

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 25-cv-02720-RMR

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

Petitioner-Plaintiff,

v.

JUAN BALTAZAR, Warden, Denver Contract Detention Facility, Aurora, Colorado, in his official capacity;

ROBERT HAGAN, 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.

**RESPONDENTS' SUPPLEMENTAL BRIEF
FOR CLASS CERTIFICATION HEARING**

Respondents¹ submit the following Supplemental Brief for Class Certification Hearing to provide the Court further information ahead of the November 20, 2025 class certification hearing and to respond to Petitioner's supplemental brief, ECF No. 38.

First, Petitioner's supplemental brief on class certification, ECF No. 38 (the "Supplemental Brief"), makes clear that he in substance seeks injunctive relief for the putative class. But such relief would run afoul of 8 U.S.C. § 1252(f)(1). And if the relief does not violate that provision, Petitioner cannot satisfy the requirements of Federal Rule of Civil Procedure 23(b)(2). The Court thus should deny class certification.

Second, Petitioner has proposed a new class definition in the supplemental brief. But the newly-proposed class definition sweeps too broadly. It would include individuals that have no stake in the outcome of this matter, or who lack common questions of law and fact as required to satisfy Rule 23(a). If the Court were to grant class certification, it must certify a class tailored to Petitioner's legal theory. The Respondents have proposed an alternative class definition for the Court's consideration. But, whatever definition the Court adopts, it should exclude individuals who have received a final order of removal and are subject to detention under 8 U.S.C. § 1231. Both Petitioner's new class definition and the definition proposed by Respondents accomplish this aim.

Third, regarding the two factual questions regarding numerosity and typicality that the Court identified in its October 17, 2025, Order, ECF No. 33, Respondents

¹ Pursuant to Fed. R. Civ. P. 25(d), Robert Hagan, in his official capacity as Director of the Denver Field Office, U.S. Immigration and Customs Enforcement, has automatically been substituted as a party.

present the information they have gathered to date.

BACKGROUND

The habeas proceeding. This case was brought as a habeas petition.

Petitioner, a noncitizen who entered the country without inspection and is now seeking a U-visa, challenged his detention on the ground that he was improperly being detained under one provision of the Immigration and Nationality Act (“INA”) which does not provide for bond hearings (8 U.S.C. § 1225(b)(2)) and should, instead, have been detained under a different provision that does provide for bond hearings (8 U.S.C. § 1226(a)). See generally ECF No. 1. He sought immediate release from Immigration and Customs Enforcement (“ICE”) custody or, in the alternative, a bond hearing. *Id.*

Petitioner then filed an amended class complaint, seeking the same habeas relief for himself and additional relief for himself and a class. ECF No. 6. It relies on the habeas statute, 28 U.S.C. § 2241, the Administrative Procedure Act (“APA”), 5 U.S.C. § 701-06, and the Declaratory Judgment Act, 28 U.S.C. § 2201. *Id.* ¶¶ 15-16. He also moved for a temporary restraining order and preliminary injunction. ECF No. 14.

Petitioner also filed a motion for class certification, seeking to represent a putative class of noncitizens detained by ICE in Colorado who are (in the government’s view) ineligible for bond hearings because they are, or will be, detained under 8 U.S.C. § 1225(b)(2) rather than 8 U.S.C. § 1226(a). ECF No. 15.

The Court’s preliminary ruling. The Court granted preliminary injunctive relief, ordering Petitioner’s immediate release without bond. ECF No. 33. It also granted preliminary relief for the putative class, enjoining Respondents from “removing Mr.

Gutierrez and the class he proposes to represent from the United States or transferring them from the District of Colorado during the pendency of this action.” *Id.* at 36.

The Court deferred its decision on class certification until it could hold a hearing. *Id.* at 36. In its order, the Court made several observations relevant to Petitioner’s proposed class. It observed that Petitioner had “clarified that he is seeking to certify the class under the APA,” not as a habeas proceeding. *Id.* at 29. The Court then reasoned that the declaratory relief Petitioner was seeking—an “order declaring that class members are subject to detention under § 1226(a) and thus entitled to bond hearings”—would not run afoul of 8 U.S.C. § 1252(f)(1), as such relief would “simply require[] defendants to follow the Constitution and the INA as Congress legislated it.” *Id.* at 32. The Court then identified several pieces of information to help it makes its determination on whether Rule 23(a) has been met. *Id.* at 33–34. The Court expressly did not analyze whether the class could be certified under Rule 23(b)(2). *Id.* at 35.

Petitioner’s clarifications of the class definition and the relief sought.

Petitioner then filed a Supplemental Brief proposing a new class definition based on the definition used in a similar case pending in the District of Massachusetts. See ECF No. 38 at 1–2 (discussing *Guerrero Orellana v. Moniz*, 25-cv-12664, 2025 WL 3033769, at *14 (D. Mass. Oct. 30, 2025) (certifying class)). Also in the Supplemental Brief, Petitioner responded to the Court’s request for information regarding noncitizens who are detained under 8 U.S.C. § 1225(b)(2) in the District of Colorado and the subset of those noncitizens who are affirmatively applying for some sort of relief. *Id.* at 2–9.

Petitioner also observes that on September 5, 2025, the Board of Immigration Appeals issued a “precedential decision” in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2015), and that, as a result of that decision, immigration judges have “lost . . . discretion” to grant bond to noncitizens detained under 8 U.S.C. § 1225(b)(2), as “all IJs in Colorado are bound going forward by the BIA’s decision.” ECF No. 38 at 5 n.5. Petitioner argues 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.” *Id.* at 8. He urges that “APA vacatur is an essential remedy” because absent such relief, immigration judges may not follow a declaratory judgment. *Id.* at 8 n.12.

ARGUMENT

I. The Court should not certify the class because the Court cannot grant the vacatur Petitioner now seeks under 8 U.S.C. § 1252(f)(1).

Although the Court stated in the October 17, 2025, order that § 1252(f)(1) did not preclude class certification as to a class-wide declaratory order, it should revisit this interlocutory determination (which it is free to do, *e.g.*, *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011)). Petitioner has clarified that the relief he seeks is the type of class-wide injunctive relief that this Court cannot grant under § 1252(f)(1). Because the Court cannot grant such class-wide relief, certifying the proposed non-opt-out class—and then denying that class a remedy—would be inappropriate.

As this Court is aware, 8 U.S.C. § 1252(f)(1) deprives district courts of “jurisdiction or authority to enjoin or restrain the operation of the provisions of [as relevant here, § 1225] . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.”

Petitioner insists that the class-wide relief he seeks stops short of what § 1252(f)(1) proscribes. See ECF No. 29 at 13–15. His own filings, however, belie that contention. They confirm that the relief he seeks is an order that would *compel* Respondents to comply with the Court’s order. Petitioner recognizes that absent such an order, “all IJs in Colorado are bound going forward by the BIA’s decision” in *Yajure Hurtado*. ECF No. 38 at 6 n.5. Indeed, immigration judges are bound by federal regulation to follow precedential rulings of the Board. See 8 C.F.R. § 1003.1(d), (g), 1003.10(d). They must do so absent injunctive relief directing them to do otherwise.

Further, Petitioner has clarified that he expressly seeks “vacatur under the APA of *Yajure Hurtado*” because otherwise “virtually all of the people illegally denied bond will receive no remedy.” ECF No. 38 at 8. But to “vacate” the Board’s decision in *Yajure Hurtado*—even assuming that such a remedy could be sought here by Petitioner—would be to grant injunctive relief. As the Tenth Circuit has recognized, “[v]acatur of agency action is a . . . form of injunctive relief” under the APA. See *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017). And because the effect of the vacatur would be class-wide, it would be class-wide relief and would run afoul of § 1252(f)(1). Put simply, any form of relief that *requires* immigration judges to provide bond hearings to class members amounts to *injunctive* relief.

Nor can § 1252(f)(1) be avoided on the theory that the Court would be directing the government to follow the law, as interpreted by the Court, and thus not restraining its implementation. The Court appeared to ground its reasoning on this approach in its

preliminary ruling, observing that “[a]n order declaring that class members are subject to detention under § 1226(a)” would “simply *require*[] defendants to follow the Constitution and the INA as Congress legislated it.” ECF No. 33 at 32 (emphasis added).

The Supreme Court in *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022), rejected the argument that it does not violate § 1252(f)(1) for a district court to tell the government to follow the law as it is interpreted by the court. It explained that § 1252(f)(1) forbids courts from issuing class-wide orders that “require officials to take actions that (*in the Government’s view*) are not required” or “to refrain from actions that (*again in the Government’s view*) are allowed by” certain provisions of the INA, including both § 1225 and § 1226. *Id.* at 551 (emphasis added). The Supreme Court held § 1252(f)(1) applies when the relief a court grants conflicts with “the Government’s view” of the statute and thus *affects* what the government is doing. *Id.* at 552–54 & n.5. That is what this Court’s order—if treated as coercive, as Petitioner proposes—would do.

In sum, to the extent Petitioner seeks declaratory relief that would be coercive—such that Respondents would need to follow it—such relief is injunctive relief and is barred by § 1252(f)(1). Indeed, Congress’s intent in passing § 1252(f)(1)—to bar class-wide relief compelling the government to take action—would be vitiated if plaintiffs could, in every case, obtain class-wide declaratory relief that functions exactly as a class-wide injunction would function. And given that such relief is barred, the Court should not certify the class, especially since class members would not be able to opt out of a Rule 23(b)(2) class in order to seek such relief in individual proceedings. 7AA Charles Alan Wright & Arthur R. Miller, *Fed. Practice and Procedure* § 1786 (3d ed.

updated 2025) (footnote omitted) (“class members in [a] Rule 23(b)(2) action[] . . . do not have the alternative of bringing a separate suit.”).

II. If the declaratory relief Petitioner seeks does not run afoul of § 1252(f)(1), the class cannot be certified under Rule 23(b)(2).

If the Court concludes that Petitioner’s class-wide relief stops short of what § 1252(f)(1) proscribes, Petitioner cannot satisfy class certification under Rule 23(b)(2).

Petitioner recognizes that if the class-wide declaratory relief he seeks does not compel Respondents to comply as to the class, *additional* relief would then be needed to provide a remedy to class members. As noted above, Petitioner himself recognizes that immigration judges are bound to follow the BIA’s decision in *Yajure Hurtado*. Petitioner thus “anticipates” that class-wide declaratory relief may not end things, and that “further proceedings may be required to ensure compliance.” ECF No. 37 at 4. Indeed, the relief he requests includes not only class-wide declaratory relief, but also “individual injunctions when requested as necessary to secure the rights of Class members,” ECF No. 6 at 25–26. Petitioner thus is seeking interim declaratory relief as a prelude for further injunctive relief, as opposed to a conclusive declaratory judgment.

But Rule 23(b)(2) is not available for such a piecemeal resolution. It is available only where “*final* injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). Accordingly, as the Supreme Court has explained, a court may not certify a class under Rule 23(b)(2) unless “a *single* injunction or declaratory judgment w[ill] provide relief to each member of the class.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (emphasis added). So if “each individual class member would be entitled to a *different* injunction or

declaratory judgment against the defendant,” a class cannot be certified under Rule 23(b)(2). *Id.* (emphasis in original). If further *individualized* proceedings will be required for each class member, Rule 23(b)(2) is not satisfied because the declaratory relief would not “provide relief to each member of the class.” *Id.* In other words, Petitioner cannot meet the requirements for class certification under Rule 23(b)(2) if he divides his claim into separate requests for different kinds of relief: first, class-wide declaratory relief that is non-coercive but does not provide any relief to each member of the class; and then, later, individual injunctions for class members.

At bottom, if Petitioner is not seeking the kind of class-wide injunctive relief prohibited by § 1252(f)(1), he is necessarily seeking piecemeal declaratory relief that does not meet the criteria for class certification under Rule 23(b)(2).

III. If the Court certifies a class, it should narrow it.

Petitioner originally sought certification of the following class:

All noncitizens in the U.S. without lawful status who are (1) detained by ICE; (2) have or will have proceedings before any immigration court hearing cases within the District of Colorado; (3) whom DHS alleges or will allege have entered the U.S. without inspection; (4) who were not or will not be apprehended upon arrival; and (5) who are not or will not be subject to detention under 8 U.S.C. §§ 1226(c), 1225(b)(1), or 1231 at the time they are scheduled for or request a bond hearing.

ECF No. 15 at 4. The Court subsequently clarified that individuals subject to detention under 8 U.S.C. § 1231 as of October 17, 2025, were not within the putative class. ECF No. 35. But individuals who *become* subject to detention under Section 1231 upon receiving a final removal order after October 17, 2025, remain in the putative class.

In the Supplemental Brief, Petitioner proposes a new class definition derived from the class definition used in *Guerrero Orellana*, 2025 WL 3033769, at *14. ECF No. 38 at 3. That class definition included:

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);

(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;

(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.

Id. at 2-3 (quoting *Guerrero Orellana*, 2025 WL 3033769, at *14).

While that new proposed class definition is superior in some respects to the original proposed class definition—for example, by making clear that individuals subject to post-final order detention under 8 U.S.C. § 1231 are excluded from its scope—it still suffers from a number of flaws.

Lack of positive description. First, the proposed class definition lacks a *positive* description of the individuals to whom it applies—those who Respondents are detaining under the authority of § 1225(b)(2)(A). Rather, the proposed definition is framed in the negative—i.e., identifying the potential class members based on provisions of the INA they are *not* detained under. It thus has the potential to inadvertently include individuals who are detained under provisions other than 8 U.S.C. § 1225(b)(2). For example, the class definition does not state that individuals detained under 8 U.S.C. § 1226a, which requires the mandatory detention of suspected terrorists, are not included in the class. Similar problems plagued Petitioner’s previous proposed class definition. See ECF No. 26 at 28–29.

Overbreadth. Second, the class is overbroad. Such overbreadth presents multiple obstacles to class certification. Overbreadth can defeat Rule 23(a)’s commonality requirement. See *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013) (“[T]he mere raising of a common question does not automatically satisfy Rule 23(a)’s commonality requirement. Rather, the common contention must be of such a nature that it is capable of *classwide resolution*[.]” (emphasis in original; internal quotation marks omitted)). And Rule 23(b)(2) requires a showing that the defendant acted (or refused to act) “on grounds that apply generally to the class,” which thus requires a showing that the defendant acted on grounds applicable to each class member.

Here, the new proposed class definition is overbroad in that it would extend to “all persons” who otherwise fit the criteria. The new proposed definition would, on its face,

include individuals even if they are not detained by ICE or are not noncitizens who are in removal proceedings. In other words, a citizen detained by local police could meet the definition above. And by referring to individuals who are “arrested or detained,” it would unnecessarily extend to individuals who are arrested but then not detained.²

Respondents’ proposed class definition. If the Court is inclined to grant certification, it should use a class definition that avoids these negative-definition and overbreadth issues, and accurately encompasses those individuals whose circumstances mirror Petitioner’s at the time he initiated this case. Specifically, Respondents propose the following class definition:

All noncitizens detained by ICE in Colorado, who:

(1) entered the United States without being apprehended by the Department of Homeland Security (“DHS”) upon arrival;

(2) were not inspected at the time they most recently entered the United States, and

(3) are being detained under 8 U.S.C. § 1225(b)(2)(A), pending a decision on whether they are to be removed from the United States.

This proposed class definition tailors the class definition to just those noncitizens who are in a similar situation to Petitioner at the start of this case: individuals who were encountered by DHS while already physically present within the United States after

² In addition, the proposed class appears to extend beyond individuals detained by ICE in Colorado. To the extent Petitioner seeks class-wide habeas relief, the class should be limited to individuals detained within the District of Colorado because habeas relief can be granted by district courts only “within their respective jurisdictions,” see 28 U.S.C. § 2241(a), and sought only in the “district of confinement,” *Trump v. J.G.G.*, 604 U.S. 670, 672 (2025)

entering without inspection, and who, in the government's view, are ineligible for a bond hearing because they are subject to mandatory detention under 8 U.S.C. § 1225(b)(2).

Clarification as to noncitizens subject to final removal orders. Any class definition the Court adopts should make clear that noncitizens who become subject to a final order of removal do *not* fall within the class. Noncitizens who have become subject to a final order of removal are detained under 8 U.S.C. § 1231, not under § 1225(b)(2). Once an individual is detained under 8 U.S.C. § 1231, that statute does *not* require bond hearings, as the Supreme Court has held. *See Johnson v. Arteaga-Martinez*, 596 U.S. 573, 582 (2022). Respondents' proposed class definition would accomplish this aim. It would limit the class to those "detained by ICE . . . pending a decision on whether they are to be removed from the United States." Petitioner's proposed class definition would accomplish this as well, specifying that an individual who is "subject to post-final order detention under 8 U.S.C. § 1231" is not part of the class. For a particular individual, once a removal decision has been made and finalized, the individual will drop out of the class and become subject to detention under § 1231.

Modification of past class relief. The Court should rule that any change in the class definition necessarily affects the operation of the temporary restraining order the Court entered on October 17, 2025, ECF No. 33 at 35–36, and modified on October 23, 2025, ECF No. 35. In particular, the Court should clarify the temporary restraining order to reflect that individuals who become detained under Section 1231 are no longer class members. Under either Respondents' proposed class definition or Petitioner's new class definition, individuals who entered without inspection and were at one point

detained under § 1225(b)(2), but become detained under § 1231 after October 17, 2025, would not be class members, and will no longer be subject to a restraining order that applies to class members. Unless the temporary restraining order is modified, it will have the effect of requiring ICE to *keep* in detention individuals subject to a final removal order who it would otherwise release by removing them from the United States.

IV. Information identified by the Court in its October 17, 2025, Order as relevant to certification under Rule 23(a).

In its October 17, 2025, Order, the Court identified two pieces of information that could inform its decision regarding class certification under Rule 23(a): first, “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 § 1225,” ECF No. 33 at 33; and second, “how many members of the proposed class have some kind of pending application for lawful status in the United States, whether it be a U-Visa application . . . , an I-589 (asylum application), an I-130 (petition for alien relative), or some other pending application,” *id.* at 34.

Respondents have gathered information regarding these two questions and present that information in the attached declaration from Supervisory Detention and Deportation Officer Alexander Hall.

1. Denials of bond based on § 1225(b)(2). Regarding the first question, Respondents have identified, to date, 519 individuals who are detained at the Denver Contract Detention Facility (“CDF”), entered without inspection during their most recent entry, were not encountered at the border by DHS, and are being detained pursuant to 8 U.S.C. § 1225(b)(2) (regardless of whether they have been in the United States for

more than two years). Respondent's App'x p. 2 – Hall Declaration. Of that population, approximately 32 entered the United States less than two years ago. *Id.*

2. Pending applications. Regarding the second question, Respondents (to date) have identified 131 noncitizens who are detained in Denver CDF under 8 U.S.C. § 1225(b)(2) and who have some kind of pending U-Visa application, asylum application, or petition for alien relative. *Id.* At this time, Respondents have not yet identified the number of noncitizens detained under § 1225(b)(2) in Denver CDF who have “some other pending” application.

If the Court requested this number because Respondents had raised Petitioner's U-Visa application as a potential objection to typicality, this objection is potentially irrelevant based on the Court's interpretation of § 1225(b)(2). In particular, the number of noncitizens who have applied for such relief may matter only if the Court finds that it is relevant to whether such a fact affects whether an individual is “seeking admission” within the meaning of § 1225(b)(2)(A). That provision states that “in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.”

Petitioner has argued that “seeking admission” qualifies 8 U.S.C. § 1225(b)(2)(A) such that it applies only to noncitizens who are at the border. ECF No. 29 at 8. Respondents, in turn, have argued that the phrase “seeking admission” does not add any additional requirements to who should be detained under 8 U.S.C. § 1225(b)(2)(A). In 8 U.S.C. § 1225(a)(1), Congress provided that “[a]n alien present in the United States

who has not been admitted or who arrives in the United States ... *shall be deemed for purposes of this chapter an applicant for admission.*" In *Jennings v. Rodriguez*, 583 U.S. 281 (2019), the Supreme Court explained that Section 1225(b)(2)(A) applies to "all applicants for admission not covered by § 1225(b)(1)," not limited to those taking some additional action to seek admission. *Id.* at 287.

The Court appears to have ruled, preliminarily, that regardless of whether Petitioner applied for a U-Visa, § 1225(b)(2)(A) cannot apply to individuals like Petitioner who have resided in the country for more than two years. ECF No. 33 at 16. If the Court adheres to that position, or adopts *either* Petitioner's view or Respondent's view, whether a noncitizen has some sort of pending application would not be material to whether that individual would fall within the scope of 8 U.S.C. § 1225(b)(2)(A) and, thus, is unlikely to impact the Court's typicality analysis.

CONCLUSION

The Court should deny class certification. Such certification is not proper in this matter under 8 U.S.C. § 1252(f)(1). Even if the Court could grant declaratory relief that would not run afoul of § 1252(f)(1), the class would not satisfy Rule 23(b)(2).

To the extent that the Court were to decide to certify a class here, it should adopt Respondents' proposed class definition, or at least modify and narrow Petitioner's new class definition. The data provided by Respondents regarding the information the Court identified in its October 17, 2025, Order, should not affect either class definition.

Dated: November 17, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Benjamin Gibson
Benjamin Gibson
U.S. Attorney's Office