**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**BROWNSVILLE DISTRICT**

| | | |
|---|---|---|
| URBAN EQUALITY NOW, | § | |
| | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | Case No. 1:15-cv-199 |
| | § | |
| JEH C. JOHNSON, | § | |
| Secretary of Homeland Security, *et al.*, | § | |
| | § | |
| Defendants. | § | |

**DEFENDANTS' MOTION TO DISMISS**
**AND BRIEF OF POINTS AND AUTHORITIES IN SUPPORT**

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## STATEMENT OF THE NATURE OF THE PROCEEDING AND SUMMARY OF ARGUMENT

The plaintiff in this immigration case, Urban Equality NOW (hereinafter "Urban Equality" or "Plaintiff"), seeks mandamus, declaratory, and injunctive relief from the Court based on broad challenges it makes to Defendants' administration and enforcement of the employment-based fifth preference immigrant visa program ("EB-5 Program") under Section 203(b)(5) of the Immigration and Nationality Act ("INA") (codified at 8 U.S.C. § 1153(b)(5)). It asserts jurisdiction under 28 U.S.C. § 1361 (the Mandamus Act) and claims to raise a federal question pursuant to 28 U.S.C. § 1331 (the Federal Question Statute), to wit, 28 U.S.C. § 2201 (the Declaratory Judgment Act).

As explained below, Plaintiff's lawsuit must be dismissed in its entirety for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). First, Urban Equality lacks Article III standing to bring any of its claims because the Complaint fails to plead a concrete, particularized injury-in-fact that is fairly traceable to Defendants and redressable through the requested relief. Plaintiff, a non-profit corporation, has not identified a single injury to *itself*, or that it has members and those members have been injured. Instead, it impermissibly brings a generalized grievance on behalf of third parties (unidentified "impoverished urban areas") not before this Court, and seeks sweeping declaratory and injunctive relief without identifying its interest in or right to that relief. Second, this Court lacks jurisdiction on the additional and separate ground that Plaintiff has not asserted any waiver of sovereign immunity. Although the Federal Question Statute is a source of jurisdiction, neither the Federal Question Statute nor the Declaratory Judgment Act waives the government's sovereign immunity. Finally, under Federal Rule of Civil Procedure 12(b)(6), Plaintiff fails to state a claim entitling it to the "drastic" remedy of a writ of mandamus because it does not allege—and cannot show—that it has a clear, indisputable right to the relief it seeks, that Defendants have clearly failed to perform a nondiscretionary duty, and that

Plaintiff lacks any other remedy. On these bases, the Court should dismiss Plaintiff's Complaint in its entirety under Rules 12(b)(1) and 12(b)(6).

## STATEMENT OF THE ISSUES TO BE RULED UPON BY THE COURT

1. Whether Plaintiff has Article III and prudential standing to bring any of its claims.
2. Whether Plaintiff has adequately pleaded a waiver of sovereign immunity.
3. Whether Plaintiff states a claim for its request for mandamus relief.

## STATUTORY AND REGULATORY BACKGROUND

At issue in this case is Defendants' administration of the employment-based, fifth preference ("EB-5") immigrant investor visa category (hereinafter the "EB-5 Program" or "EB-5 classification"). Under the EB-5 Program, immigrant entrepreneurs or investors are eligible to apply for permanent residence if they make the necessary capital investment in a new commercial enterprise (hereinafter "NCE") that creates or preserves ten full-time jobs for workers in the United States. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 121(a) (Nov. 29, 1990) (codified at 8 U.S.C. § 1153(b)(5)). Congress has charged the Secretary of Homeland Security with administering the EB-5 Program.[1] *See* 8 U.S.C. § 1103 ("The Secretary . . . shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens."); 6 U.S.C. § 202(4) (providing that the Secretary "shall be responsible" for "[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States"). United States Citizenship and Immigration Services ("USCIS") is the specific component within the Department of Homeland Security ("DHS")

[1] Congress initially charged the Attorney General with carrying out the EB-5 Program, *see generally* 8 U.S.C. § 1153(b)(5). The Attorney General lawfully delegated that authority to the Immigration and Naturalization Service ("INS"). 8 U.S.C. § 1103(a)(4) (amended 2002). In 2002, Congress abolished the INS, *see* 6 U.S.C. § 291, and transferred jurisdiction to enforce and administer the nation's immigration laws to the Secretary of Homeland Security. *See* 6 U.S.C. §§ 202, 557. Thus, all statutory references to the "Attorney General" in this context are now deemed to refer to the Secretary of Homeland Security. *See* 6 U.S.C. § 557.

responsible for adjudicating EB-5 petitions and promulgating regulations that govern the EB-5 Program, within the bounds set out by Congress in the INA.

***Statutory Requirements***

Under the statutory provisions governing EB-5 classification, petitioning immigrants must invest a set-minimum amount of capital into an NCE that, as a result of the investment, creates at least ten full-time jobs for United States workers. Generally, a petitioner must invest $1,000,000 of capital into the NCE to qualify for EB-5 classification. 8 U.S.C. § 1153(b)(5)(C)(i). Congress, however, reduced the required amount of capital, and set aside "[n]ot less than 3,000 of the visas made available" under the Program in each fiscal year for petitioning aliens who invest in an NCE located in a "targeted employment area" (hereinafter a "TEA"). *Id.* § 1153(b)(5)(B). The statute defines a TEA as "a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)." *Id.*[2] Setting the floor at $500,000, Congress gave DHS the discretion to determine the amount of capital required for petitioning immigrants seeking to invest in a TEA. *Id.* § 1153(b)(5)(C)(ii) ("The Attorney General *may*, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than ½ of) the amount specified in clause (i).") (emphasis added).

Other than mandating the specific number of visas that must be made available each year and setting floors for the amount of capital and rate of unemployment required for TEA's, Congress did not further define what qualifies as an "area" for purposes of TEA's or delineate how the agency must adjudicate petitions seeking EB-5 classification in a TEA. In the face of such Congressional silence, DHS—through the express authority conferred upon it to administer the EB-5 Program—must exercise its discretion when promulgating regulations and adjudicating petitions involving

[2] A petitioner need only show that the area where he or she is investing is *either* a rural area *or* an area with high unemployment. *See id.* Because Plaintiff's Complaint focuses only on areas of high unemployment, and not rural areas, this motion addresses only what is required for TEA's in high unemployment areas.

TEA's. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 997 (2005) ("[Congressional] silence suggests that the [agency] has the discretion to fill the consequent statutory gap."); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (explaining that deference is accorded to the agency when Congress has left a gap for the agency to fill pursuant to an express or implied delegation of authority to the agency); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

***Regulatory Requirements***

In 1991, the former INS published regulations through notice and comment rulemaking interpreting the relevant statutory terms and establishing procedures for aliens to file petitions under the EB-5 program. *See* 56 Fed. Reg. 60,897, 60,910-13 (Nov. 29, 1991) (codified at 8 C.F.R. § 204.6). Under these procedures, a prospective alien investor self-petitions USCIS for an EB-5 immigrant visa using Form I-526 (hereinafter "EB-5 petition"). 8 C.F.R. §§ 204.6(a), (c). In order for a petitioner to establish eligibility for the reduced EB-5 investment threshold of $500,000 in high unemployment areas, the petition must be accompanied by the following:

> (A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or
>
> (B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 CFR 204.6(i).

8 C.F.R. § 204.6(j)(6)(ii).

Recognizing that states are naturally in the best position to determine what constitutes an "area of high unemployment" within their own boundaries, the regulations permit state governments to "designate a particular geographic or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more within such state as an area of high unemployment (at least 150 percent of the national average rate)." 8 C.F.R. § 204.6(i).[3] The USCIS Adjudicator's Field Manual instructs that submission of a state-designation is *required* if a petitioner claims "high unemployment in only a portion or portions of a geographic area or political subdivision for which distinct unemployment data is not readily available to the general public from federal or state governmental sources." Adjudicator's Field Manual ("AFM") § 22.4(c)(F)(ii).[4] In requiring the foregoing, the agency expressly prohibits a petitioner "to 'gerrymander' a finding of high unemployment when in fact the area does not qualify as being a high unemployment area." *Id.*

***Regional Center Pilot Program***

In 1993, Congress expanded the EB-5 Program by authorizing a "pilot program" for "regional investment center[s] in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." *See* Departments of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriations Act of 1992, Pub. Law No. 102-395, § 610(a) (Oct. 6, 1992) (hereinafter "Appropriations Act of 1992"). The pilot program allows public or private economic units engaged

[3] Section 204.6(i) continues as follows:

> Evidence of such designation, including a description of the boundaries of the geographic or political subdivision and the method or methods by which the unemployment statistics were obtained, may be provided to a prospective alien entrepreneur for submission with Form I-526. Before any such designation is made, an official of the state must notify the Associate Commissioner for Examinations of the agency, board, or other appropriate governmental body of the state which shall be delegated the authority to certify that the geographic or political subdivision is a high unemployment area.

*Id.*

[4] The Field Manual may be found at http://www.uscis.gov/portal/site/uscis by clicking on the "Laws" link and then, on the left toolbar, "Immigration Handbooks, Manuals and Guidance."

in the promotion of economic growth to seek regional investor status with USCIS for the purpose of sponsoring alien investors to fund proposed economic development plans. *See* AFM § 22.4(a)(2)(A); 8 C.F.R. § 204.6(m). Notably, an alien investing in an NCE located in a regional center is not required to make the normal showing that the NCE itself *directly* employs ten U.S. workers; a showing of indirect job creation and improved regional productivity will suffice.[5] *See* 8 C.F.R. § 204.6(m); AFM § 22.4(a)(2)(A). Congress directed the agency to "permit aliens admitted under the pilot program . . . to establish reasonable methodologies for determining the number of jobs created by the pilot program, including such jobs which are estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the pilot program." Appropriations Act of 1992, § 610(c) (as amended by Pub. Law No. 106-396, § 402(b) (2000)).

USCIS defines "indirect jobs" as "jobs held by persons who work for the producers of materials, equipment, and services that are used in a commercial enterprise's capital investment project, but who are not directly employed by the commercial enterprise, such as steel producers or outside firms that provide accounting services." AFM § 22.4(a)(2)(A). The agency also recognizes a subset of indirect jobs flowing from capital investments, called "induced jobs," which are defined as "jobs created when direct and indirect employees go out and spend their increased incomes on consumer goods and services." *Id.*

**PLAINTIFF'S COMPLAINT**

In Plaintiff's Original Complaint (hereinafter the "Complaint"), it claims that Defendants act contrary to applicable immigration laws by "routinely" granting EB-5 classification to immigrant

[5] Plaintiff does not specify whether the four EB-5 projects it identifies in the Complaint are investments within designated regional centers or not. As explained *infra*, because an alien investing in an NCE within a regional center may show indirect job creation (or even "induced jobs"), Plaintiff's assertion that Brownsville residents could not possibly experience any job-creation benefit from a project in Laredo is unfounded without more information regarding what type of EB-5 investment is involved. Nevertheless, the Court need not get to the merits of Plaintiff's claims because Plaintiff has not established that the Court has subject matter jurisdiction to review those claims.

investors who submit petitions seeking to use "gerrymandered TEA's" in order to meet the minimum unemployment rate required for a TEA. Dkt. No. 1 at 4 ¶ 14, 8 ¶ 31. Plaintiff requests an order from the Court enjoining Defendants from permitting TEA's to be created in circumvention of the INA, an order directing Defendants to establish policies and procedures to ensure compliance with the INA, and an order declaring Defendants' current policies and procedures inadequate and inconsistent with the INA. *Id.* at 8-9 ¶ 33.

## ARGUMENTS

### I. Plaintiff's Complaint Must be Dismissed Under Rule 12(b)(1) for Lack of Jurisdiction

#### A. Standard of Review

Motions filed under Federal Rule of Civil Procedure 12(b)(1) allow a party to challenge the court's subject matter jurisdiction. Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Determining whether a court has subject matter jurisdiction "ordinarily involves an examination of the constitutional limitations in Article III and congressional statutory grants of power." *Sheehan v. Army & Air Force Exch. Serv.*, 619 F.2d 1132, 1136 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982); *see also Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998) (explaining that federal courts must have statutory or constitutional power to hear a case). However, when a party sues the federal government, "sovereign immunity, unless waived, operates as a bar to the action in the nature of an additional limitation on the court's subject matter jurisdiction." *Sheehan*, 619 F.2d at 1136; *Rothe Dev. Corp. v. U.S. Dep't of Defense*, 194 F.3d 622, 624 (5th Cir. 1999) (explaining that the United States cannot be sued unless Congress expressly waives immunity).

When a defendant moves under Rule 12(b)(1), the plaintiff has the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *See Ramming v. United States*, 281

F.3d 158, 161 (5th Cir. 2001). A court should grant a motion to dismiss under 12(b)(1) if it appears that the plaintiff cannot prove any set of facts to support his claim that would entitle him to relief, or if "the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

**B. Plaintiff Lacks Article III Standing**

To invoke federal jurisdiction, Plaintiff must meet the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); U.S. Const. art. III, § 2, cl. 2 (limiting federal courts' jurisdiction to "Cases" and "Controversies"). Article III restricts judicial power to the "traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of the law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). As the Supreme Court has emphasized, "[e]xcept when necessary in the execution of that [traditional] function, courts have no charter to review and revise legislative and executive action." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *Lyons*, 461 U.S. at 111-12).

"To state a case or controversy under Article III, a plaintiff must establish standing," *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011), which requires that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *See Summers*, 555 U.S. at 493 (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)). Standing is a necessary predicate to any exercise of federal jurisdiction; if it is lacking, the dispute is not a proper case or controversy under Article III, and the court does not have subject matter jurisdiction to decide the case. *Delta Commercial Fisheries Ass'n v. Gulf of Mex. Fishery Mgmt. Council*, 364 F.3d 269, 272 (5th Cir. 2004).

The irreducible minima of Article III standing contain three elements, which Plaintiff bears the burden of establishing. *Lujan*, 504 U.S. at 561. First, Plaintiff must have suffered an "injury in

fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (quotations and citations omitted). Second, Plaintiff must establish a "causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of [Defendants], and not the result of the independent action of some third party not before the court." *Id.* Finally, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561. Plaintiff must *plead facts* showing injury, causation, and redressability. *See Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). Additionally, Plaintiff bears the burden of demonstrating that the requirements for standing are satisfied for *each claim* it brings and for *each type of relief* it seeks. *See Davis v. FEC*, 554 U.S. 724, 734 (2008). Specifically, for the injunctive and declaratory relief Plaintiff seeks, it must show a "sufficient likelihood" of future injury. *Lyons*, 461 U.S. at 111.

Beyond the constitutional requirements for standing, federal courts also adhere to certain "prudential" limitations on standing.[6] *See Superior MRI Servs., Inc. v. Alliance Healthcare Servs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015) ("Prudential standing requirements exist in addition to the immutable requirements of Article III as an integral part of judicial self-government.") (citations

[6] The continued vitality of labeling these three standing limitations as "prudential" is uncertain in the wake of the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (acknowledging its historic practice of adverting to a "'prudential' branch of standing," but concluding that "a court . . . cannot limit a cause of action . . . merely because 'prudence' dictates."). Specifically, as to the prohibition on "generalized grievances," the *Lexmark* Court stated in dicta that "such suits do not present constitutional 'cases' or 'controversies'" and are thus "barred for constitutional reasons, not 'prudential' ones." *Id.* at 1387 n.3. The Court found the limitation on third-party suits "harder to classify," but declined to consider "that doctrine's proper place in the standing firmament." *Id.* Lastly, the Court concluded that the zone of interests test was a matter of statutory interpretation rather than a prudential consideration. *Id.* at 1387-88. However, the Fifth Circuit in *Superior MRI Servs., Inc.*, rejected the claim that *Lexmark* prevented it from applying the prudential standing doctrine as a jurisdictional bar. 778 F.3d at 504-06 ("To be sure, *Lexmark* does note that prudential standing doctrine as a whole 'is in some tension with . . . the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging' . . . . However, we have long applied the prudential requirement that a party must assert its own rights . . . and we are bound to follow our precedent until the Supreme Court squarely holds to the contrary.") (citations omitted); *see also In re Emergency Room Mobile Servs., L.L.C.*, 529 B.R. 676, 685 (N.D. Tex. 2015) ("Despite the Supreme Court's recent criticism of the prudential standing doctrine, and the zone-of-interest test in particular, the Fifth Circuit continues to endorse the doctrine's application."). In light of the Fifth Circuit's holding, this motion will continue to consider prudential limitations on standing.

and quotations omitted). For one, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499; *Superior MRI Servs., Inc.*, 778 F.3d at 504. Additionally, even when the plaintiff has alleged a redressable injury sufficient to meet constitutional requirements, courts refrain from adjudicating "'abstract questions of wide public significance, which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982) (quoting *Warth*, 422 U.S. at 499-500). Thus, the Supreme Court has denied standing when the plaintiff sued "claiming only harm to [plaintiff's] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lujan*, 504 U.S. at 573-74. Lastly, the plaintiff's complaint must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970). In the immigration context, the Supreme Court has held that "private persons . . . have no judicially cognizable interest in procuring enforcement of the immigration laws by the [DHS]." *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 897 (1984).

**1. Injury-in-Fact**

"Injury in fact" within the meaning of Article III standing requires Plaintiff to show "an invasion of a legally-protected interest" that affects *Plaintiff* in a "personal and individual way." *Lujan*, 504 U.S. at 560 n.1. A corporation suing on its own behalf must also allege a "personal stake" in the outcome of the controversy and otherwise meet the general standing requirements applied to individuals.[7] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). Specifically, the Supreme Court has required an organizational or corporate plaintiff suing on its

[7] Organizational (or "associational") standing is inapplicable here because Urban Equality brings suit on its own behalf and does not claim to have members whose interests it represents, or any members at all.

own behalf to demonstrate "[s]uch concrete and demonstrable injury to the organization's activities—with [a] consequent drain on the organization's resources—constitut[ing] . . . more than simply a setback to the organization's abstract social interests." *Id.* at 379. Such a showing requires "more than allegations of damage to an interest in 'seeing' the law obeyed or a social goal furthered." *Am. Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987) (interpreting Supreme Court precedent); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39-40 (1976) (concluding that an organization with a "special interest in the health problems of the poor" could not establish standing to sue on its on behalf "simply on the basis of that goal").

Here, Urban Equality sues on its own behalf as a "non-profit corporation established under the laws of the State of Texas." Dkt. No. 1 at 1, ¶ 1. That is the full extent of information it provides about itself. Other than gleaning what Urban Equality's interests or goals might be from the sole fact that it has filed a lawsuit complaining of the EB-5 Program, Urban Equality has not identified a single corporate purpose, an interest it wishes to protect, or an activity in which it engages. Without any indication of its purpose, interests, or activities, Urban Equality cannot, and has not, alleged an injury to its interests, or that its activities have been or are in imminent danger of being affected in any way—by Defendants or otherwise.[8] Not once in the Complaint does Plaintiff aver that *it* is harmed by the alleged approval of EB-5 petitions in areas that do not qualify as TEA's, or that it has otherwise "personally suffered some actual or threatened injury." *Valley Forge Christian Coll.*, 454 U.S. at 472.[9] Nor could Plaintiff allege such harm because it does not

[8] While "general factual allegations" of injury usually suffice on a motion to dismiss, Urban Equality has failed to plead even *general* allegations of injury to itself for the Court to even begin to "presume that [the] "general allegations embrace those specific facts that are necessary to support the claim," as it would at the pleading stage. *Lujan*, 504 U.S. at 561. In other words, this is not an instance where a plaintiff's allegations are merely conclusory, as is often argued on dismissal; rather, factual allegations of injury to Urban Equality are altogether missing.

[9] Nor does Plaintiff allege that it has foreign-national members, any of whom have petitioned for and was denied an EB-5 petition. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972) (holding that a guest at a membership club who was refused service by the club did not have standing to challenge the club's discriminatory membership policy because he never actually applied for and was denied membership). For this reason, as discussed *infra*, Plaintiff also fails the "zone of interests" test.

have—or even attempt to plead—a *legally-protected* interest in how Defendants adjudicate EB-5 petitions. Allegations of a violation of law without concrete, imminent harm to a cognizable legal interest do not satisfy the injury-in-fact requirement.[10]

The allegations here are similar to those found insufficient in *Sierra Club v. Morton*, 405 U.S. 727 (1972). There, a non-profit membership corporation, Sierra Club, brought an action for declaratory and injunctive relief seeking to restrain federal officials from issuing permits for construction of a resort and recreation area in a national park. It alleged that approval of the permit for the proposed development violated federal laws and regulations governing the conservation of national parks. The complaint provided the corporation's national and local membership numbers, and alleged that for "many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks . . . regularly serving as a responsible representative of persons similar [sic] interested." *Id.* at 735 n.8.[11] The complaint also described the corporation's "principal purpose" ("to protect and conserve the national resources of the Sierra Nevada Mountains") and claimed that "[i]ts interests would be vitally affected . . . and . . . aggrieved by those acts of the defendants." *Id.* Lastly, Sierra Club's asserted injury was that the approved-development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." *Id.* at 734. In evaluating the adequacy of Sierra Club's allegations, the Supreme Court noted that the *type* of injury alleged "may amount to an 'injury in fact' sufficient to lay the basis for standing." *Id.* However, the "'injury in fact' test requires more than an injury to a cognizable interest." *Id.* at 734-35. "It requires that the party seeking review be himself among the

[10] Without *any* allegation of injury to Urban Equality, it is impossible to determine whether there is a "likelihood of future injury" for purposes of its standing to seek injunctive and declaratory relief. *Lyons*, 461 U.S. at 105.

[11] In analyzing the sufficiency of the complaint to determine whether a preliminary injunction was properly issued, the Supreme Court implied that the corporation's alleged "interest in the dispute" was tenuous. *Id.* In contrast, Urban Equality does not allege *any* interest in the dispute.

injured." *Id.* at 735. According to the Court, Sierra Club failed to allege in its complaint that it or its members would be affected in any of their activities by the development; nowhere did it state that its members used the affected park "for any purpose, much less that they use[d] it in any way that would be significantly affected by the proposed actions of the [defendants]."

Urban Equality's Complaint is even more deficient. Unlike Sierra Club, it does not identify a single interest—let alone a legally-protected one—in the dispute. And like Sierra Club, it fails to allege that, as the party seeking review, Urban Equality *itself* is among the alleged injured, or that Defendants' alleged actions affect its activities.[12] Without any indication of its interests, purpose, or activities, or harm thereto, Urban Equality has failed to plead *any* personal stake in the outcome of this lawsuit to meet the requirements under Article III.[13]

Further, even assuming Urban Equality does have a special interest in Defendants' administration of the EB-5 Program (which it fails to plead), "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the [plaintiff] is in evaluating the problem, is not sufficient by itself to render [it] 'adversely affected' or 'aggrieved.'" *Id.* at 739.[14] Urban Equality may not seek to "vindicate [its] own value preferences through the judicial process." *Id.* at 740. An ideological interest in a matter is simply not enough to satisfy standing requirements. *See also Lujan*, 504 U.S. at 562-63 (concluding that environmental groups lacked standing despite their cognizable interest in the "desire to use or observe an animal species, even for purely esthetic

[12] The Supreme Court's opinion in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), is also instructive. There, the Court found insufficient plaintiff's general allegation of injury that its "members used environmental resources that would be damaged by" actions taken as part of the defendant-agency's program. *Id.* at 880. The Court reached this conclusion despite the fact that plaintiff had submitted affidavits of two of its members who claimed to use specific lands covered by the agency's program that would be adversely affected by the agency's actions. If the allegations in *Lujan* were fatal to standing, Urban Equality's allegations are certainly deficient.

[13] Without an assertion of any interest protected by statute, it is impossible to evaluate whether Urban Equality falls within the "zone of interests" protected or regulated by a statute, as required for the zone of interests test.

[14] As the Supreme Court reasoned, "if a 'special interest' in this subject were enough to entitle the Sierra Club to commence . . . litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived." *Id.* at 739-40.

purposes," because they failed to show that one or more of its members would be "directly affected apart from their special interest in the subject").

**2. Causation and Redressability**

Urban Equality also fails to meet the causation and redressability requirements of Article III standing. For one, and most obviously, because it does not allege an injury to *itself*, Plaintiff cannot show that "a favorable decision will relieve a discrete injury to [*itself*]." *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) ("A Plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself."). The only harm alleged as the result of the challenged actions is that to "truly economically distressed areas," and "impoverished urban areas." Dkt. No. 1 at 6 ¶ 20, 7 ¶ 26. Even assuming *arguendo* that Plaintiff's assertion of injury on behalf of these impoverished urban areas—third parties not before the Court (or whose interests Urban Equality claims to represent)—constituted a cognizable injury in fact, Plaintiff cannot and does not allege facts to satisfy the causation and redressability prongs of standing. "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.'" *Lujan*, 504 U.S. at 562 (citations omitted); *id.* ("When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed."). This is because "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Id.* Accordingly, when, as is the case here, "[t]he existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,'" the plaintiff has the burden "to adduce facts showing that those choices have

been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* (citations omitted).

Granting the relief Urban Equality requests is not "likely" to redress the alleged injury that, as a result of Defendants' actions, "impoverished urban areas . . . continue to languish and suffer from inadequate investment and unemployment." Dkt. No. 1 at 7 ¶ 26. Nor can Plaintiff establish a causal connection between this alleged injury and the challenged conduct.[15] Urban Equality is not the object of the government action it challenges. Notably, "impoverished urban areas"—the only ones with an alleged injury—are also not the object of the government action Plaintiff challenges. Instead, causation and redressability hinge on immigrant investors—the only subjects of the challenged government action or regulation—whose future, "unfettered choices" neither the parties nor the Court can predict. And Plaintiff fails to adduce facts indicating otherwise. Rather, Plaintiff simplistically assumes that in the absence of Defendants' alleged approval of gerrymandered TEA's, "impoverished urban areas" (the putative injured party not before the Court) would receive the benefit of EB-5 investment. However, this assumption relies almost exclusively on speculative third-party conduct. To find a causal link and conclude that this injury is redressable, one must speculate that these undefined impoverished areas will be (or would have been) actually targeted for investment, that they will be (or would have been) targeted by immigrant investors, that the immigrant investors intend to apply (or would have applied) for EB-5 classification and meet the several prerequisites to apply, and that USCIS will approve (or would have approved) their petitions. *See Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) ("When considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties), as well as

[15] Claiming that Defendants' adjudication of EB-5 petitions causes "continue[d]" languishment and "continue[d]" suffering from "inadequate investment and unemployment rates nearly double national averages" in "impoverished areas" is nonsensical. Dkt. No. 1 at 7 ¶ 26. Congress never intended for the EB-5 visa program to completely alleviate the country's economic or social issues in distressed areas. *See* S. Rep. No. 101-55, at 21.

predictions of future injury that are not normally susceptible of labelling as 'true' or 'false.'") (citations omitted); *id.* at 15 (rejecting standing based on "third-party conduct—such as the anticipated reactions of undocumented aliens abroad"); *Williams v. Lew*, --F.3d--, 2016 WL 1612804, at *5 (D.C. Cir. 2016) ("Because [plaintiff] fails plausibly to allege that any future injuries are '*certainly impending* to constitute injury in fact,' he cannot rely on such injuries to establish Article III standing.") (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)).[16]

To put it another way, investment by EB-5 alien investors in areas other than the allegedly harmed impoverished urban areas is a necessary condition of the alleged harm's occurrence, and their investment in these harmed areas is also necessary to redress the asserted injury. Yet, it is entirely uncertain whether EB-5 alien investors will take the actions necessary for either the alleged harm to occur or for the alleged injury to be redressed. This conclusion is best exemplified by what Plaintiff's own theory suggests. Implicit within Plaintiff's theory throughout the Complaint (to which Defendants do not subscribe), certain immigrant investors are so determined to invest in affluent areas (where they will presumably face less risk with their investment), that in order to successfully do so, they must gerrymander census tracts to achieve the required unemployment threshold. If, in accordance with Plaintiff's request, USCIS denied all petitions submitted by this type of investor, it is not only speculative to theorize that those alien investors would turn around and invest in a project located in an area where they never had their eyes set on in the first place, but it is also completely unrealistic to assume such investors would be willing to invest in a high-risk,

[16] The Supreme Court has found causation insufficient in cases where there were multiple factors possibly contributing to the injury and the policy challenged by the plaintiff likely played a minor part. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 756-59 (1984) (noting that the asserted lack of opportunity for plaintiffs' children to attend racially integrated public schools was traceable not only to tax exemptions for discriminatory private schools, but also to decisions made by administrators of those schools and other parents); *McConnell v. FEC*, 540 U.S. 93, 228 (2003). In other cases where causation was found to be lacking, the independent act of a third party was a necessary condition of the harm's occurrence, and it was uncertain whether the third party would act. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 156-60 (1990); *Clapper*, 133 S. Ct. at 1147-50.

low-rate of return project in these impoverished areas. They may instead pursue the myriad of other immigration options, for instance, or simply decide to invest in a project located in a non-TEA.[17]

In sum, Plaintiff does not allege facts that could plausibly demonstrate "substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." *Nat'l Wrestling Coaches Ass'n v. Dep't of Edu.*, 366 F.3d 930, 941 (D.C. Cir. 2004).

**C. Plaintiff Lacks Prudential Standing**

Under prudential standing requirements, Plaintiff lacks standing to bring this suit for two additional, key reasons: (1) it impermissibly asserts the interests of third parties, and (2) its programmatic challenge to ongoing agency action is a generalized grievance that is more appropriately addressed in the representative branches.

By virtue of Plaintiff's own language in the Complaint, the alleged injured party is actually a third party not before the Court. It identifies the putative injured as "American citizens who actually experience high unemployment rates," who "often are ethnic minorities, single mothers, and other economically disadvantaged U.S. citizens," Dkt. No. 1 at 6 ¶ 18, "truly economically distressed areas," *id.* ¶ 20, and "impoverished urban areas, the undeniable beneficiaries of INA § 203(b)(5)(B)," *id.* at 7 ¶ 26. Critically missing from this theory of injury is a single allegation that Plaintiff is a part of—or associated with—one of those groups or that it represents their interests. It is a well-established principle of standing that a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Superior MRI*

[17] This case is no different than that in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). There, the Supreme Court found that a mother lacked standing to sue the district attorney for failure to prosecute her child's father for non-support because even if she was successful, the only result would be that the father would go to jail and "[t]he prospect that prosecution will, at least in the future, result in payment of support, can, at best, be termed only speculative." *Id.* at 618. "Certainly the [required] 'direct' relationship between the alleged injury and the claim sought to be adjudicated . . . is absent." *Id.* Likewise, even if this Court were to grant the relief Plaintiff requests, the prospect that denying EB-5 petitions submitted by immigrant investors who have allegedly gerrymandered census tracts to create a TEA will result in those investors deciding to instead invest in impoverished areas, "can, at best, be termed only speculative." *Id.*

*Servs., Inc.*, 778 F.3d at 504; *Lexmark Int'l, Inc.*, 134 S. Ct. at 1386 (noting "the general prohibition on a litigant's raising another person's legal rights"); *Moose Lodge No. 107*, 407 U.S. at 166 ("Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others.").

Urban Equality's Complaint must also be dismissed because it presents a generalized grievance, which, under either a prudential or constitutional analysis, in insufficient to confer standing. Without an allegation of a distinct injury that is particular to Urban Equality, and by only alleging harm suffered by these amorphous "economically distressed areas" or "impoverished urban areas," its Complaint merely presents "harm to the 'common concern for obedience to law,'" which has been soundly rejected by the Supreme Court. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23-24 (1998) (citations omitted); *Lujan*, 504 U.S. at 572–578 (holding that injury to an interest in seeing that certain procedures are followed is not normally sufficient by itself to confer standing); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) (finding that plaintiffs lacked standing because they failed to show injury to "a particular right of their own, as distinguished from the public's interest in the administration of the law"); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (noting that a party may not merely assert that "he suffers in some indefinite way in common with people generally"); *Massachusetts v. EPA*, 549 U.S. 497, 516-17 (2007) ("We will not, therefore, 'entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.'") (quoting *Lujan*, 504 U.S. at 581). Like the interest asserted in *Lujan*, Urban Equality's general "interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure)" does not provide standing (especially when it "suffer[s] no distinctive concrete harm) to sue." *Lujan*, 504 U.S. at 576.

Moreover, Urban Equality impermissibly seeks wholesale improvement of parts of the EB-5 Program, without identifying how a specific, discrete action taken by Defendants harms it directly

or personally. Although its Complaint references four "instance[s]" in which USCIS has allegedly permitted gerrymandering, it cites these purely for the purpose of providing examples of its broader, programmatic challenge to USCIS' adjudicatory practices within the EB-5 Program.[18] *See Lujan*, 504 U.S. at 568 ("[S]uits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations . . . [are], *even when premised on allegations of several instances of violations of law*, . . . rarely if ever appropriate for federal-court adjudication.") (emphasis added); *Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000) ("Nor is this programmatic challenge made justiciable by the fact that the environmental groups identified some specific sales in their pleadings."); *id.* ("Rather than limit their challenge to individual sales, [plaintiffs] merely used these sales as evidence to support their sweeping argument that the [agency's] . . . management of the Texas forests over the last twenty years violates the [governing statute].").[19]

Notably, Plaintiff never once asks the Court to set aside USCIS' alleged approval of any these four projects. The scope of its claims and the relief it requests "go well beyond any challenge to discrete [approvals]." *Id.* This is further evidence that Plaintiff seeks "wholesale improvement" of the EB-5 Program, which has been rejected by both the Fifth Circuit and the Supreme Court. *See Sierra Club*, 228 F.3d at 567 (rejecting environmental groups' challenge to certain "past, ongoing, and future" actions taken by the agency as impermissibly seeking a "wholesale improvement" of the agency's program); *Lujan*, 497 U.S. at 891 ("[R]espondent cannot seek wholesale improvement of

[18] In addition to fatal defects in Plaintiff's standing to proceed, venue is clearly improper here for the projects in New York that Plaintiff cites. As for the project in Laredo, Plaintiff fails to identify any connection it has to that project (or to South Texas for that matter). It also fails to identify any agency action or decision involving the Laredo project that it wishes to set aside. In fact, Plaintiff does not even allege that USCIS has specifically approved the project. *See* Dkt. No. 1 at 4 ¶ 15 ("In one instance, a group of immigrant investors *propose* to build a hotel conference center in Laredo, Texas.") (emphasis added).

[19] Plaintiff's programmatic challenge may be better characterized as a standing deficiency under Article III. Either way, the Court does not have jurisdiction to consider Plaintiff's challenge to "general [agency] practices" in adjudicating EB-5 petitions, and Plaintiff may not "demand a general judicial review of the [agency's] day-to-day operations." *Sierra Club*, 228 F.3d at 566 (quoting *Lujan*, 497 U.S. at 899).

this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.").[20]

Finally, and relatedly, Urban Equality has raised a non-justiciable political question. Urban Equality "merely invite[s] [this Court] to substitute [its] judgment for that of [the Legislature and Executive] in deciding which aliens shall be eligible" to receive certain immigration benefits. *Mathews v. Diaz*, 426 U.S. 67, 84 (1976). As the Supreme Court held in *Mathews*, "for reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government . . . . such [immigration-related] decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." Accordingly, "the reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." *Id.* at 81-82. Plaintiff seeks to have the Court re-define what the Executive can and cannot do in carrying out the duties and obligations bestowed upon it by Congress to administer the EB-5 Immigrant Investor Visa Program. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543-44 (1978) (explaining that precedent is clear that "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (citations and quotes omitted). However, without an allegation of "more direct interest" in how the agency adjudicates EB-5 petitions and determines what qualifies as a TEA, Plaintiff does not have "standing in the legal sense sufficient to challenge the exercise of

[20] The Fifth Circuit in *Sierra Club* found the following statement by the Supreme Court in *Lujan* controlling to its case: "it is at least entirely certain that the flaws in the entire 'program'—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members." *Id.* at 567-68 (quoting *Lujan*, 497 U.S. at 892-93).

responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." *Sierra Club*, 405 U.S. at 731 (quoting—and ultimately affirming—the court of appeal's conclusion that Sierra Club did not have standing to sue federal officials for approving permits for development in a national park); *Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 877 (11th Cir. 2009) ("Systemic improvement and sweeping actions are for the other branches, not for the courts" in a challenge to agency conduct).

**D. Plaintiff Fails to Plead Any Waiver of Sovereign Immunity**

Plaintiff has sued Defendants, who are government employees, in their official capacities under 28 U.S.C. §§ 1331 (Federal Question Statute), 2201 (Declaratory Judgment Act), and 1361 (Mandamus Act).[21] Courts treat official capacity suits against federal employees as suits against the United States.[22] *See Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000); *Alpha K9 Pet Servs. v. Johnson*, No. B-15-095,

[21] As for Plaintiff's claim for mandamus relief, courts are divided as to the extent that § 1361 waives governmental immunity. *Compare Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 901 (D.C. Cir. 1996) (§ 1361 by itself does not constitute waiver of immunity); *Odd v. United States*, 972 F.2d 1341 (9th Cir. 1992) (§ 1361 does not provide broad waiver of immunity); *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 4 (1st Cir. 1989) ("The provisions of 28 U.S.C. § 1361 . . . do not constitute a waiver of sovereign immunity by the United States."); *Essex v. Vinal*, 499 F.2d 226, 231 (8th Cir. 1974) (§ 1361 does not waive immunity); *Helfgott v. United States*, 891 F. Supp. 327, 329 (S.D. Miss. 1994) ("[T]he mandamus statute, is not a general waiver of sovereign immunity.") (citing *Bobula v. U.S. Dep't of Justice*, 970 F.2d 854, 860 (Fed. Cir. 1992)); *with McClain v. Panama Canal Com'n*, 834 F.2d 452, 454 (5th Cir. 1987) (noting that Mandamus Act waives sovereign immunity only "for some purposes"); *Huffstutler v. Bergland*, 607 F.2d 1090, 1092 (5th Cir. 1979) (concluding that an employee's mandamus request for reinstatement "bypasses the obstacle of the doctrine of sovereign immunity"). However, even assuming the Mandamus Act waives sovereign immunity in this case, as discussed below, Plaintiff woefully fails to state a claim for mandamus relief under Rule 12(b)(6).

[22] Although Plaintiff does not explicitly state that it sues Defendants in their official capacities, language in the Complaint and the nature of Plaintiff's allegations make it clear that Defendants are being sued as heads of federal agencies acting within the scope of their employment. *See, e.g.*, Dkt. No. 1 at 6 (claiming that "DHS and USCIS have abrogated selective portions of the INA"), 7 ("Defendants promulgated regulations that purportedly satisfied Congress' intent. Defendants, however, have failed to adjudicate immigrant investor petitions . . . ."). Other than naming Defendants as parties at the beginning of the Complaint, Plaintiff never refers to—or attributes actions to—the individual Defendants by name, nor does it allege specific misconduct by either Defendant in his private capacity. *See Unimex, Inc. v. U.S. Dep't of Housing & Urban Dev.*, 594 F.2d 1060, 1061-62 (5th Cir. 1979) (concluding that the suit against two individual officials was in reality a suit against the sovereign in part because the complaint did not allege misconduct in their private capacities). Instead, Plaintiff challenges conduct of "Defendants," "DHS" and "USCIS." *See id.* at 2, 4-6. Moreover, the relief Plaintiff seeks is directed against the federal government (that is, it implicates governmental rights and duties and will directly affect government operations, "interfere with the public administration," and "restrain the Government from acting, or [] compel it to act"), and thus must be recognized as an action against the sovereign itself, even though nominally framed against federal officials. *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (quotations omitted).

2016 WL 1090241, at *1 n.2 (Mar. 21, 2016) (finding an official-capacity suit against the same federal defendants sued in this case "merely a suit against the agency") (citing *Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985)). The United States, as sovereign, is immune from suit without its express consent. *Hebert v. United States*, 438 F.3d 483, 487–88 (5th Cir. 2006). "A waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citations and quotations omitted); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) ("Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity . . . together with a claim falling within the terms of the waiver.") (citations omitted). This immunity deprives courts of subject-matter jurisdiction over claims against the United States. *Hebert*, 438 F.3d at 487-88; s*ee also FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature.").

The presence of federal question jurisdiction alone does not waive the government's sovereign immunity from suit. *See Belle Co., L.L.C. v. U.S. Army Corps of Engineers*, 761 F.3d 383, 395 (5th Cir. 2014) ("28 U.S.C. § 1331 is a general jurisdiction statute and does not provide a general waiver of sovereign immunity.") (citations and quotations omitted); *Humphreys v. United States*, 62 F.3d 667, 673 (5th Cir. 1995). Accordingly, if Plaintiff wishes to use 28 U.S.C. § 1331 to secure relief against Defendants in their official capacities, it must tie its claims to some additional authority—under which it asserts a valid cause of action—that waives the government's sovereign immunity. *See Taylor-Callahan-Coleman Counties Dist. Adult Probation Dep't v. Dole*, 948 F.2d 953, 956 (5th Cir. 1991) (concluding that the court had jurisdiction over plaintiff's due process and APA claims under 28 U.S.C. § 1331, but that plaintiff still had to establish a waiver of sovereign immunity under the APA's final-agency-action requirement). Plaintiff has failed to allege any basis for a waiver of sovereign immunity for any of its claims; therefore, this Court must dismiss the

complaint for lack of jurisdiction.[23] *See Belle Co.*, 761 F.3d at 395 (affirming dismissal of due-process claim for lack of subject-matter jurisdiction because, despite the complaint's citation to the APA's waiver of sovereign immunity, plaintiff failed to argue that it was a claim involving final agency action under the APA or otherwise plead any other waiver of immunity).[24]

## II. Plaintiff's Mandamus Claim Must be Dismissed Under Rule 12(b)(6) for Failure to State a Claim

A court may dismiss a complaint for failure to state a claim under Rule 12(b)(6). A court considering a 12(b)(6) motion must "accept the complaint's well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004). To survive such a motion, the complaint does not require detailed factual allegations but instead "must provide the plaintiff's grounds for entitlement to relief – including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v.*

[23] The Declaratory Judgment Act, 28 U.S.C. § 2201, does not operate in and of itself to waive sovereign immunity *or* to confer jurisdiction on the federal courts. *See In re-B 727 Aircraft Serial No. 21010*, 272 F.3d 264, 270 (5th Cir. 2001). Instead, it provides an additional remedy where jurisdiction already exists. *Id.* Therefore, as with § 1331, by failing to cite any waiver of sovereign immunity, Plaintiff's claim under the Declaratory Judgment Act must be dismissed for lack of subject-matter jurisdiction.

[24] In light of Plaintiff's claims for non-monetary relief against federal officials in their official capacities, the only way it could bring its suit is through the waiver of sovereign immunity found in the Administrative Procedure Act ("APA"). However, even assuming *arguendo* that Plaintiff had asserted a cause of action under the APA, the case is still unreviewable for three key reasons: (1) Plaintiff fails to allege that it is suffering legal wrong because of agency action or is adversely affected or aggrieved by agency action within the meaning of a relevant statute, 5 U.S.C. § 702, (2) Plaintiff is not within the zone of interests of the relevant provisions of the INA (the statute that it claims was violated), and (3) Plaintiff does not allege discrete "final agency action" within the meaning of the APA. *See, e.g.*, *Sierra Club*, 228 F.3d at 565 ("Absent a specific and final agency action, we lack jurisdiction to consider a challenge to agency conduct."); *Belle Co., L.L.C.*, 761 F.3d at 388. In *Belle Co., L.L.C.*, the plaintiff asserted jurisdiction under § 1331, and cited the APA's waiver of sovereign immunity for its claims that a jurisdictional determination ("JD") by the Army Corps of Engineers was unlawful and that the process used in issuing the JD violated plaintiff's due process rights. The Fifth Circuit found subject matter jurisdiction lacking for both claims. Specifically, for the due process claim, the court did not have jurisdiction because in "neither its complaint nor its briefs on appeal [did] Belle cite a statutory waiver of sovereign immunity for its due-process claim or argue that it is a claim under the APA." *Id.* at 396. Belle, unlike Urban Equality, had pleaded the APA's waiver of sovereign immunity in its complaint. However, the waiver was nevertheless unavailable to Belle because it failed to argue that "the administrative appeal process that culminated in the JD, as applied to Belle, [was] final agency action." *Id.* Here, not only has Urban Equality failed to invoke the APA's waiver of immunity (or any waiver for that matter), but it has also failed to allege discrete, final agency action causing it to suffer legal wrong or be aggrieved within the meaning of a relevant statute. Thus, even if the Court were to conclude that Plaintiff's failure to cite the APA is not fatal, the facts alleged in the complaint do not satisfy the APA's reviewability requirements. *See, e.g.*, *Doss v. S. Cent. Bell Tel. Co.*, 834 F.2d 421, 424 (5th Cir. 1987) ("[W]here a complaint fails to cite the statute conferring jurisdiction, the omission will not defeat jurisdiction," but only if the "facts alleged in the complaint satisfy the jurisdictional requirements of the statute.").

*Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). Hence, a complaint must contain sufficient factual pleadings that state a plausible claim to relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And regardless of facts alleged, the Court may dismiss claims not legally cognizable. *See Doe v. Metro. Police Dep't*, 445 F.3d 460, 467 (D.C. Cir. 2006).

The Mandamus Act vests district courts with "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The granting of mandamus is a "drastic" remedy to be used "only in extraordinary situations" where government officials have clearly failed to perform nondiscretionary duties. *Kerr v. United States*, 426 U.S. 394, 402 (1976); *see also Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004); *Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (explaining that the writ "is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear non-discretionary duty."). The party seeking mandamus relief must show that its claim to the writ is clear and indisputable. *In re Volkswagen of America, Inc.*, 545 F.3d 304, 311 (5th Cir. 2008). Further, mandamus is appropriate only when "[t]he legal duty [is] set out in the Constitution or by statute . . . and its performance [is] positively commanded and so plainly prescribed as to be free from doubt." *Dunn-McCampbell Royalty Interest v. Nat'l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997) (citations omitted). The duty Plaintiff seeks to have Defendants compelled to perform must be "ministerial;" therefore, mandamus is not available for discretionary acts of agency officials. *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992); *Newsome v. EEOC*, 301 F.3d 227, 231 (5th Cir. 2002) (citing *Green v. Heckler*, 742 F.2d 237, 241 (5th Cir. 1984)).

Thus, in sum, mandamus relief is only proper where the plaintiff demonstrates that: (1) it has a clear and certain right to the relief sought; (2) the defendants have a clear duty to do the act

requested; and (3) the plaintiff lacks any other remedy. Here, Urban Equality has failed to demonstrate any—let alone all—of the required elements for mandamus relief.[25]

First, Plaintiff cannot show that it has a clear right to the relief requested or that the government has a clear duty to act. For a mandamus application to succeed, Plaintiff must show that Defendants have failed to carry out a statutory or regulatory duty *owed to Plaintiff*. 28 U.S.C. § 1361. Nowhere in the Complaint does it allege that Defendants owe *Urban Equality* a duty at all.[26] The only arguably judicable duty that Plaintiff identifies is Defendants' alleged "clear duty to adjudicate immigrant investor applications." Dkt. No. 1 at 7 ¶ 23.[27] Assuming that USCIS has a legal duty to adjudicate EB-5 petitions—or even assuming *arguendo* that USCIS has a duty to adjudicate petitions in the manner Plaintiff prescribes (which it does not)—USCIS does not owe that duty to Urban Equality, and Urban Equality does not allege otherwise. Plaintiff does not claim that it petitioned for EB-5 classification on behalf of a foreign national (or any other immigration benefit for that matter) and that USCIS neglected its duty to adjudicate the petition, nor does it claim that USCIS is neglecting to adjudicate *any* immigrant investor petitions. Rather, its complaint impermissibly asserts a "nonconcrete interest in the proper administration of the laws," and alleges injury on behalf of a large group of citizens with whom it claims no association. Without an assertion that Defendants owe some legal duty to Urban Equality, it certainly cannot show that it has a right, let alone a "clear" one, to the relief it requests. *See generally Iqbal*, 556 U.S. at 678

[25] Although it is unclear what specific action Plaintiff seeks to compel Defendants to perform in conjunction with its cause of action for mandamus relief (Dkt. No. 1 at 7, ¶¶ 22-26), Plaintiff fails to state a claim for any of the complained-of actions.

[26] On a more basic pleading level, Plaintiff has not even alleged facts pertaining to each of the three required elements of mandamus. Its mandamus cause of action (Dkt. No. 1 at 7 ¶¶ 23-26) does not state what action it seeks to compel Defendants to perform or identify what right it has to seek compulsion of *any* action. *See Iqbal*, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

[27] In Plaintiff's request for mandamus relief, it also asserts that "Congress tasked Defendants with establishing and enforcing regulations to effectuate [Congress'] intent." Dkt. No. 1 at 7 ¶ 24. However, this duty is clearly outside the realm of mandamus. Plaintiff cannot plausibly assert that such duty is ministerial, as required to seek a writ of mandamus. Instead, as discussed throughout this motion, the agency is vested with substantial discretion in carrying out its obligations to establish and enforce regulations.

("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'") (quoting Fed. R. Civ. P. 8(a)(2)).

Plaintiff further fails to state a claim for mandamus relief because it does not identify any *nondiscretionary* duty required by statute that the agency has failed to perform. Plaintiff never claims, nor can it, that USCIS is without any discretion or judgment with respect to the adjudication of EB-5 petitions. *Mississippi v. Johnson*, 71 U.S. 475, 489-90 (1866) (holding that mandamus is only available if plaintiff seeks a "simple *ministerial* act required to be done by the officer in virtue of some specific law," for which the officer "has no discretion whatever"). Even assuming that USCIS has a general duty to adjudicate immigrant investor petitions, it is clear that *how* those petitions are adjudicated—*i.e.*, a determination on the petitioner's eligibility for approval—is discretionary. "Mandamus may not be used to force the exercise of discretion in a particular way . . . . Where the 'duty' alleged involves agency expertise on an issue of judgment and choice, the matter is left to the agency's informed discretion, and is not subject to mandamus." *California v. Settle*, 708 F.2d 1380, 1384-85 (9th Cir. 1983) (citing *Wilbur v. United States*, 281 U.S. 206, 218-19 (1930); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 317-18 (1958)); *McClain v. Panama Canal Comm'n*, 834 F.2d 452, 454 (5th Cir. 1987) (concluding that because plaintiff only sought "to require the Commission to take jurisdiction, not to dictate the results of its taking jurisdiction, and to perform a nondiscretionary duty imposed on it by law," she had invoked the "classic function of mandamus"). Nothing in the applicable laws or regulations clearly mandates that USCIS approve only those EB-5 petitions in which the proposed TEA includes "one U.S. Census Tract wherein unemployment meets or exceeds the 150% threshold," as Plaintiff would have it. Dkt. No. 1 at 8 ¶ 32. The INA does not elaborate on what a non-rural area of high unemployment must entail beyond the 150% threshold. *See* 8 U.S.C. § 1153(b)(5)(B)(ii) ("[T]he term 'targeted employment

area' means, at the time of the investment, a rural area *or an area which has experienced high unemployment* (of at least 150 percent of the national average rate.") (emphasis added).

Notably, Plaintiff acknowledges that Congress has set "*minimum* standards and thresholds to qualify" for an EB-5 visa (Dkt. No. 1 at 7 ¶ 23 (emphasis added)), and concedes that the INA "only requires the TEA to be in an 'area.'" *Id.* ¶ 25. Plaintiff does not point to any factors or other criteria that Congress requires USCIS to use, and which it fails to use, when determining whether an area is properly designated as a TEA. No such requirements can be found in the regulations either. Where an "agency reasonably construes a statute endowing it with broad authority, [courts] must defer to that interpretation, and 'the remedy, if any is indicated, is for congressional, and not judicial, action.'" *La. Forestry Ass'n Inc. v. Sec. U.S. Dep't of Labor*, 745 F.3d 653, 674 (3d Cir. 2014) (quoting *Flood v. Kuhn*, 407 U.S. 258, 285 (1972)); *see also Norton v. S. Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 66-67 (2004) ("The principal purpose of . . . the traditional limitations upon mandamus . . . is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.").

Thus, while Congress established the basic requirements for TEA's (*i.e.*, the percentage of unemployment the "area" must be experiencing, the minimum amount of capital required, and the minimum number of visas that must be set aside for TEA's), it did not otherwise define the bounds of such an "area", or further prescribe the manner in which USCIS must evaluate whether a proposed area qualifies as a non-rural TEA (or how USCIS must adjudicate EB-5 petitions at all). *See SUWA*, 542 U.S. at 66 (denying mandamus when "[the statute] [was] mandatory as to the object to be achieved, but it [left] [the agency] a great deal of discretion in deciding how to achieve it"); *Newsome*, 301 F.3d at 231 (denying that plaintiff had a "clear right" to the "extraordinary remedy" of mandamus because, despite the governing statute's command that the agency "shall make an

investigation" of a discrimination charge, the statute's failure to "prescribe the manner for doing so" made the nature and extent of the agency's investigation discretionary). By its silence, Congress left a gap for the agency to fill pursuant to an expressed or implied "delegation of authority to the agency." *Chevron*, 467 U.S. at 843-44; *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (explaining that when Congress leaves a gap in the law, courts presume that Congress "understood that the [gap] would be resolved, first and foremost, by the agency"). Congress has expressly delegated authority to DHS to administer the EB-5 Program. *See* 8 U.S.C. §§ 1103, 1153(b)(5); 6 U.S.C. § 202(4). Thus, in the face of congressional silence, USCIS lawfully exercises its discretion when determining what qualifies as a TEA, and such discretionary decisions must be accorded deference.[28]

It is true that Plaintiff is unhappy with how USCIS has exercised its discretion in adjudicating EB-5 petitions and would prefer that it approve only those petitions proposing a TEA with at least one census tract meeting the 150% unemployment threshold, but this preference is insufficient to state a claim for mandamus.[29] *See SUWA*, 542 U.S. at 62, 65; *Mississippi*, 71 U.S. at 489-90.[30]

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[28] To be sure, its discretionary determinations (based on the broad grant of discretion it exercises to adjudicate visa petitions) are bolstered by the fact that it frequently relies on evidence from state governmental bodies—presumably the foremost experts on what areas within their own borders are experiencing the most unemployment. It is eminently reasonable, and fully within the discretion conferred on it by Congress, for DHS to depend on state designations of areas with high unemployment because each state is uniquely qualified to provide such information. *See generally La. Forestry Ass'n Inc.*, 745 F.3d at 673 (citation omitted) (explaining that when "Congress has entrusted a federal agency with broad discretion to permit or forbid certain activities, [the court] will uphold the agency's conditioning of its 'grant of permission on the decision of another entity, such as a state, local, or tribal government, so long as there is a reasonable connection between the outside agency's decision and the federal agency's determination.'"). Thus, in light of statutory silence, DHS' discretionary approvals of TEA-petitions, based on state governmental bodies' submission of evidence certifying an area of high unemployment, are reasonable. *See id.* (concluding that DHS' conditioning of its grant of H-2B visas on certification from DOL that certain labor-based requirements are met is reasonable in light of Congress' silence on the issue).

[29] For the same reasons its mandamus claim must be dismissed, assuming *arguendo* that Plaintiff had pleaded its cause of action under the APA, it would fail to state a claim under 5 U.S.C. § 706(1), which employs substantially the same analysis as that conducted for a mandamus action. *See, e.g.*, *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 n.4 (1986) (explaining that a mandamus action "in essence[] is one to 'compel agency action unlawfully withheld'" under § 706(1)); *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992) (noting that claims made under § 706(1) of the APA and the Mandamus statute are subject to the same standard); *Yan v. Mueller*, No. H-07-0313, 2007

Third, Plaintiff cannot demonstrate that it lacks an adequate alternative remedy. *McClain*, 834 F.2d at 455 (noting that the "extraordinary" remedy of mandamus is only available if plaintiff "has exhausted all other avenues of relief"). The relief that Plaintiff seeks could plausibly be plead under the Administrative Procedure Act.[31] *See Ahmadi v. Chertoff*, 522 F. Supp. 2d 816, 818 n.3 (N.D. Tex. 2007) (citing *Mt. Emmons Min. Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) (recognizing the Tenth Circuit's holding that mandamus relief is precluded by the availability of relief under the APA, and thus confining its analysis to the APA); *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1268 (11th Cir. 2011) (holding that available relief under the APA precluded the possibility of mandamus in a suit over repossession of tribal property); *Stehney v. Perry*, 101 F.3d 925, 934 (3d Cir. 1996) (denying mandamus relief because plaintiff had an adequate alternative remedy under the APA).

In sum, Plaintiff is not without an alternative remedy, and there is a clear absence of any "legal duty set out in the Constitution or by statute," the performance of which is "positively commanded and so plainly prescribed as to be free from doubt" to support the reward of mandamus

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WL 1521732, at *8 (S.D. Tex. May 24, 2007) (rejecting plaintiff's assertion of jurisdiction under the APA for the same reasons the court rejected plaintiff's use of mandamus jurisdiction).

[30] Even if the Court were to conclude that Plaintiff's suggestion for determining the boundaries of a TEA was a good idea, there still would be no legal basis for a mandamus claim because the Court would be compelling Defendants to do something not clearly mandated by the INA. *See Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 933 (9th Cir. 2010) ("Allowing plaintiffs' claim to proceed would invite us to compel the Forest Service to do something . . . to fit [plaintiffs'] preference, [which is] not clearly mandated in the Act. Although . . . [the applicable Acts] require the Forest Service to establish the wilderness area boundary and to prohibit unauthorized vehicles within that area, the Forest Service has done precisely that. Nothing in either act requires [it] to use any particular topographical feature as the boundary.") (citing *SUWA*, 542 U.S. at 65). Faced with similar complaints as Urban Equality's, the *Hells Canyon* court affirmed dismissal for failure to state a claim for a violation of § 706(1) of the APA because plaintiffs failed to identify "a *discrete* agency action that [the agency] [was] *required to take*." *Id.* at 933 (emphasis in original). The court noted that "[h]ad the Forest Service failed to establish a boundary at all, plaintiffs might have a case for § 706(1) review, but we have no basis for compelling the Forest Service to adopt [plaintiffs'] preferred boundary." *Id.* Likewise, Urban Equality does not claim that USCIS is failing altogether to adjudicate petitions seeking EB-5 classification in TEA's; rather, it complains that USCIS is not adjudicating such petitions in the way Urban Equality would prefer.

[31] Defendants maintain, however, that any cause of action brought by Plaintiff under the APA would not survive a motion to dismiss, as explained above. *See, e.g.*, *Sierra Club*, 228 F.3d at 565 ("Absent a specific and final agency action, we lack jurisdiction to consider a challenge to agency conduct."); *Belle Co., L.L.C.*, 761 F.3d at 388.

relief in this case. *Dunn-McCampbell Royalty Interest*, 112 F.3d at 1288. As such, Plaintiff's claim for mandamus relief must be dismissed.[32]

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that this action be dismissed in its entirety.

Respectfully submitted,

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[32] Plaintiff's request for declaratory relief must also be dismissed on the additional basis that it fails to state a claim. Plaintiff asks this Court to declare Defendants' regulations and policies unlawful. However, Plaintiff utterly fails to identify which regulation it wishes to be declared unlawful (*see* Dkt. No. 1 at 8 ¶ 29), or which one is causing the alleged injury. Additionally, while it makes a general allegation that the agency has "failed to adjudicate immigrant investor petitions based on the letter or spirit of the law," *id.* at 7 ¶ 25, it does not identify which statutory provision it believes Defendants are violating. Nor could it because, as detailed above, there is no provision dictating how USCIS must adjudicate EB-5 petitions or what qualifies as a TEA (beyond the required unemployment rate). Further, it is not even clear whether Plaintiff is challenging Defendants' *regulations* at all. It claims that the agency's regulations themselves are unlawful (which is the basis for its request for declaratory judgment), yet elsewhere it alleges that the agency is violating its own regulations. *Compare* Dkt. No. 1 at 4 ¶ 14 ("Contrary to . . . its own regulations, DHS and USCIS routinely grant . . . [EB-5] visas . . . in areas that do not qualify as TEAs."); 5 ¶ 16 ("DHS' and USCIS' over-permissive interpretation of the . . . regulations"); *and* 7 ¶ 25 ("Defendants promulgated regulations that purportedly satisfied Congress' intent."); *with id.* at 7 ¶ 28 ("Defendants, *by regulation* and policy memoranda, have permitted TEAs to exist in such a way as to frustrate Congress' explicit intent."); *and* 8 ¶ 29 ("[T]he . . . INA does not grant Defendants authority to implement regulations permitting gerrymandered TEAs."). For these reasons, Plaintiff's declaratory judgment request fails to state a claim.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 2, 2016, I filed the foregoing Motion to Dismiss using the CM/ECF system for the Southern District of Texas, which will send a notification of such filing to the following counsel of record:

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