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. 1:21-cv-09203-ALC

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs are noncitizens who applied for and were granted Temporary Protected Status (TPS). While they held TPS, Defendant U.S. Citizenship and Immigration Services (USCIS) granted Plaintiffs permission to travel abroad and return to the United States, which Plaintiffs all did after August, 20, 2020. For decades, USCIS and its predecessor, the Immigration and Naturalization Service (INS), recognized that upon their return from authorized travel abroad, TPS holders had been "inspected and [either] admitted or paroled into the United States," and thus satisfied this requirement for adjustment of status under 8 U.S.C. § 1255(a). Thus, individuals, like the Plaintiffs, who initially entered the United States without inspection, but subsequently obtained TPS and traveled abroad and returned with USCIS' permission, could then apply to become lawful permanent residents (LPRs), provided that they otherwise qualified for adjustment.

However, on August 20, 2020, Defendant USCIS abruptly reversed course. On that date, USCIS's Administrative Appeals Office (AAO) issued *Matter of Z-R-Z-C-*, which held that a TPS holder's entry into the United States upon return from authorized travel abroad was neither an admission nor a parole. *See* USCIS Policy Mem. 602-0179, *Matter of Z-R-Z-C-*, Adopted Decision 2020-02, 2020 WL 5255637 (AAO Aug. 20, 2020). Simultaneously, USCIS officially adopted this decision as agency-wide policy, applying it to all authorized travel by TPS holders occurring after that date. *Id.* Under this policy, Plaintiffs are barred from gaining LPR status because their travel occurred after August 20, 2020. Plaintiffs challenge the *Z-R-Z-C-* policy under the Administrative Procedure Act (APA), as there is no lawful basis to support the agency's novel interpretation of the relevant statutory provisions.

Defendants provide no valid basis to dismiss Plaintiffs' claims. Defendants primarily rely on two assertions: first, that all Plaintiffs' individual applications remain pending before USCIS, and second, that Defendants are reviewing the *Z-R-Z-C-* policy pursuant to President Biden's Executive Order 14012, which instructed the agency to "review existing regulations, orders, guidance documents, policies, and any other similar agency actions" in order 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." 86 Fed. Reg. 8277 (Feb. 2, 2021).

Neither argument supports dismissal. In 2020, USCIS incorporated the *Z-R-Z-C-* policy into its Policy Manual as a rule that is binding on all employees. Defendants do not contend that the policy is not currently in effect. Nor has the AAO issued a new decision withdrawing or overturning *Matter of Z-R-Z-C-*. To the contrary, USCIS *denied* one named Plaintiff's individual application on the basis of the *Z-R-Z-C-* policy, notwithstanding the ongoing policy "review." That denial occurred in September 2021, over six months after the Executive Order. It was only after Plaintiffs filed this complaint that Defendants then moved to reopen the decision.

Critically, neither of Defendants' assertions defeat Plaintiffs' allegations that *Z-R-Z-C-* is a final agency policy, undermine Plaintiffs' standing, or render Plaintiffs' claims unripe. Plaintiffs have alleged facts that demonstrate this Court should exercise jurisdiction over their claims and review the *Z-R-Z-C-* policy under the APA. Therefore, the Court should deny Defendants' motion to dismiss.

BACKGROUND

I. Overview of the Facts and Law

Plaintiffs and the class members they seek to represent all entered the United States without inspection but subsequently applied for and were granted TPS by USCIS. TPS provides nonpermanent lawful status for noncitizens living in the United States when natural disasters or civil strife render their countries of origin unsafe for return. TPS holders have lawful status in the United States. They are protected from removal, 8 U.S.C. § 1254a(a)(1)(A), they are eligible to apply for work authorization, *id.* § 1254a(a)(1)(B) and permission to travel internationally and return to the United States, *id.* § 1254a(f)(3), and they are deemed to be in lawful status as a nonimmigrant for purposes of adjustment of status, *id.* § 1254a(f)(4). Like the Plaintiffs, putative class members generally have held TPS for years and, in many cases, for more than two decades. *See* Compl., ECF 1 ¶¶ 15–16, 21–22, 28–30. During their time in the United States, TPS holders marry U.S. citizens and raise U.S.-citizen children, *Id.* ¶¶ 16, 22, 29, and work to support their families, including as essential workers, *Id.* ¶¶ 20, 22, 30.

Plaintiffs and the proposed class members wish to adjust to LPR status to avoid being forcibly separated from their families, homes, and employment. Each is eligible for an immigrant visa—a prerequisite for adjustment of status—based on their familial relationship as an "immediate relative." 8 U.S.C. § 1255(a) (requiring that an adjustment applicant be eligible to receive an immigrant visa and that a visa be immediately available); *id.* § 1151(b)(2)(A)(i) (defining immediate relatives as the children and spouses of U.S. citizens and the parents of U.S. citizens who are at least 21 years old); *see also* ECF 1 ¶ 67 (defining class as including only those seeking to adjust to LPR status as "immediate relatives").

Applicants for adjustment of status must show, inter alia, that they were "inspected and admitted or paroled." 8 U.S.C. § 1255(a). Accordingly, a TPS holder who initially entered the United States without inspection is ineligible for adjustment of status absent a later admission or parole entry. *Id.*; *see also Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021) (holding that a grant of TPS is not an "admission" for purposes of adjustment of status).

For decades, the agency recognized that TPS holders could satisfy this requirement by traveling abroad after receiving permission from immigration authorities. Congress authorized TPS holders to "travel abroad with the prior consent" of the Secretary of Homeland Security. 8 U.S.C. § 1254a(f)(3).[1] In May 1991, the former INS promulgated regulations providing TPS holders the ability to travel abroad "pursuant to the Service's advance parole provisions," 8 C.F.R. § 244.15(a), which provide temporary travel authorization to a noncitizen without a visa. When USCIS approves an advance parole application, it issues the noncitizen a document authorizing their travel for a certain period of time and authorizing parole back into the United States upon their return. *Id.* § 212.5(f).

In late 1991—after the INS adopted 8 C.F.R. § 244.15 authorizing travel by TPS holders through its advance parole authority, *see* Temporary Protected Status, 56 Fed. Reg. 618, 619 (Jan. 7, 1991) (published as an interim rule)—Congress addressed the issue of travel by TPS holders in the Miscellaneous and Technical Immigration and Naturalization Amendments Act of 1991 (MTINA), Pub. L. No. 103-232, 105 Stat. 1733. MTINA § 304(c) states that where the Department of Homeland Security (DHS) authorizes temporary travel abroad and the TPS holder

[1] While § 1254a continues to refer to the Attorney General, the Homeland Security Act of 2002 transferred many functions previously vested in the Attorney General to the Secretary of the Department of Homeland Security, including the adjudication of immigration benefit applications. *See* 8 U.S.C. § 1103(a)(1); Homeland Security Act of 2002, Pub. L. No. 107-296 § 1517, 116 Stat 2135, 2311.

returns to the United States in accordance with such authorization, the TPS holder "shall be *inspected and admitted* in the same immigration status [the individual] had at the time of departure." 105 Stat. at 1749 (emphasis added) (codified at § 1254a note). At the time Congress enacted MTINA § 304(c)—as today—a neighboring statutory provision provided for the adjustment of status to permanent residence of nonimmigrants who had been "inspected and admitted or paroled." *See* 8 U.S.C. § 1255(a) (1991). The regulation at 8 C.F.R. § 244.15 was not amended after the enactment of MTINA to reflect the statute's use of the term "inspected and admitted." Instead, the agency continued to provide parole to those who traveled. Regardless, the adjustment provision makes eligible persons who are *either* "admitted or paroled." 8 U.S.C. § 1255(a).

For close to thirty years—from the promulgation of 8 C.F.R. § 244.15 in 1991 until August 20, 2020—the former INS and, subsequently, USCIS consistently recognized that a TPS holder's return after authorized travel satisfies § 1255(a)'s requirement that an applicant have been "inspected and admitted or paroled" into the United States. *See Matter of Z-R-Z-C-*, at 9 & n.11. However, in August 2020, USCIS suddenly changed course. In the case of a single adjustment applicant, the AAO held that TPS-authorized travel would not satisfy § 1255(a)'s requirement of being "inspected and admitted or paroled." *Matter of Z-R-Z-C*, at 6–8. Simultaneously, USCIS adopted *Matter of Z-R-Z-C-* as agency-wide policy binding on "all [USCIS] employees." *See* USCIS Policy Mem. 602-0179, 2020 WL 5255637, at *1 (Aug. 20, 2020). According to USCIS, the policy manual "contains the official policies of USCIS" and "is to be followed by all USCIS officers in the performance of their duties." Policy Manual, USCIS, (last updated Mar. 23, 2022), https://www.uscis.gov/policy-manual.

Under the new *Z-R-Z-C-* policy, TPS holders are treated as if they never left the United States, notwithstanding their physical departure and authorized return. *Matter of Z-R-Z-C*, at 6. The agency reached this conclusion by disregarding Congress' express use of the phrase "inspected and admitted" in MTINA § 304(c), a phrase that had long existed in the neighboring adjustment of status provision, 8 U.S.C. § 1255(a), and had a well-recognized meaning in that context. *See, e.g.*, *Matter of Areguillin*, 17 I. & N. Dec. 308, 310 n.6 (BIA 1980) (defining "admission" as occurring when an inspector indicates that a person is not inadmissible and permits the applicant to pass through the port of entry).[2] The agency further concluded that, going forward, TPS holders who departed on authorized travel after August 20, 2020—the date of *Matter of Z-R-Z-C*—and subsequently returned to the United States would not qualify to adjust status under § 1255(a) solely on the basis of their inspection and entry following this travel.[3]

On October 6, 2020, USCIS issued a policy alert that specifically "[i]ncorporate[d] *Matter of Z-R-Z-C-*" into its Policy Manual, as "controlling" guidance for USCIS officers. USCIS Policy Alert, PA-2020-17 (Oct. 6, 2020), https://www.uscis.gov/sites/default/files/

[2] That Congress did not define the terms "admitted" and "admission" until 1996 does not undermine the significance of the agency's construction of the terms prior to that date. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C § 301(a), 1101 Stat. 3009-1, 3009-575. As noted above, immigration authorities have long defined admission in a manner similar to the definition adopted in IIRIRA, i.e., as the act of gaining a lawful entry to the United States following inspection by and authorization from an immigration official. *See Matter of Areguillin*, 17 I. & N. Dec. at 310 n.6; *see also Matter of V-Q-*, 9 I. & N. Dec. 78, 79-80 (BIA 1960). Congress was presumed to be aware of this accepted definition when it enacted MTINA, underscoring that MTINA's use of "admission" should not be construed differently than the similar definition later adopted at 8 U.S.C § 1101(a)(13)(A). *See Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) (explaining that a longstanding administrative interpretation is "entitled to great weight, particularly when, as here, congress has revisited the Act and left the practice untouched").

[3] USCIS stated that it would not apply this policy to those who traveled prior to August 20, 2020, given that these individuals relied upon the agency's longstanding policy. USCIS Policy Mem. 602-0179, 2020 WL 5255637, at *1.

document/policy-manual-updates/20201006-TPSAndAOS.pdf; *see also* Baran Decl., ECF 37 ¶ 4. This policy remains in effect today, and Plaintiffs and putative class members are all subject to it. *See* 7 USCIS Policy Manual, pt. B, ch. 2 § A.5, https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2 (last updated Mar. 23, 2022) ("TPS beneficiaries who depart and return to the United States with the prior consent of DHS pursuant to INA 244(f)(3) are neither admitted nor paroled upon return . . . .").

II. Named Plaintiffs' Factual Backgrounds

Evelyn Gomez

Plaintiff Evelyn Gomez (Ms. Gomez) is a 46-year-old noncitizen from Honduras who first entered the United States without inspection in or about March 1998. ECF 1 ¶ 15. In 2000, Defendant USCIS granted her TPS. *Id.* She has maintained that status for more than twenty years, renewing it and the attendant employment authorization regularly as required by USCIS. *Id.* Ms. Gomez resides in Bronx, New York, with her U.S. citizen spouse and has two U.S. citizen children, ages 21 and 13. *Id.* ¶ 16.

In 2020, USCIS granted Ms. Gomez advance permission to travel outside of the United States. *Id.* ¶ 17. In December 2020, Ms. Gomez traveled to Guatemala. Upon her return, on or about December 7, 2020, DHS inspected her and authorized her entry into the United States as a TPS holder. *Id.*

On October 27, 2021, Ms. Gomez filed an adjustment of status application with USCIS based on her marriage to her U.S. citizen spouse and the immigrant relative petition that her husband filed on her behalf. *Id.* ¶ 18. Ms. Gomez's adjustment of status application remains pending. *Id.* ¶ 19. Nevertheless, pursuant to current USCIS policy, the application must be denied because of the agency's refusal to acknowledge her inspection and admission or parole

for purposes of adjustment of status. But for Defendants' unlawful policy, Ms. Gomez would be found eligible for adjustment of status. *Id.*

Ms. Gomez has been self-employed as a housekeeper since 2015. *Id.* ¶ 20. She seeks to become an LPR to remain with her family in the United States, avoid any future loss of her protected status, have a path to U.S. citizenship, and continue to maintain her work authorization. *Id*. Should DHS terminate the TPS designation for Honduras, Ms. Gomez will lose her status, face deportation to a country in which she has not resided for over two decades, and be separated from her U.S.-citizen spouse and children. *Id.*

Karla Alvarado Pineda

Plaintiff Karla Alvarado Pineda (Ms. Alvarado) is a 33-year-old noncitizen from El Salvador who first entered the United States without inspection on or about May 1997, when she was nine years old. *Id*. ¶ 21. In 2001, Defendant USCIS granted Ms. Alvarado TPS. *Id.* She has maintained that status ever since, renewing it as required by USCIS. *Id.* Ms. Alvarado works as a registered nurse and resides in Norristown, Pennsylvania with her husband, a U.S. citizen. *Id.* ¶ 22. Ms. Alvarado and her husband have been together since Ms. Alvarado was eighteen years old and were married in 2017. *Id.*

In November 2020, USCIS granted Ms. Alvarado advance permission to travel outside the United States. *Id.* ¶ 23. On December 12, 2020, Ms. Alvarado traveled to El Salvador and returned one week later on December 19, 2020. *Id.* ¶ 24. Upon her return to the United States through Miami International Airport, DHS inspected her and authorized her entry into the United States as a TPS holder. *Id.*

In October 2021, Ms. Alvarado filed an adjustment of status application with USCIS based on her marriage to a United States citizen. *Id.* ¶ 25. Ms. Alvarado's husband had

previously filed a visa petition on her behalf, which USCIS had approved in September 2018. Ms. Alvarado's adjustment of status application remains pending. *Id.* ¶ 26. Nevertheless, pursuant to USCIS's policy, Ms. Alvarado's application must be denied because of the agency's refusal to acknowledge her inspection and admission or parole for purposes of adjustment of status. *Id.* But for Defendants' unlawful policy, Ms. Alvarado would be found eligible for adjustment of status. *Id.*

Ms. Alvarado will be harmed when USCIS denies her adjustment application. As a TPS holder, she faces uncertainty regarding her future status within the United States, where she arrived as a young child and has remained ever since. *Id.* ¶ 27. She seeks to become an LPR to ensure that she can remain in the United States with her husband and family, avoid any future loss of her protected status, and have a path to U.S. citizenship. *Id.* Should DHS terminate the TPS designation for El Salvador, Ms. Alvarado will lose her status and face deportation to a country in which she has not resided since she was nine years old. *Id*. Deportation would separate her from her husband, with whom she has been in a relationship for fifteen years. *Id.*

Gilberto Landaverde Garcia

Plaintiff Gilberto Landaverde Garcia is a 43-year-old citizen of El Salvador who first entered the United States without inspection in or around 2000. *Id.* ¶ 28. In 2001, Defendant USCIS granted him TPS. *Id.* He has maintained that status for over twenty years, renewing it and the attendant employment authorization regularly as required by USCIS. *Id.*

Mr. Landaverde resides in Springdale, Arkansas, with his wife and children, ages 15 and 21, all of whom are U.S. citizens. *Id.* ¶ 29. Since his 2000 entry to the United States, Mr. Landaverde has worked mostly in landscaping and is the primary financial provider for his family. *Id.* ¶ 30.

Mr. Landaverde took the first step in the application process for permanent residency in September 2019, when his wife filed a Form I-130 visa petition on his behalf. *Id.* ¶ 31. On or about June 15, 2020, USCIS granted the visa petition, establishing that there was an immigrant visa available to him as an immediate relative. *Id*.

In 2020, USCIS granted Mr. Landaverde advance permission to travel outside of the United States. *Id.* ¶ 32. Mr. Landaverde traveled to El Salvador on or about October 24, 2020. Upon his return, on or about October 31, 2020, DHS inspected him and authorized his entry into the United States as a TPS holder. *Id.*

On or about December 22, 2020, Mr. Landaverde filed his application for adjustment of status with USCIS. *Id.* ¶ 33. On or about September 9, 2021, USCIS denied his adjustment of status application. *Id.* ¶ 34. Citing *Matter of Z-R-Z-C-*, USCIS concluded that Mr. Landaverde was ineligible for adjustment of status because his authorized travel and return to the United States occurred after August 20, 2020, and he did not provide evidence of a legal entry before that date. *Id.*

Mr. Landaverde's adjustment application was denied based on USCIS's policy of not treating his inspection and permission to enter the country as an inspection and admission or parole for purposes of adjustment of status. *Id.* ¶ 35. But for Defendants' unlawful policy, the agency would have found that he was eligible for adjustment of status. Indeed, on December 15, 2021, after Plaintiffs filed the instant action, USCIS sua sponte reopened Mr. Landaverde's application to review its prior denial. Defs.' Pre-Mot. Letter, ECF 22 at 2 n.1. His application now remains pending before USCIS. *Id.*

Mr. Landaverde has and will continue to face harm from Defendants' erroneous policy and denial of his adjustment of status application. ECF 1 ¶ 36. The denial of his adjustment of

status application would block his path to permanent legal status and U.S. citizenship. As a TPS holder, he faces uncertainty regarding his ability to remain in the United States, a country in which he has lived for over two decades, raising and supporting his family. *Id.* Should DHS terminate the TPS designation for El Salvador, Mr. Landaverde will lose his status and face separation from his U.S.-citizen wife and children. *Id.*

ARGUMENT

I. Legal Standard

Under Rule 12(b)(1), while Plaintiffs bear the burden of establishing subject-matter jurisdiction, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), they "need only make a prima facie showing," *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). The Court should "construe jurisdictional allegations liberally and take as true uncontroverted factual allegations." *Id.*

Under Rule 12(b)(6), Plaintiffs need allege only "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). A claim is facially plausible when the plaintiff pleads "enough factual matter (taken as true)" to allow the court to draw the reasonable inference that the defendant is liable. *Id.* at 556.

II. The *Matter of Z-R-Z-C-* Policy Constitutes a Final Agency Action.

The *Matter of Z-R-Z-C-* policy is a final agency action that is subject to this Court's review under the APA. In *Bennett v. Spear*, the Supreme Court articulated a two-pronged test for determining whether an agency action is final: (1) "the action must mark the 'consummation' of the agency's decisionmaking process," and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. 154, 177–78 (1997). Courts have long taken a "pragmatic" approach to determine finality, *U.S. Army*

Corps of Engineers v. Hawkes Co., 578 U.S. 590, 599 (2016), and consider whether the agency action "'is sufficiently direct and immediate' and has a 'direct effect on day-to-day business,'" *Franklin v. Massachusetts*, 505 U.S. 788, 796–97 (1992) (alterations omitted).

Defendants attempt to refute finality by characterizing the relevant agency action as USCIS's decisions with respect to the named Plaintiffs' individual applications. Yet ultimately, and correctly, they acknowledge that the instant action challenges "the *Z-R-Z-C-* Interpretation itself." Defs.' Mot. Dismiss Mem., ECF 36 at 12. As outlined below, the *Z-R-Z-C-* policy constitutes a final agency action notwithstanding the procedural posture of Plaintiffs' individual applications or Defendants' purported subsequent, ongoing review of the policy.

A. The *Z-R-Z-C-* Policy Meets the Two *Bennett* Prongs.

First, the undisputed facts demonstrate a consummation of USCIS's decision-making process. Defendants do not contest that *Matter of Z-R-Z-C-* reinterpreted MTINA and reversed a prior, decades-long policy deeming a TPS holder's authorized travel and return to the United States as satisfying 8 U.S.C. § 1225(a). *See* ECF 36 at 4–5. Nor is it controverted that the agency "designated the *Matter of Z-R-Z-C-* decision as USCIS interpretation." *Id.* at 5; *see also* USCIS Policy Mem., 2020 WL 5255637, at *1 ("USCIS personnel are directed to follow the reasoning in this decision in similar cases."). Defendants also acknowledge that USCIS subsequently incorporated *Matter of Z-R-Z-C-* and its legal analysis into the agency's policy manual. ECF 37 ¶ 4; USCIS Policy Alert, *supra* p.6.

This Court has found a USCIS policy change to be a consummation of the agency's decision-making process where, as with the *Z-R-Z-C-* policy, it "undertook a review process and issued a directive . . . instructing its employees on how to interpret the . . . statute." *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 375–76 (S.D.N.Y. 2019); *see also id*. at 375 ("[T]he new policy is

the result of an internal agency process."); *see also, e.g.*, *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 41 (D.D.C. 2018) (finding that a USCIS memorandum meets the first *Bennett* prong because it "outlines USCIS policy for identifying and processing cases with national security (NS) concerns" and "explicitly rescinds" existing policy). Like the USCIS internal guidance at issue in *R.F.M.*, the *Z-R-Z-C-* policy addresses a threshold eligibility requirement for an immigration benefit. Specifically, by adopting *Z-R-Z-C-*, USCIS completed a review process and "definitively decide[d]" that Plaintiffs and similarly situated individuals are ineligible for adjustment of status. *NRDC*, *Inc.*, *v. U.S. Dep't of the Interior*, 397 F. Supp. 3d 430, 448 (S.D.N.Y. 2019). Indeed, USCIS has made clear that the *Matter of Z-R-Z-C-* policy "is controlling and supersedes any prior guidance on the topic." USCIS Policy Alert, *supra* p.6; *see also* USCIS Policy Manual, About the Policy Manual, https://www.uscis.gov/policy-manual (last updated Mar. 23, 2022) (requiring that the manual "be followed by all USCIS officers in the performance of their duties"). Such "definitive language marks the consummation of agency action." *Tzumi Innovations LLC v. Regan*, --- F. Supp. 3d ---, 2021 WL 3271828, at *3 (S.D.N.Y. July 30, 2021); *see also Hawkes Co.*, 578 U.S. at 597–98 (finding that a U.S. Army Corps determination meets the first *Bennett* condition because it is not "advisory in nature"); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (finding that a EPA guidance satisfied the first *Bennett* condition because it articulated "unequivocal" and "certain" standards for state agencies).

The *Z-R-Z-C-* policy also meets the second prong of the *Bennett* test because it both determines rights or obligations and is an action from which legal consequences will flow. Because being "inspected and admitted or paroled" is a mandatory requirement under 8 U.S.C. § 1255(a), the policy has functionally eviscerated Plaintiffs' right to apply for adjustment of status.

Additionally, by adopting *Matter of Z-R-Z-C-*, USCIS obligated adjudicating officers to apply the new policy. As a result, USCIS's policy has "a virtually determinative effect," *Bennett*, 520 U.S. at 170, and is "the source of profound legal consequences for the plaintiffs," *R.F.M.*, 365 F. Supp. 3d at 376. *See also, e.g.*, *State v. U.S. Immigration and Customs Enforcement*, 431 F. Supp. 3d 377, 387 (S.D.N.Y. 2019) (finding that legal consequences flow from an agency guidance that "embodies [its] novel interpretation" of the law, "and not merely case-by-case guidance to individual officers"); *see also* USCIS Policy Manual, About the Policy Manual, *supra* p. 13 (explaining that USCIS adjudicators must follow the policy manual). Indeed, at least one Plaintiff—Gilberto Landaverde Garcia—had his application denied on the basis of the *Z-R-Z-C-* policy. *See supra* p. 10.

Accordingly, the *Z-R-Z-C-* policy satisfies both prongs of *Bennett* and constitutes a final agency action reviewable under the APA.

B. Neither the Absence of Individual Denials nor the Possibility of Reconsideration Undermines the Finality of USCIS's Action.

Rather than apply *Bennett's* two-prong test to the *Matter of Z-R-Z-C-* policy, Defendants instead erroneously resort to characterizing the operative agency action as "USCIS's future determination of [Plaintiffs'] individual cases," arguing there is no reviewable action because the applications "remain open and pending before USCIS." ECF 36 at 10. Plaintiffs, however, challenge the legality of the *Z-R-Z-C-* policy itself. ECF 1 ¶¶ 80–89 (challenging the policy as being in violation of the INA, MTINA, and APA), ¶¶ 90–95[4] (challenging the policy as being in violation of the agency's own regulations and the APA). In support of their argument,

[4] Plaintiffs' complaint inadvertently repeats paragraph numbers 92 and 93. *See* ECF 1 at 22–23. The proper paragraph numbering for count two should extend from paragraph 90 to paragraph 95.

Defendants mistakenly claim that another district court in the Second Circuit dismissed "an identical challenge to the *Z-R-Z-C-* interpretation" because the plaintiff's application was reopened by USCIS." ECF 36 at 10 (citing *Amaya v. Borgen*, No. 20 Civ. 4616, 2021 WL 5866485, at *2 (E.D.N.Y. Dec. 10, 2021)).

But *Amaya* is not apposite, much less identical. The plaintiff in *Amaya* sought review of USCIS's denial of his adjustment application. All of the relevant facts in his case took place before *Matter of Z-R-Z-C-* was issued. Specifically, the plaintiff (1) applied for adjustment on the basis of his employment and was not an immediate relative, (2) undertook TPS-authorized travel and applied for adjustment of status in 2019, (3) received an initial denial in October 2019, and (4) was denied reconsideration in July 2020. *See Amaya*, 2021 WL 5866485, at *1. As a result, *Matter of Z-R-Z-C-* was not the basis for USCIS's denial. While the plaintiff did "argue[] that *Matter of Z-R-Z-C-* . . . preordain[ed] his application's denial," *id.* at *2, that argument ignores that, (a) *Matter of Z-R-Z-C-* expressly limited the new policy to travel after the date it was issued, on August 20, 2020, and (b) the agency's Policy Manual prior to *Matter of Z-R-Z-C-* conceded that a return after authorized travel might be an "admission" under MTINA.[5] *See* 7 USCIS Policy Manual, pt. B, ch. 2 § A.5, Eligibility Requirements, https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2 (Aug. 6, 2020) [https://web.archive.org/web/20200815111525/https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2]; *see also Matter of Z-R-Z-C-,* at 9 & n.11 (quoting the former version of the Policy Manual and applying the agency's decision only on a prospective basis). Moreover, the court had no occasion to

[5] As an employment-based adjustment applicant, the plaintiff had to have a lawful admission to avoid the bar to adjustment in 8 U.S.C. § 1255(c)(2). *See* 8 U.S.C. § 1255(k)(1).

review the finality of *Matter of Z-R-Z-C*-because the parties simply "concede[d] [that] the AAO has the power [to] withdraw or reconsider that decision." *Amaya*, 2021 WL 5866485, at *2.

Similarly, Defendants' reliance on *Quintanilla v. Wolf*, No. 20 Civ. 4944, 2021 WL 4350346 (N.D. Ill. Sept. 20, 2021), is unavailing. The plaintiffs in *Quintanilla* specifically "challenge[d] . . . a decision of the United States Citizenship and Immigration Services denying their applications for adjustment of status," and not the *Z-R-Z-C*- policy. *Quintanilla*, No. 20 Civ. 4944, 2021 WL 4350307 (N.D. Ill. Jan. 22, 2021). And like in *Amaya*, the plaintiffs traveled prior to August 20, 2020. *See* Pl.'s Opp. to Defs.' Mot. to Dismiss *Quintanilla*, No. 20 Civ. 4944, ECF 12 at 1, 4 (N.D. Ill. Nov. 30, 2020) (stating that the plaintiffs filed their adjustment applications in 2018 and that the agency initially denied the plaintiffs' applications on July 23, 2020, prior to the *Matter of Z-R-Z-C*- decision).

Defendants also argue that the *Z-R-Z-C*- policy is not final because it "ha[s] yet to play out in individual adjudications." ECF 36 at 12. As a factual matter, this assertion is incorrect because USCIS explicitly applied the policy in denying Plaintiff Landaverde's adjustment of status application. ECF 1 ¶¶ 34–35. USCIS reopened his application on December 15, 2021, only after the instant action was filed. ECF 22 at 2 n.1. Furthermore, there may be additional denials in cases that Plaintiffs have not identified, and which USCIS has not reopened. Defendants' argument is also wrong on the merits. It is well-established that an agency action that "'give[s] notice of how the [agency] interpreted' the relevant statute can be final agency action, even if the notice "'would have effect only if and when a particular action was brought.'" *Hawkes Co.*, 578 U.S. at 599-600 (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 150 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)); *see also, e.g.*, *Sharkey v. Quarantillo*, 541 F.3d 75, 89 (2d Cir. 2008) ("[I]f an agency has issued a 'definitive statement of

its position, determining the rights and obligations of the parties,' the agency's action is final notwithstanding '[t]he possibility of further proceedings in the agency' on related issues" (second alteration in original)); *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 981 F.3d 1360, 1379 (Fed. Cir. 2020) ("[T]he whole regime of challenges to rules assumes that rules are often going to be applied in future individual adjudications."). Accordingly, this Court has rejected the argument that a final agency action "will occur only in any forthcoming individual decisions . . . or other agency actions premised on the application of" a policy. *NRDC*, 397 F. Supp. 3d at 447–48; *see also, e.g.*, *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 413 (D.C. Cir. 2011) (rejecting argument that "final agency action . . . requires the completion of a full enforcement action").

Further, the agency actions addressed by *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), and *RCM Technologies Inc., v. U.S. Dep't of Homeland Security*, 614 F. Supp. 2d 39 (D.D.C. 2009), are distinguishable from the *Z-R-Z-C-* policy. *See* ECF 36 at 12 (citing *Cobell* and *RCM Technologies*). *Cobell* addressed the finality of an agency plan "consist[ing] of twelve 'subprojects,'" designed to "overcome numerous gaps and deficiencies in the Interior Department's record-keeping and trust management." 240 F.3d at 1091. Unlike that "on-going program," the *Z-R-Z-C-* policy is "a single step or measure" that establishes a firm rule. *Id.* at 1095. Defendants' reliance on *RCM Technologies* is also misplaced. There, the plaintiffs challenged an "informal policy," 614 F. Supp. 2d at 45, that provided USCIS adjudicators "clearance . . . to require master's degree[s]" of occupational and physical therapists seeking a specific employment visa, *id.* at 46 (alterations in original). The court found that there was no final agency action, but this conclusion was not premised on the fact that the policy had not been applied to individual applications. Rather, there was no final agency action because the

challenged policy "[did] not appear to *require* adjudicators to require master's degrees in all cases." *Id.* As a result, the policy did not meet "either aspect of *Bennett*'s second prong." *Id.* By contrast, the *Z-R-Z-C-* policy is binding on all USCIS officers.

Lastly, Defendants' contention that the *Z-R-Z-C-* policy is under "active reconsideration," ECF 36 at 12, does not undermine the finality of USCIS's action. As the Second Circuit has held, "[t]he APA does not require that the challenged agency action be the agency's final word on the matter for it to be 'final' for the purposes of judicial review." *Salazar v. King*, 822 F.3d 61, 83–84 (2d Cir. 2016). Courts have generally recognized that the possibility of revision or reconsideration "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Hawkes Co.*, 578 U.S. at 598; *see also, e.g.*, *Sackett v. EPA*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider . . . does not suffice to make an otherwise final agency action nonfinal."); *Nat'l Env't Dev. Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) ("An agency action may be final even if the agency's position is 'subject to change' in the future."). Judicial review is particularly apt in this case, as Defendants do not specify a timeline for their review process, nor contend that the policy has been withdrawn or even stayed pending the agency's reconsideration. *See* ECF 37 ¶ 6. Moreover, USCIS denied Plaintiff Landaverde's application in September 2021—many months after the February 2, 2021, executive order that Defendants claim resulted in a review of the *Z-R-Z-C-* policy. *See id.* ¶ 5 (citing Exec. Order No. 14012, 86 Fed. Reg. 8277).

III. Plaintiffs All Have Standing.

All Plaintiffs have standing to challenge the *Z-R-Z-C-* policy. To demonstrate standing, a plaintiff must show that he or she "suffered an injury in fact—an invasion of a legally protected right that is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or

hypothetical"; that there is a "causal connection between the injury and the conduct complained of"; and finally, that it is "likely . . . that the injury will be redressed by a favorable decision." *Chevron Corp. v. Donziger*, 833 F.3d 74, 120 (2d Cir. 2016) (quoting *Lujan*, 504 U.S. at 560–61).

Additionally, "the standing inquiry [is] focused on whether the party invoking jurisdiction had the requisite stake in the outcome *when the suit was filed*." *Id*. at 121 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)); *see also Klein ex rel. Qlik Techs., Inc. v. Qlik Techs., Inc.*, 906 F.3d 215, 221 (2d Cir. 2018) ("[S]tanding doctrine evaluates a litigant's personal stake as of the outset of litigation." (alteration in original) (citation omitted)). Defendants assert that Plaintiffs lack standing because all of their applications remain pending. ECF 36 at 13. First, this ignores the fact that, on November 8, 2021, when this suit was filed, Plaintiff Landaverde's adjustment application had been denied solely based on the *Z-R-Z-C-* policy. ECF 1 ¶ 34. The agency did not reopen it until December 15, 2021, over a month after the lawsuit was filed. ECF 22 at 2 n.1. Consequently, at the onset of the suit, Mr. Landaverde was suffering a concrete injury which was directly caused by the challenged policy and which this Court could redress through a grant of injunctive relief. When, as here, there are multiple plaintiffs, only one of them must satisfy the standing requirement. *See Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017). Thus, Plaintiff Landaverde's standing alone is sufficient for the case to proceed.

Defendants do not argue that Mr. Landaverde's claim became moot when USCIS reopened it, presumably because they are unable to satisfy the "stringent" and "formidable" burden of demonstrating mootness. *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 604 (2d. Cir. 2016) (citations omitted); *see also id*. at 603 (explaining that a defendant has the burden

of demonstrating that a case has become moot). It is well established that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id*. at 603 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). To satisfy this burden, a defendant must show that "(1) there is no reasonable expectation that the alleged violation will recur and (2) interim . . . events have completely and irrevocably eradicated the effects of the alleged violation." *Id*. (quoting *Granite State Outdoor Advert. Inc. v. Town of Orange*, 303 F.3d 450, 451 (2d Cir. 2002)). Defendants have not met—and could not meet—either prong of this test. Although they contend the *Z-R-Z-C-* policy is currently under agency review, Defendants admit that they have made "no final determination" as to whether they may, at an indefinite point in the future, revise the policy, and so it remains valid and in force. ECF 36 at 6. At this point, there are no intervening events which have "irrevocably eradicated" the effects of the policy; instead, there is simply an agency review which may *or may not* result in the withdrawal of the policy.

Second, while not necessary given Plaintiff Landaverde's standing, Plaintiffs Gomez and Alvarado also have standing. Defendants admit that the *Z-R-Z-C-* policy was in effect at the time the suit was filed. In fact, USCIS specifically updated its Policy Manual in October 2020 to include this policy; it now "reflect[s] USCIS' interpretation that an adjustment of status applicant who was a TPS recipient and who was present in the United States without inspection, and who previously traveled pursuant to TPS travel authorization, would not satisfy the 'inspected and admitted or paroled' provision at 8 U.S.C. § 1255(a) based on 8 U.S.C. § 1254a(f)(3) and MTINA." ECF 37 ¶ 4; *see also* 7 USCIS Policy Manual, pt. B, ch. 2 § A.5, Eligibility Requirements, https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2 (last updated Mar. 23, 2022). Under this binding policy, a USCIS adjudicator is prohibited from finding either

Plaintiff Gomez or Plaintiff Alvarado eligible for adjustment of status, since their only lawful entry into the United States was pursuant to USCIS-authorized travel abroad that occurred *after* August 20, 2020. ECF 1 ¶¶ 9, 10, 17–19, 23–26; *see also* 7 USCIS Policy Manual, pt. B, ch. 2 § A.5, Eligibility Requirements, https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2 (last updated Mar. 23, 2022) (noting that "the statutory construction announced by *Matter of Z-R-Z-C-* only applies to TPS recipients who departed and returned to the United States under [8 U.S.C. § 1254a(f)(3)] after the date of the AAO's Adopted Decision, August 20, 2020"). Consequently, when the lawsuit was filed, both plaintiffs faced a "credible threat" of harm under the *Z-R-Z-C-* policy. *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 385 (2d Cir. 2015). At a minimum, there was a "substantial risk" that their applications would be denied. *Lacewell v. Office of Comptroller of Currency*, 999 F.3d 130, 141 (2d Cir. 2021) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)); *see also Make the Rd. N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 251 (S.D.N.Y. 2020) (rejecting Defendants' motion to dismiss based on lack of standing where "[i]ndividual Plaintiffs or their family members [were] unable to move forward with their visa applications out of fear of denial").

IV. Plaintiffs' Claims Are Ripe.

Plaintiffs' claims challenging the *Z-R-Z-C-* policy are ripe for judicial review. When considering prudential ripeness, which Defendants challenge here, *see* ECF 36 at 15–17, courts "evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Sharkey*, 541 F.3d at 89 (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)).[6] Plaintiffs' claims meet those requirements.

[6] While Defendants do not challenge constitutional ripeness, the claims are ripe for the same reasons that Plaintiffs have standing. *See supra* Section II; *Ross v. Bank of America, N.A. (USA)*,

First, whether the *Z-R-Z-C-* policy is contrary to the INA, MTINA, the APA, and agency regulations is an issue fit for judicial decision. When making this assessment, the Second Circuit considers whether "the dispute presents legal questions and there is a concrete dispute between the parties." *Id.* at 89. The court also considers whether the claim at issue involves review of a "nonfinal proposed policy" or a final promulgated policy, whether the claim "would not benefit from any further factual development," and whether the court "would be in no better position to adjudicate the issues in the future than it is now." *NYCLU v. Grandeau*, 528 F.3d 122, 132 (2d Cir. 2008) (quotation marks and citations omitted); *see also NRDC*, 397 F. Supp. 3d at 451 (finding claim ripe where agency memorandum eliminated discretion with respect to agency interpretation of the statute at issue). Here, Plaintiffs present a pure question of law, which requires no further factual development and which involves the validity of a final agency policy. Plaintiff Landaverde's claim to ripeness is especially strong since Defendants denied his adjustment of status application before the complaint in this case was filed, and he continued to challenge the underlying policy even after that denial was reopened. *See* ECF 1 ¶¶ 34-35.

Under similar case law, the Ninth Circuit has expressly recognized that where a court can "firmly predict" that a plaintiff will apply for a benefit and that the agency will deny their application based on a challenged policy, the challenge is ripe even if the agency has not yet denied the application. *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1436 (9th Cir. 1996); *see id.* at 1434–36 (finding claims ripe even though plaintiff had not applied for a license under the challenged regulation); *see also, e.g.*, *Chang v. United States*, 327 F.3d 911, 921–22 (9th Cir. 2003) (finding immigrant investors' claims ripe although agency had not yet denied

524 F.3d 217, 226 (2d Cir. 2008) (finding claim ripe where harm was "sufficiently 'actual and imminent'" for injury in fact analysis).

their petitions).[7] Here, Plaintiffs have already applied for adjustment of status but, due to the challenged policy, cannot receive the status for which they are otherwise eligible. Thus, their claims are even stronger. There is no benefit to waiting for a foregone conclusion while Plaintiffs remain in limbo.

This is true even though Defendants assert that they may reassess the *Z-R-Z-C-* policy. Defendants advise that they placed the policy under review through an executive order issued in February 2021. ECF 36 at 5–6. Since that time, individuals have continued to be subject to the policy. ECF 1 ¶¶ 34–35. Defendants have not determined whether they will voluntarily reverse the policy or even provided a timeline for making such a determination. ECF 36 at 6 (noting that "no final determination has been made" regarding *Matter of Z-R-Z-C-*). Were this enough to establish that a challenge to a policy was insufficiently ripe for judicial review, an agency could indefinitely delay judicial review of any final policy simply by stating that the policy was under internal review—all the while applying the policy and/or using it to discourage eligible applicants from pursuing benefits. As one court has noted, "[t]he government's speculation [that a rule may be changed] is far from enough" to render the rule unreviewable, since "'[t]he fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.'" *Garcia v. Acosta*, 393 F. Supp. 3d 93, 106–07 (D.D.C. 2019) (quoting *Appalachian Power Co.*, 208 F.3d at 1022) (second alteration in original).

The cases Defendants cite, *see* ECF 36 at 15–16, are inapposite. Both involve pre-enforcement challenges to policies that would have required a court to undertake fact-intensive analyses before the relevant facts had developed. In *Pacific Gas and Electric Co. v. State Energy*

[7] The Ninth Circuit's decision stems from a concurrence by Justice O'Connor in *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 69 (1993), which the majority opinion did not reject. *See Freedom to Travel Campaign*, 82 F.3d at 1435–36.

Resources Conservation & Development Commission, 461 U.S. 190 (1983), the Supreme Court considered a challenge to energy regulations, including one which required "case-by-case" assessments of adequate capacity for interim storage at proposed nuclear powerplants. *Id.* at 201–03. The Court found the challenge to the interim storage regulation unripe, because, without factual information relevant to a particular case, courts could not determine whether any proposed powerplant would violate the regulation. *Id*. at 203. In *Ohio Forest Association, Inc. v. Sierra Club*, 523 U.S. 726 (1998), the Court similarly rejected a challenge to a land management plan that was intended from its inception to be subject to ongoing revision and that would have required the court to assess "the details of an elaborate, technically based Plan" absent yet-to-be-determined specifics. *Id*. at 736. No such uncertainty exists here; adjudication would not require this Court to develop the factual record or delve into elaborate details regarding any individual plaintiff.

Plaintiffs also satisfy the second prong of the prudential ripeness test; they will face hardship should the Court withhold consideration. Under the *Z-R-Z-C-* policy, Plaintiffs, who are otherwise statutorily eligible to adjust to LPR status, are unable to do so. Defendants suggest that no hardship exists because they have not yet applied *Z-R-Z-C-* to deny Plaintiffs' applications—but they do not contest that, under the law as it stands, they must do so. *Cf.* ECF 36 at 5 (noting that "USCIS designated the *Matter of Z-R-Z-C-* decision as USCIS interpretation"); *Sharkey*, 541 F.3d at 90 (noting that the opportunity to request the agency's discretion to reassess the petitioner's eligibility for LPR status does not merit a finding that she would suffer no hardship absent federal court review).

Furthermore, though Defendants claim that they may reassess the policy, they provide no timeline for doing so, suggesting that their alternative to review by this Court is to simply

indefinitely decline to adjudicate Plaintiffs' applications. This too causes hardship. Plaintiffs are harmed by every additional week of delay, which leaves their legal status in limbo and prevents them from obtaining LPR status and from accruing time needed for U.S. citizenship eligibility, both of which entitle them to additional benefits. *See* 8 U.S.C. § 1430(a); *see also Nat'l Park Hosp. Ass'n*, 538 U.S. at 809 (indicating that plaintiffs may show hardship by establishing "adverse effects of a strictly legal kind" including through a policy that would "withhold . . . any formal legal license, power, or authority" (quoting *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 733)); *cf. Make the Rd. N.Y.*, 475 F. Supp. 3d at 251 (rejecting government's constitutional ripeness argument where "Individual Plaintiffs or their family members are unable to move forward with their visa applications out of fear of denial" and "continue to be deprived of the many benefits of LPR status"). This hardship is especially notable given the tenuousness of their TPS, without which they would lose any legal status, work authorization, and protection from deportation. *See* ECF 1 ¶ 42 (noting that TPS for six countries, including El Salvador and Honduras, was terminated but has been extended due to ongoing litigation); *cf. Citizens United v. Schneiderman*, 882 F.3d 374, 388–89 (2d Cir. 2018) (finding claim ripe where "[w]ithholding court consideration would require Appellants to risk losing their permission to solicit in New York before litigating [the] issue").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss.

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