UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 25-CV-2720-RMR

NESTOR ESAI MENDOZA GUTIERREZ, for himself and on behalf of others similarly situated,

Petitioners-Plaintiffs,

v.

JUAN BALTASAR, Warden, Aurora ICE Processing Center, in his official capacity,

ROBERT GUADIAN, Director of the Denver Field Office for U.S. Immigration and Customs Enforcement, in his official capacity;

KRISTI NOEM, Secretary of the U.S. Department of Homeland Security, in her official capacity;

TODD LYONS, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity;

PAMELA BONDI, Attorney General of the United States, in her official capacity;

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW;

SIRCE OWEN, Acting Director for Executive Office of Immigration Review, in her official capacity;

U.S. DEPARTMENT OF HOMELAND SECURITY;

AURORA IMMIGRATION COURT; and,

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondents-Defendants.

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY AND SUPPLEMENTAL BRIEF ON CLASS CERTIFICATION

Plaintiff-Petitioner Nestor Esai Mendoza Gutierrez ("Plaintiff"), on behalf of himself and the proposed class, files this supplemental brief to (a) notify the Court of supplemental authority certifying a class of noncitizens arrested or detained in Massachusetts (or subject to the jurisdiction of an Immigration Court in Massachusetts) that is seeking the same relief Plaintiff seeks here (*Guerrero Orellana v. Moniz*, 25-cv-12664, 2025 WL 3033769 (D. Mass. Oct. 30, 2025)) and (b) address the two questions the Court raised regarding class certification in its October 17, 2025 order. ECF 33.

I. Notice of Supplemental Authority

The District of Massachusetts recently certified a near-identical regional class of detained noncitizens in *Guerro Orellana* who challenge the same policy and practice at issue here. The class there is defined as:

> All people who are arrested or detained in Massachusetts, or are detained in a geographical area over which, as of September 22, 2025, an Immigration Court located in Massachusetts is the administrative control court, or who are otherwise subject to the jurisdiction of an Immigration Court located in Massachusetts, where:
>
> (a) the person is not in any Expedited Removal process under 8 U.S.C. § 1225(b)(1), does not have an Expedited Removal order under 8 U.S.C. § 1225(b)(1), and is not currently in proceedings before an immigration judge due to having been found to have a credible fear of persecution under 8 U.S.C. § 1225(b)(1)(B)(ii);
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> (b) for the person's most recent entry into the United States, the government has not alleged that the person was admitted into the United States and has not alleged that person was paroled into the United States pursuant to 8 U.S.C. § 1182(d)(5)(A) at the time of entry;
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> (c) the person does not meet the criteria for mandatory detention pursuant to 8 U.S.C. § 1226(c);

(d) the person is not subject to post-final order detention under 8 U.S.C. § 1231; and,

(e) the person is not a person whose most recent arrest occurred at the border while they were arriving in the United States and has been continuously detained thereafter.

Guerrero Orellana, 2025 WL 3033769, at *14. The District of Massachusetts court found that the *Guerrero Orellana* plaintiff satisfied each requirement of Rule 23(a), certified the above class under Rule 23(b)(2), and appointed one of the same attorneys who is counsel here to serve as class counsel. *Id.* (appointing Michael K.T. Tan of the ACLU Foundation as class counsel).

The Court should adopt the same class definition here, as it is detailed, carefully crafted, and addresses the concerns the government raised regarding Plaintiff's original proposed class definition. The Court has the discretion to craft or modify the proposed definition, *Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999), and it should do so here to address the alleged ambiguities the government identifies and limit the potential that the defendants could attack or evade any order on class certification. Accordingly, Plaintiff respectfully requests that the Court adopt the same class definition as the Massachusetts court, making regional modifications such as changing "Massachusetts" to "Colorado" and making the effective date September 3, 2025 (the date Plaintiff filed the amended class action complaint, ECF 6).

II. Answers to the Court's Class Certification Questions

In this Court's order granting Plaintiff's individual emergency TRO, the Court asked (1) "how many noncitizens detained in the District of Colorado have resided in the United States for over two years and were denied bond on the basis that the Immigration Court

lacked jurisdiction under [8 U.S.C.] § 1225"? and (2) "how many members of the proposed class have some kind of pending application for lawful status in the United States"? ECF 33, pp. 33 & 34.

A. The Proposed Class of Noncitizens Denied Bond Due to the Government's New Policy is Sufficiently Numerous

With respect to the Court's first question, publicly available data cannot provide a precise answer, although it would likely be within Defendants' knowledge. Plaintiff further respectfully explains why the Court may certify the class without those exact data points and provides additional data that is available.

First, there is no requirement that a noncitizen have resided in the country for more than two years in order to seek bond. The requirement of two years of presence is relevant to whether a noncitizen is potentially subject to expedited removal proceedings. The Immigration and Nationality Act (INA) permits the government to subject certain noncitizens who are present in the country for less than two years to expedited removal. *See* 8 U.S.C. § 1225(b)(1)(A)(iii). Placement in expedited removal results in mandatory detention under different statutory provisions than the ones at issue in this case, *id.* §§ 1225(b)(1)(B)(ii) & (iii)(IV) – meaning those noncitizens are statutorily ineligible for bond and already excluded from the proposed class definition. ECF 6, p. 20 (excluding those "subject to detention under . . . 1225(b)(1)").

But where expedited removal can be lawfully applied, placing a noncitizen in expedited removal is left to the government's discretion.[1] Where the government does

[1] The government's ability to use expedited removal in the interior of the country, like Colorado, however, is currently stayed and being actively litigated in *Make The Road New*

not pursue expedited removal and instead pursues regular removal proceedings – which is true for all class members in this case – a noncitizen detained under § 1226(a) may still seek bond, *regardless* of whether they have been present in the country for two years.[2] Because the proposed class definition[3] applies only to people detained pending regular removal proceedings, the two-years of presence requirement for determining if someone is eligible for expedited removal has no bearing on the legal issues in this case.

Second, while public data cannot precisely answer the Court's question of how many noncitizens detained in Colorado "were denied bond on the basis that the Immigration Court lacked jurisdiction under § 1225," additional government data further addresses the Court's question and supports that the class is sufficiently numerous. Movant's App. 3, Supp. Decl. Prof. D. Hausman. Based on data released since the filing of the Motion for Class Certification, Professor Hausman compared two recent periods – May 1, 2025 to July 8, 2025, before Defendants' announced policy change, and July 9, 2025 to August 29, 2025, immediately following Defendants' policy change.[4] During the

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York v. Noem, --- F.Supp.3d ----, 2025 WL 2494908 (D. D.C. Aug. 29, 2025) (holding that plaintiff "has made a strong showing that the Government's expansion of expedited removal violates the due process rights of those it affects").

[2] Indeed, some of the cases ordering bond hearings that the Court cited in its order – such as *Jimenez v. FCI Berlin*, --- F.Supp.3d ----, 2025 WL 2639390, *8 (D. N.H. Sept. 8, 2025), *Martinez v. Hyde*, 25-11613, 2025 WL 2084238, *8 (D. Mass. July 24, 2025), *Gomes v. Hyde*, 25-cv-11571, 2025 WL 1869299, *7 (D. Mass. July 7, 2025) – involved noncitizens who had been present in the U.S. for less than two years.

[3] The *Guerrero Orellana* class specifically clarifies this issue by addressing expedited removal cases in (a) of the definition.

[4] More recent data is not currently available. *See* Movant's App. 5, Supp. Decl. Prof. Hausman, ¶ 5.

pre-policy change period, Aurora Immigration Judges (IJs) found they lacked jurisdiction to consider bond in only 22 cases where the person was detained for alleged violations of 8 U.S.C. § 1182(a)(6)(a)(i), the "entry without inspection" provision – or 7.35% of such bond decisions. In contrast, during the post-policy change period, Aurora IJs found "no jurisdiction" in 71 such cases, or 33.65% of bond decisions. *Id.* at ¶¶ 5-9.[5] If nothing else, this data shows that, during the post-policy change period through August 2025, at least 55 putative class members in Colorado[6] were likely denied bond solely based on Defendants' policy change.

This evidence supports certification because more than 40 putative class members were likely illegally denied bond hearings during the July/August 2025 period alone – the number courts generally presume is adequate to establish numerosity. *See Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009) (class larger than 40 members is

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[5] Notably, the latest available data (pre-August 29, 2025) falls between the Defendants' announced policy change and the Board of Immigration Appeals' precedential decision *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025) on September 5, 2025. Prior to *Yajure Hurtado*, a minority of IJs had been declining to follow Defendants' new interpretation of § 1225 – thus explaining why some cases from July-August were still making bond determinations on the merits. The IJs have since lost that discretion, and all IJs in Colorado are bound going forward by the BIA's decision. Thus, the Court can expect that the number of bond grants after September 5, 2025 for class members should be zero, but this data is not yet publicly available due to the government shutdown.

[6] Assuming a "no jurisdiction" rate of 7.35% (consistent with the prior time period) for the 211 cases from July-August 2025, there should have been "no jurisdiction" in just 15.5 cases, as opposed to the actual "no jurisdiction" holdings in the 71 cases. The difference between actual "no jurisdiction" cases (71) and presumed "no jurisdiction" cases without the policy change (rounded up to 16) is at least 55 noncitizens denied bond due to the policy change during that period. Even this number is likely a vast understatement because it does not take into account the many people detained in Aurora who simply did not request a bond hearing after they learned IJs had started finding they had no jurisdiction to issue bond.

presumed sufficiently numerous); *Consolidated Rail Corp. v. Town of Hyde Park, N.Y.*, 47 F.3d 473, 483 (2d Cir. 1995) (same); *Stewart v. Abraham*, 275 F.3d 220, 226-7 (3d Cir. 2001) (same); *In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227, 234 (4th Cir. 2021) (same); *Afro Am. Patrolmen's League v. Duck*, 503 F.2d 294, 298 (6th Cir. 1974) (affirming certification of class composed of "no more than 35" members); *Rannis v. Recchia*, 380 Fed.Appx. 646, 651 (9th Cir. 2010) (affirming certification of class of 20 individuals, discussing certification of classes between 15-40 individuals); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (affirming certification of class of 31 identified individuals when class "include[d] future and deterred job applicants, which of necessity cannot be identified"); *Coleman through Bunn v. Dist. of Columbia*, 306 F.R.D. 68, 76 (D. D.C. 2015) ("numerosity is satisfied when a proposed class has at least forty members"). *See also Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 358 (D. Colo. 1999) (certifying class when plaintiffs identified only 29 class members). *See also* 1 NEWBERG ON CLASS ACTIONS § 3.05, at 3-25 (3d ed. 1992) (suggesting any class consisting of more than 40 members "should raise a presumption" favoring certification).

In addition, the Court should consider the existence of future, unnamed class members, which also supports certification. ECF 15, pp. 5-6. *See also Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1215 (10th Cir. 2014) (explaining that "[t]here is no set formula to determine" numerosity and that numerosity is a "fact-specific inquiry" where the court has "wide latitude" to determine if it is satisfied).[7]

[7] Even a class with a very small number of identifiable members – unlike the class here

Here, it can be inferred from the available data that at least 1,000 people per year in Colorado would be unable to access bond over the next year due to Defendants' policy absent this Court's intervention. Publicly available data shows that between June 2021 and June 2025, 4,419 people were detained by ICE in Colorado in cases where the immigration judge reached a bond decision on the merits (as opposed to finding they "lacked jurisdiction" as bond was legally unavailable). ECF 15-3, p. 3, ¶ 8 (Decl. Prof. D. Hausman). Each of these individuals was detained for alleged violations of the "entry without inspection" statute, 8 U.S.C. § 1182(a)(6)(a)(i), like the putative class members, and is eligible for bond under § 1226(a)(2). *Id.* Thus, before Defendants' policy change, approximately 1,000 people per year similarly situated to the proposed class members received bond hearings.[8] Therefore, it can be reasonably inferred that about 1,000 people will be excluded from accessing bond in the next year due to Defendants' change in policy.

Furthermore, all the above data assumes no ramp-up in ICE detention and presumes similar enforcement as the prior four years. In reality, however, ICE has plans to triple detention capacity in the state,[9] and ICE arrests have increased substantially in

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– can be certified because "the numerosity requirement is not a question of numbers" alone. *Abercrombie & Fitch Co.*, 765 F.3d at 1215 (though only five class members were identified, the court could "infer" the existence of "a substantial number" of class members were likely to encounter architectural barriers at the defendant's stores that violated the Americans with Disabilities Act).

[8] If anything, this number is also likely underinclusive, as it does not include individuals who did not know they could seek bond during detention because they lacked legal counsel (which is 85% of detainees in Colorado). ECF 15-10 ¶ 15.

[9] Seth Klamann, "ICE plans to open as many as three new detention centers in rural Colorado, report says," DENVER POST, Aug. 15, 2025, permalink: https://perma.cc/QUR6-

Colorado under the current administration.[10] In fact, recent arrests and detentions further starkly show the need for expedited relief for class members in Colorado.[11] The fact that more than 85% of the people detained at the Aurora Detention Center lack lawyers (ECF 15-10, ¶ 15) means that, without class-wide declaratory relief and vacatur under the APA of *Yajure Hurtado*, virtually all of the people illegally denied bond will receive no remedy.[12]

Indeed, that the number of noncitizens arrested in Colorado[13] and bond denials are both substantially up, further offers a "common sense assumption" that the class is sufficiently numerous. *Taco Bell Corp.*, 184 F.R.D. at 358.

Class-wide relief is particularly apt here, where several other cases addressing the identical legal issue are pending in various postures before this Court.[14] Indeed, other

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[10] Seth Klamann, "ICE arrests climb in Colorado this summer, but people detained are less likely to have criminal backgrounds," DENVER POST, Sept. 8, 2025, permalink: https://perma.cc/YUJ8-4AP5.

[11] *See*, *e.g.*, Allison Sherry, "Durango family was detained without a warrant – lawyers say it's another example of ICE not following the law," COLO. PUBLIC RADIO, Oct. 31, 2025, permalink: https://perma.cc/5MUH-K79A; Anna Alejo, "Fifth grade teacher in Colorado detained by ICE along with family, says school," CBS NEWS, Oct. 29, 2025, permalink: https://perma.cc/P7HY-RXVR.

[12] In this case, APA vacatur is an essential remedy as at least some of the immigration judges in Tacoma, Washington, are ignoring the declaratory judgment won in *Rodriguez Vazquez v. Bostock*, --- F.Supp. 3d ----, 2025 WL 2782499 (W.D. Wash. Sept. 30, 2025). *See* Nina Shapiro, "Federal court ruling doesn't stop WA immigration judges' bond denials," SEATTLE TIMES, Oct. 27, 2025, permalink: https://perma.cc/W2TC-B37R.

[13] *See* Seth Klamann, "ICE arrests climb in Colorado this summer, but people detained are less likely to have criminal backgrounds," DENVER POST, Sept. 8, 2025, permalink: https://perma.cc/BX95-L27U (discussing 50% increase in arrests).

[14] Plaintiff is aware of the following nine cases at this time: *Garcia Cortes v. Noem*, 25-cv-02677, 2025 WL 2652880, *3 (D. Colo. Sept. 16, 2025) (Sweeney, J., granting relief); Movant's App. at 7, *Moya Pineda v. Baltasar*, 25-cv-02955 (D. Colo. Oct. 20, 2025)

district courts considering this issue have noted a "tsunami" of near-identical cases. *Roa v. Albarran*, 25-cv-07802, 2025 WL 2732923, *1 (N.D. Cal. Sept. 25, 2025).

In sum, though the exact answer to the Court's question is particularly within the knowledge of the Defendants, for purposes of class certification, the evidence demonstrates that the number is sufficiently numerous to certify the class. Notably, in both *Guerrero Orellana* and *Rodriguez Vazquez* "[t]he government [did] not contest [plaintiff's] contention that the proposed class satisfies numerosity." *Guerrero Orellana*, 2025 WL 3033769 at *8; *Rodriguez Vazquez v. Bostock*, 349 F.R.D. 333, 352 (W.D. Wash. 2025). This Court may comfortably conclude numerosity is met here.

B. Differences in Immigration Relief the Class Members Seek are Not Relevant

The answer to how many "proposed class [members who] have some kind of pending application for lawful status" is also not publicly available or within Plaintiff's knowledge, but in deciding certification, this Court also need not be concerned with the answer. As this Court noted, regardless of what immigration relief various class members may be seeking, "a common legal issue appears to exist," and the named representative is "not required to share the same factual circumstances of other class members,

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(Gallagher, J., same); *Loa Caballero v. Baltazar*, 25-cv-03120, 2025 WL 2977650 (D. Colo. Oct. 22, 2025) (Wang, J., same); Movant's App. at 13, *Hernandez Vazquez v. Baltazar*, 25-cv-03049 (D. Colo. Oct. 23, 2025) (Gallagher, J., same); *Nava Hernandez v. Baltazar*, 25-cv-03094, 2025 WL 2996643 (D. Colo. Oct. 24, 2025) (Sweeney, J., same: "the Court joins the chorus of courts nationwide and rejects the government's arguments"); *Artola Aruaz v. Baltazar*, 25-cv-03260, 2025 WL 3041840 (D. Colo. Oct. 31, 2025) (Martinez, J., same); Movant's App. 18, *Cervantes Arredondo v. Baltazar*, 25-cv-03040 (D. Colo. Oct. 31, 2025) (Jackson, J., same); *Domingo Campos v. Baltazar*, 25-cv-03062 (D. Colo. filed Sept. 30, 2025); *Ortiz Rosales v. Baltazar*, 25-cv-03275 (D. Colo. filed Oct. 16, 2025).

particularly where questions of law are common to the class." ECF 33, p. 35 (cleaned up). For certification purposes, a "single question of law" common to the class is enough. *Menocal v. GEO Group, Inc.*, 882 F.3d 905, 914 (10th Cir. 2018). Here, the Court concluded that at least one common question exists: "whether § 1225(b)(2)'s mandatory detention provisions apply to the class and prevent them from being considered for release on bond under § 1225(a) and its implementing regulations." ECF 33, p. 34. Simply, what – if any – immigration remedies might be available to class members is not relevant to whether they can be legally denied access to a bond hearing while they pursue those remedies.

III. Conclusion

The Court should certify the class consistent with the class definition used in Massachusetts in *Guerro Orellana*, declare that Defendants' interpretation of the INA is unlawful, and vacate the Defendants' new detention policies under the APA.

Dated: November 7, 2025.

Respectfully submitted,

s/ Scott Medlock

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ATTORNEYS FOR PLAINTIFF-PETITIONER AND THE PUTATIVE CLASS

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2025, I electronically filed the foregoing **PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY AND SUPPLEMENTAL BRIEF ON CLASS CERTIFICATION** with the Clerk of the Court using the CM/ECF system, and that in accordance with Fed. R. Civ. P. 5, all counsel of record shall be served electronically through such filing.

s/ Scott Medlock
Counsel for Plaintiff-Petitioner and the Putative Class