRs") after leaving the

country with agency permission and relying on this entry to adjust status upon their return. Compl. ¶ 2.

In August 2020, USCIS adopted *Matter of Z-R-Z-C-*, finding that under MTINA, TPS beneficiaries return to the United States "in the same immigration status the alien had at the time of departure," meaning that, as at the time of departure, TPS beneficiaries who originally entered the country unlawfully cannot meet the "inspected and admitted or paroled" criterion for adjustment of status. *Matter of Z-R-Z-C-*, 2020 WL 5255637, at *1. The AAO reviewed several agency guidance documents and INS General Counsel opinions from around the time of the enactment of the Immigration Act of 1990, Pub. L. No. 101–649, and the MTINA, as well as the statutory language itself, and concluded that Congress intended for "TPS recipients granted authorization to travel" to "return to the United States 'in the same immigration status they had at the time of departure.'" *Matter of Z-R-Z-C-*, 2020 WL 5255637, at *4 (citing Memorandum from Grover Joseph Rees III, General Counsel, INS to James A. Puleo, Assoc. Comm'r, Examinations, INS, *Travel Authorization for Aliens Granted TPS*, INS Gen. Counsel Op. No. 92-10, 1992 WL 1369349, at 1 (Feb. 27, 1992); Memorandum from Paul W. Virtue, Acting General Counsel, INS to Lawrence J. Weinig, Acting Assoc. Comm'r, Examinations, *Travel Permission for Temporary Protected Status (TPS) Registrants*, INS Gen. Counsel Op. No. 93-51, 1993 WL 1503998, at 1 (Aug. 4, 1993)). USCIS designated the *Matter of Z-R-Z-C-* decision as USCIS interpretation.

III. E.O. 14012 and Reconsideration of the *Matter of Z-R-Z-C-* Interpretation

On February 2, 2021, President Biden issued Executive Order 14012 ("E.O. 14012"), "Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans," 86 Fed. Reg. 8277 (Feb. 2, 2021). E.O. 14012 directed the Department of Homeland Security to, *inter alia*, "review existing regulations, orders, guidance

documents, policies, and any other similar agency actions," to "identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits," and to "make recommendations on how to remove these barriers, as appropriate and consistent with applicable law." *Id.* USCIS and DHS are actively reviewing various immigration policies consistent with the directives articulated in E.O. 14012. Declaration of Amanda Baran, Ex. A ("Baran Decl."), at ¶¶ 5-6.

The *Matter of Z-R-Z-C-* interpretation falls within the scope of E.O. 14012. *Id.* at ¶ 6. USCIS is actively reviewing "the consequences of DHS-authorized temporary foreign travel by TPS beneficiaries, including with respect to eligibility to apply for adjustment of status under § 1255(a)." *Id.* While no final determination has been made yet, the ongoing review "bears on the exact substantive issues presented by this litigation." *Id.*

IV. Plaintiffs

Plaintiffs in this case are all TPS recipients who entered the United States unlawfully without inspection and admission or parole, were later granted TPS, traveled outside the United States and returned with the Secretary's authorization, and applied for adjustment of status upon return. Two Plaintiffs' applications remain pending, and these Plaintiffs speculate that their applications will be denied based on the *Matter of Z-R-Z-C-* interpretation. Compl. ¶¶ 19, 26. The third Plaintiff's application was initially denied and has since been re-opened, but he believes that the *Matter of Z-R-Z-C-* interpretation was a but-for cause of his application's initial denial and will result once again in his application's denial. *Id.* ¶ 35.

A. Evelyn Gomez

Plaintiff Evelyn Gomez is a 46-year-old noncitizen from Honduras. Compl. ¶ 15. She entered the United States unlawfully without inspection and admission or parole on or about March 1998 and was granted TPS in 2000. *Id.*; *see* 8 U.S.C. § 1254(a)(1)(A), (a)(1)(B); 8 C.F.R.

244.15(a). After obtaining travel authorization from USCIS as a TPS recipient, she traveled outside the United States in 2020 and, upon her return on December 7, 2020, DHS allowed her to re-enter the United States. Compl. ¶ 17. She filed for adjustment of status based on her marriage to her U.S. citizen spouse on October 27, 2021; that application remains pending. *Id.* ¶¶ 18-19.

B. Karla Alvarado Pineda

Plaintiff Karla Alvarado Pineda is a 33-year-old noncitizen from El Salvador. Compl. ¶ 21. She entered the United States unlawfully without inspection and admission or parole in May 1997 when she was nine years old, and was granted TPS in 2001. *Id.* She was granted permission to travel, based on her TPS status, to El Salvador on November 17, 2020, traveled to El Salvador on December 12, 2020, and returned to the United States on December 19, 2020. *Id.* ¶¶ 23-24. Alvarado applied for an adjustment of status based on her marriage to her husband. *Id.* ¶¶ 22, 25. That application also remains pending. *Id.* ¶ 26.

C. Gilberto Landaverde Garcia

Plaintiff Gilberto Landaverde Garcia is a 43-year-old noncitizen from El Salvador. Compl. ¶ 28. He entered the United States unlawfully without inspection and admission or parole around 2000 and was granted TPS in 2001. *Id.* ¶ 28. He traveled to El Salvador in October 2020 with prior USCIS authorization based on his TPS status, returned at the end of that month, and was allowed to re-enter the United States. *Id.* ¶ 32. He applied for adjustment of status on December 22, 2020, and received a denial approximately nine months later. *Id.* ¶¶ 33-34. USCIS cited the *Matter of Z-R-Z-C-* interpretation and the lack of evidence of a lawful entry into the United States prior to his authorized travel as the reason for the denial of his application. *Id.* ¶ 34. USCIS reopened Landaverde's application on December 15, 2021, and his application is currently pending. Baran Decl. ¶ 7.

ARGUMENT

I. Legal Standard

A. Motion to Dismiss Pursuant to Rule 12(b)(1)

"A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court lacks the statutory or constitutional power to adjudicate it, such as when (as in the case at bar) the plaintiff lacks constitutional standing to bring the action." *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.À.R.L.*, 790 F.3d 411, 416-17 (2d Cir. 2015) (internal quotation marks and citation omitted). To survive a motion to dismiss under Rule 12(b)(1), a plaintiff must establish a court's jurisdiction through sufficient allegations. *See Lujan*, 504 U.S. at 561. The plaintiff bears the burden of establishing that subject matter jurisdiction exists over his claims, including that standing exists. *Cortlandt St.*, 790 F.3d at 417. While a court resolving a motion to dismiss under Rule 12(b)(1) "must take all uncontroverted facts in the complaint . . . as true, and draw all reasonable inferences in favor of the party asserting jurisdiction," when jurisdictional facts are placed in dispute, "the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits," in which case "the party asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014) (alteration and quotation marks omitted).

B. Motion to Dismiss Pursuant to Rule 12(b)(6)

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's

liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). While the Court accepts well-pleaded factual allegations as true, "mere conclusory statements" and "legal conclusion[s] couched as . . . factual allegation[s]" are "disentitle[d] . . . to th[is] presumption of truth." *Id*. at 678, 681 (citation omitted). Although the Court generally may not rely on material outside the pleadings under Rule 12(b)(6), it may consider any matters of public record of which the court may take judicial notice, as well as documents incorporated in the complaint by reference. *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

II. No Final Agency Action Has Occurred with Respect to Plaintiffs' Applications

The Court should dismiss the Complaint because no final agency action has occurred.[2] The APA provides an avenue for individuals to obtain judicial review of administrative agency actions, 5 U.S.C. § 702, but judicial review is limited to cases challenging "final agency actions," *id.* § 704. For an agency action to be considered "final" and reviewable under the APA, the action must first "mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Salazar v. King*, 822 F.3d 61, 82 (2d Cir. 2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). USCIS's actions with respect to Plaintiffs neither mark the consummation of the agency's decisionmaking process nor determine the rights or obligations of Plaintiffs.

[2] The Second Circuit has observed that it is "uncertain in light of recent Supreme Court precedent whether [the] threshold limitations [of the APA, including finality of agency action] are truly jurisdictional or are rather essential elements of the APA claims for relief." *Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514-15 (2006)). But whether analyzed under Fed. R. Civ. P. 12(b)(1) or 12(b)(6), Plaintiffs' APA claims should be dismissed. *See Conyers v. Rossides*, 558 F.3d 137, 143 n.8 (2d Cir. 2009); *County of Westchester v. HUD*, 778 F.3d 412, 416 n.5 (2d Cir. 2015).

A. A Pending Application Is Not the Consummation of a Decisionmaking Process

Plaintiffs' contention that USCIS's future determination of their individual cases constitute the "consummation of a decisionmaking process" is flatly controverted by the record and contrary to precedent. Whether an agency's decisionmaking process has been consummated requires the court to determine "whether an action is properly attributable to the agency itself and represents the culmination of the agency's consideration of an issue, or is, instead, only the ruling of a subordinate official, or tentative." *POET Biorefining, LLC v. Env't Prot. Agency*, 970 F.3d 392, 404 (D.C. Cir. 2020) (internal citations and quotations omitted).

Plaintiffs concede that, with respect to Plaintiffs Gomez and Pineda, USCIS has not reached a determination regarding their applications for adjustment of status. Compl. ¶¶ 19, 26. And, with respect to Plaintiff Landaverde, USCIS has re-opened his application, thus rendering nonfinal what previously might have been considered a final agency action conferring jurisdiction for review under the APA. *See 6801 Realty Co., LLC v. USCIS*, No. 15 Civ. 5958, 2016 WL 7017354, at *2 (E.D.N.Y. Nov. 30, 2016), *aff'd*, 719 F. App'x 58 (2d Cir. 2018) (holding that rejection of plaintiff's H-1B visa petition was nonfinal where USCIS reopened petition after district court complaint was filed); *accord Ahlijah v. Neilsen*, No. PX-17-1720, 2018 WL 3363875, at *2 (D. Md. July 10, 2018) (collecting cases as to same).

For these reasons, another district court in this Circuit recently dismissed an identical challenge to the *Z-R-Z-C-* interpretation by a plaintiff whose application had been denied but then reopened. *Amaya v. Borgen*, No. 20 Civ. 4616, 2021 WL 5866485, at *2 (E.D.N.Y. Dec. 10, 2021); *accord Quintanilla v. Wolf*, No. 20 Civ. 4944, 2021 WL 4350346 (N.D. Ill. Sept. 20, 2021) (dismissing challenge to *Z-R-Z-C-* Interpretation where no decision had been made on application). The fact that Plaintiffs' applications remain open and pending before USCIS renders the agency actions nonfinal and requires dismissal of their Complaint.

B. No Rights or Obligations Have Been Determined by Agency Action

Similarly, the pending applications do not constitute an action "by which rights or obligations have been determined or from which legal consequences will flow." *Bennett*, 520 U.S. at 178. The core question of this prong is "whether the result of [the agency's decisionmaking] process is one that will directly affect the parties." *Salazar*, 822 F.3d at 82 (quoting *Bennett*, 520 U.S. at 177-78). The Supreme Court has interpreted this requirement in a "pragmatic" way. *Sharkey*, 541 F.3d at 88 (citing *FTC*, 449 U.S. at 239); *see also Paskar v. U.S. Dep't of Transp.*, 714 F.3d 90, 97-98 (2d Cir. 2013) (holding that the "substantial practical impact" of an agency's letter should be considered in deciding whether the letter was a final agency decision). Where an agency has issued a "definitive statement of its position, determining the rights and obligations of the parties," the agency's action is final despite possible "further proceedings in the agency" on related issues. *Bell v. New Jersey*, 461 U.S. 773, 779-80 (1983).

Here, the relevant practical impact is whether Plaintiffs' applications are granted or denied. No rights or obligations are determined by USCIS having signaled by adoption of the *Z-R-Z-C-* Interpretation that applications such as Plaintiffs' would be denied in the future, any more than Plaintiffs' rights or obligations have now been determined by USCIS and DHS reconsidering that interpretation. Courts have repeatedly held that it is the grant or denial of a plaintiff's application that marks the determination of rights and obligations in this context. *See, e.g.*, *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003) (identifying the "particular agency action at issue" as "INS's denial of an immigrant investor visa petition"); *Khalil v. Napolitano*, 983 F. Supp. 2d 484, 488-89 (D.N.J. 2013) ("[T]he district courts may review the final determinations of visa denials when they are alleged to have violated the terms of the APA").

Because there has been no final determination of Plaintiffs' applications in this case, there is no final agency action nor any determination of Plaintiffs' rights or obligations.

C. The *Z-R-Z-C-* Interpretation Itself Is Not a Justiciable Agency Action

Faced with the fact that their applications have not been the subject of justiciable final agency action, Plaintiffs attempt to frame the "final agency action" in this case as the *Z-R-Z-C-* Interpretation itself. That argument is unavailing.

As a general matter, "an on-going program or policy is not, in itself, a 'final agency action' under the APA." *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001). For this reason, courts have frequently rejected policy challenges that have yet to play out in individual adjudications. As the district court noted in rejecting such an immigration policy challenge in *RCM Techs., Inc. v. U.S. Dep't of Homeland Sec.*, 614 F. Supp. 2d 39 (D.D.C. 2009): "Courts stand ready to entertain appeals from specific, concrete agency adjudications. But absent that, courts have neither the resources nor the expertise to superintend agency policy-making." *Id.* at 46.

The principle that courts do not leap in to review policies before such policies have been concretely applied is particularly salient where the interpretation is under active reconsideration. *See* Baran Decl. ¶¶ 5-6 (stating that the *Z-R-Z-C-* Interpretation is under active reconsideration). In *Env't Def. Fund, Inc. v. Johnson*, 629 F.2d 239 (2d Cir. 1980), the Second Circuit dismissed a complaint seeking an injunction against the Army Corps of Engineers' evaluation of a potential water supply project. The court noted that "the proposed Phase I Study may reaffirm the HRP, reform it, or even recommend that it not be constructed. We are here asked to intervene in an administrative process which at this point has created no rights or obligations and involves no legal consequences." *Id.* at 241. The court further noted that "the possibility still exists that the HRP either may be abandoned or significantly altered after the Phase I Study is completed." *Id.* (internal quotation marks omitted).

Here, Plaintiffs attempt to challenge an agency interpretation that has created no rights or obligations, has so far resulted in no legal consequences to them, and which may be abandoned or

significantly altered before it is applied to their still-pending applications. Such a challenge falls far short of the APA's "final agency action" requirement.

III. Plaintiffs Lack Standing to Challenge the *Z-R-Z-C-* Interpretation

Because Plaintiffs' applications are still pending, they lack standing to bring this suit. "Under Article III, federal courts do not adjudicate hypothetical or abstract disputes . . . . [A] federal court may resolve only 'a real controversy with real impact on real persons.'" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting *Am. Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2103 (2019)). In order to demonstrate standing, Plaintiffs must show "(i) that [they] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id.* (citing *Lujan*, 504 U.S. at 560-61). Conjectural future injuries or alleged fear of such injuries is insufficient to confer standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). "[T]hreatened injury must be certainly impending to constitute injury in fact" and "[a]llegations of possible future injury" are not sufficient. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Plaintiffs have not met their burden to demonstrate standing. No injury has occurred, so Plaintiffs cannot meet the requirement for a "concrete" or "particularized" injury. Since the *Z-R-Z-C-* Interpretation is under active reconsideration by DHS and USCIS as well as in multiple individual adjudications before the AAO, the interpretation's application to Plaintiffs also cannot be said to be "imminent" or "certainly impending." *See* Baran Decl. ¶¶ 5-6; *Amaya*, 2021 WL 5866485, at *2; *Quintanilla*, 2021 WL 4350346, at *1.

Ordinarily, where "the plaintiff is himself an object of the action . . . at issue, . . . there is little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62; *see also City of Los Angeles v.*

Lyons, 461 U.S. 95, 101-02 (1983) ("The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'"). However, the interpretation has not been applied to Plaintiffs. Their applications remain pending with USCIS. Baran Decl. ¶ 7. Moreover, the agency is reconsidering the interpretation and may never apply it to Plaintiffs. *Id.* ¶¶ 5-6. *Lujan* speaks in terms of a concrete "action" or "inaction," but Plaintiffs here seek standing based on an action that has not yet taken place, with no indication that they face agency *in*action. They therefore are not objects of the agency action which they challenge and cannot claim standing.

Plaintiffs argue that they face a credible threat of future harm, but given the uncertainty surrounding the future of the *Z-R-Z-C-* Interpretation, the final disposition of their adjustment of status applications is far from a foregone conclusion. Plaintiffs here must await the completion of agency deliberations regarding the continued viability of *Z-R-Z-C-* and the adjudication of their applications. Moreover, there is significant uncertainty over whether USCIS will ever apply the *Z-R-Z-C-* Interpretation to Plaintiffs' applications. *Contra, e.g.*, *Knife Rights v. Vance*, 802 F.3d 377, 387 (2d Cir. 2015) (noting that defendants affirmatively confirmed they would bring a criminal prosecution against the plaintiffs if further violations of law came to defendants' attention). Plaintiffs therefore do not face an imminent or certain threat of future harm.

Plaintiffs have not met their burden to prove standing. They do not face a concrete and particularized injury that is actual or imminent, they are not the objects of agency action or inaction (because the agency is actively engaged in deliberations over the continued viability of the interpretation they seek to challenge), and they do not face a certain threat of future harm. As the

Supreme Court summarized recently, "[n]o concrete harm, no standing." *TransUnion*, 141 S. Ct. at 2214.

IV. Plaintiffs' Claims Against the *Z-R-Z-C-* Interpretation Are Unripe

Even if the *Z-R-Z-C-* Interpretation constituted a final agency action subject to APA review and Plaintiffs had standing to challenge it, the complaint should be dismissed because such a challenge is unripe. The ripeness doctrine is meant to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and "protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967); *see also Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002). It derives from both "Article III limitations on judicial power" as well as "prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (citing *Buckley v. Valeo*, 424 U.S. 1, 144 (1976) (per curiam); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972)). "While standing is primarily concerned with *who* is a proper party to litigate a particular matter, ripeness addresses *when* litigation may occur." *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir.1997) (emphasis in original). Determining whether administrative action is ripe for judicial review requires evaluating (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003).

Plaintiffs cannot meet either prong of the ripeness inquiry. First, the *Z-R-Z-C-* Interpretation is unfit for review because it is under active reconsideration. Baran Decl. ¶¶ 5-6. In *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), the Supreme Court found a challenge to part of a California nuclear waste disposal regulation unfit

for review. While a generally applicable part of the regulation whose implementation would have required the expenditure of millions of dollars was found to be ripe for review, a more specific provision would be applied "on a case by case basis" was not. *Id.* at 202-03. With respect to that more specific provision, the Court found that "we cannot know whether the Energy Commission will ever find a nuclear plant's storage capacity to be inadequate" and thus subject to the regulation's requirements. *Id.* at 203. Therefore, the Court reasoned, "judicial consideration of this provision should await further developments." *Id.*; *accord Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998) (finding an agency forestry plan unfit for review where it had yet to be applied to a specific parcel of land). Here too Plaintiffs seek to challenge an interpretation that may well be reconsidered before being applied to Plaintiffs.

Nor can Plaintiffs meet the hardship prong because, again, no status determination has been made under the *Z-R-Z-C*- Interpretation. The Supreme Court has explained that hardship requires "adverse effects of a strictly legal kind." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 809 (quoting *Ohio Forestry Ass'n*, 523 U.S. at 735). In *Ohio Forestry*, the Supreme Court held that a Forest Service plan that did "not grant, withhold, or modify any formal legal license, power or authority;" "subject anyone to any civil or criminal liability;" or "create [any] legal rights or obligations" did not create a "hardship" under the second prong of the ripeness inquiry. 523 U.S. at 733. Here, the *Z-R-Z-C*- Interpretation has not been applied to any of the Plaintiffs in this case in a manner that would create an "adverse effect" as required by the ripeness doctrine.

Because Plaintiffs cannot prove that the *Z-R-Z-C*- Interpretation is fit for judicial review or that withholding of court consideration would create a hardship for the parties, Plaintiffs' challenge to the interpretation is unripe for judicial review. Even if this court finds that Plaintiffs were

subject to final agency action and that Plaintiffs have standing, the court should dismiss because Plaintiffs' challenge is unripe.

CONCLUSION

For the reasons stated herein, Plaintiffs' complaint should be dismissed in its entirety without prejudice.

Dated: March 2, 2022
New York, New York

Respectfully Submitted,

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York

By: /s/ *Lucas Issacharoff*
LUCAS ISSACHAROFF
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Tel.: (212) 637-2737
Fax: (212) 637-2702
E-mail: lucas.issacharoff@usdoj.gov