

**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.

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**PLAINTIFF'S REPLY TO SUPPLEMENTAL BRIEF ON CLASS CERTIFICATION**

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Petitioner-Plaintiff Nestor Mendoza Gutierrez (“Plaintiff”) respectfully submits this supplemental reply brief to respond to the following points raised in Respondents-Defendants’ (“Defendants”) Supplemental Brief for Class Certification Hearing (ECF 40).

**I. 8 U.S.C. § 1252(f)(1) Does Not Bar Vacatur Under the Administrative Procedure Act (“APA”).**

Defendants wrongly assert 8 U.S.C. § 1252(f)(1) prevents this Court from vacating their unlawful detention policies under the APA, 5 U.S.C. § 706, because they claim that vacatur is a form of injunctive relief. ECF. 40 at 6; *see also* 8 U.S.C. § 1252(f)(1) (barring grants of class-wide relief that “enjoin or restrain” detention policies).

Defendants are incorrect. “[A]ll courts that have addressed the issue” have recognized that vacatur is not an injunction barred by Section 1252(f)(1). *Nat’l TPS Alliance v. Noem*, 773 F.Supp.3d 807, 826 (N.D. Cal. 2025) (surveying cases); *see, e.g., Texas v. U.S.*, 40 F.4th 205, 220 (5th Cir. 2022) (per curiam); *Las Americas Immigrant Advoc. Ctr. v. U.S. Dep’t of Homeland Sec’y*, 783 F.Supp.3d 200, 232–33 (D. D.C. 2025); *Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem*, --- F.Supp.3d ----, 2025 WL 1825431, at \*21 (D.D.C. July 2, 2025); *Florida v. U.S.*, 660 F.Supp.3d 1239, 1284–85 (N.D. Fla. 2023); *Al Otro Lado, Inc. v. Mayorkas*, 619 F.Supp.3d 1029, 1045 (S.D. Cal. 2022). *Cf. Immigrant Defs. L. Ctr. v. Noem*, 145 F.4th 972, 981 (9th Cir. 2025) (stay pursuant to APA § 705 is not an “injunction” barred by Section 1252(f)).

This is so because Section 1252(f)(1) is “nothing more or less than a limit on injunctive relief.” *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999) (emphasis added). Vacatur, however, is not an injunction. Whereas an injunction is an “extraordinary” remedy as to which a court has considerable discretion, *Weinberger v.*

*Romero-Barcelo*, 456 U.S. 305, 312 (1982), “setting aside” an agency rule or policy is a statutory remedy under the APA that is normally available when agency action is unlawful. *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022). Indeed, the APA mandates that the reviewing court “shall . . . hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2) (emphasis added); see *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating that “shall” “normally creates an obligation impervious to judicial discretion”).

Moreover, the consequences of an order vacating an agency action are meaningfully different from those of an order “enjoin[ing] or restrain[ing]” the agency from acting. 8 U.S.C. § 1252(f)(1). An order setting aside an agency action nullifies it. See BLACK’S LAW DICTIONARY (11th ed. 2019) (vacatur is “[t]he act of annulling or setting aside”). Unlike an injunction, which operates in personam to compel or prohibit further action—on pain of contempt sanctions—vacatur voids or “unwinds” the challenged agency action itself. See *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 522 (7th Cir. 2021); *Nat’l TPS Alliance v. Noem*, 773 F.Supp.3d 807, 826-28 (N.D. Cal. 2025). Indeed, the government has conceded as much. See Movant’s Appx. at 46-47, Br. for Appellants, *Make the Road v. Noem*, No. 25-5320 (D.C. Cir. filed Oct. 20, 2025) (stating that APA vacatur “is not a remedy that naturally ‘enjoins or restrains’ the use of a given power; instead, it *eliminates* that power in the first place”) (emphasis in original).

Tenth Circuit law does not conflate the two forms of relief, as Defendants suggest. ECF 40 at 6. Although Defendants cite dicta in *WildEarth Guardians v. U.S. Bureau of*

*Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017) (Briscoe, J.), the Tenth Circuit, in an opinion also written by Judge Briscoe, later noted that injunctions and vacatur are distinct remedies. In *Diné Citizens Against Ruining Our Env't v. Bernhardt*, the Tenth Circuit declined to grant “the additional and extraordinary relief of an injunction” where the vacatur of the challenged agency action—in that case, a set of drilling permits—was “sufficient to redress [appellants’] injury.” 923 F.3d 831, 859 (10th Cir. 2019) (Briscoe, J.) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 166 (2010), and citing *WildEarth Guardians*, 870 F.3d at 1239). See also *Diné Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016, 1050 (10th Cir. 2023) (discussing APA vacatur and injunctive relief as distinct remedies). In so doing, the Court relied on the Supreme Court’s distinguishing of vacatur from injunctions. See *Monsanto*, 561 U.S. at 165-66 (explaining that “[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. If a less drastic remedy (such as partial or complete vacatur of [the agency’s] deregulation decision) was sufficient to redress respondents’ injury, no recourse to the additional and extraordinary relief of an injunction was warranted” (citation omitted)).

In sum, Section 1252(f)(1)’s bar on class injunctions does not prohibit this Court from vacating Defendants’ policies under the APA.

**II. This Court Should Certify a Rule 23(b)(2) Class Based on Declaratory Relief.**

Defendants make two additional arguments regarding declaratory relief. First, Defendants assert that to the extent that a final declaratory judgment would be binding on Defendants, Section 1252(f)(1) prohibits this Court from granting such relief to the

class. Alternatively, Defendants argue that if they choose to willfully ignore a declaratory judgment order entered by this Court (as they are in Washington state), such a judgment would not be “final” for purposes of Rule 23(b)(2). See ECF 40 at 6-9. Defendants are wrong on both counts.

First, this Court has already rejected the government’s claim that Section 1252(f)(1) bars class declaratory relief—even though such judgment necessarily would be binding on Defendants. See ECF 33 at 30-32; see also 28 U.S.C. § 2201(a) (empowering courts to “declare the rights and other legal relations of any interested party seeking such declaration” and providing that “[a]ny such declaration shall have the force and effect of a final judgment”).

Second, to the extent Defendants intend not to comply with a declaratory judgment by this Court, that noncompliance cannot defeat class certification.<sup>1</sup> And in any event, Defendants are wrong that the possibility that some class members may need to file individual enforcement actions, or seek further orders to ensure Defendants follow the law or this Court’s orders, in the event of such noncompliance means the class cannot satisfy Rule 23(b)(2)’s requirement that “final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” FED. R. CIV. P. 23(b)(2). As Judge Saris recently explained in her class certification order:

A final declaratory judgment establishing a right to a bond hearing would be appropriate on a class-wide basis, and each class member could then secure a coercive remedy enforcing that right in an individual action. Rule 23(b)(2) squarely permits this procedure. See FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (explaining that “[d]eclaratory relief

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<sup>1</sup> Indeed, Defendants’ position only reinforces the importance of vacating the challenged detention policies under the APA.

'corresponds' to injunctive relief when as a practical matter it affords injunctive relief *or serves as a basis for later injunctive relief* (emphasis added)).

*Guerrero Orellana v. Moniz*, 25-CV-12664, 2025 WL 3033769, at \*13 (D. Mass. Oct. 30, 2025).

**III. Class Members' Applications for Immigration Relief Do Not Bear on Typicality.**

Finally, the parties agree that whether class members have applied for immigration relief has no bearing on the Rule 23(a) analysis. See ECF 40 at 15-16; ECF 38 at 10-11. Specifically, this Court has already concluded that an individual living in the U.S. is not "seeking admission" for purposes of the detention statute Defendants are applying to class members, 8 U.S.C. § 1225(b)(2)(A). See ECF 33 at 16. Petitioner further notes that, contrary Defendants' prior arguments, see ECF 26 at 13, both Supreme Court precedent and Defendants' own policy guidance make clear that a noncitizen who is residing in the country and applies for a U visa or similar immigration relief cannot be deemed as "seeking admission" under Section 1225(b)(2)(A).

In *Sanchez v. Mayorkas*, 593 U.S. 409 (2021), the Supreme Court considered whether a grant of Temporary Protected Status ("TPS")—a form of temporary relief from deportation, see 8 U.S.C. § 1254a—constitutes an "admission" that renders noncitizens eligible for adjustment of status to lawful permanent residence under 8 U.S.C. § 1255. 593 U.S. at 414. The Court held that the petitioner, who had originally entered the country unlawfully, but was subsequently granted TPS, had not been "admitted" and was therefore ineligible to adjust under the relevant provisions. *Id.* at 419. As the Court explained, an "admission" is defined as "the lawful entry of the alien into the United States after

inspection and authorization by an immigration officer.” *Id.* at 411 (quoting 8 U.S.C. § 1101(a)(13)(A)). TPS, however, provided the petitioner only a grant of “lawful status” in the country—and *not* an “admission.” *Id.* at 416.

The Court elaborated:

Lawful status and admission . . . are distinct concepts in immigration law: Establishing one does not necessarily establish the other. On the one hand, a foreign national can be admitted but not in lawful status—think of someone who legally entered the United States on a student visa, but stayed in the country long past graduation. On the other hand, a foreign national can be in lawful status but not admitted—think of someone who entered the country unlawfully, but then received asylum. The latter is the situation Sanchez is in, except that he received a different kind of lawful status. The TPS statute permits him to remain in the country; and it deems him in nonimmigrant status for purposes of applying to become [a lawful permanent resident]. But the statute does not constructively “admit” a TPS recipient—that is, “consider[ ]” him as having entered the country “after inspection and authorization.” § 1254a(f)(4); § 1101(a)(13)(A). And because a grant of TPS does not come with a ticket of admission, it does not eliminate the disqualifying effect of an unlawful entry.

*Id.* at 415–16 (citations omitted).

The reasoning of *Sanchez* makes clear that, contrary to Defendants’ suggestion, a noncitizen inside the country applying for a U visa or other forms of immigration relief like TPS, is “seeking lawful status”—and not “seeking admission”—because those forms of relief confer only “lawful status” in the U.S. They do not constructively “admit” a noncitizen who entered the country unlawfully. And just two weeks ago Defendants issued new policy guidance clarifying that, like TPS, a grant of U nonimmigrant status is not an “admission” that renders the noncitizen eligible for adjustment under 8 U.S.C. § 1255(a). See U.S. Citizenship & Immigr. Servs., Policy Alert: Admission for Adjustment of Status under INA 245(a), PA-2025-25 (Nov. 3, 2025), permalink: <https://perma.cc/W9MG-SRLB>.

Thus, Defendants' own guidance makes clear that, like the TPS holder or asylum seeker discussed in *Sanchez*, an applicant for relief like a U visa is seeking "lawful status" in, and not an "admission" into, the U.S..

#### **IV. Conclusion**

The Court should certify a class to declare Defendants' bond practice unlawful and vacate the agencies' policies under the APA.

Dated: November 19, 2025.

Respectfully submitted,

*s/ Scott Medlock*

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Scott C. Medlock

Timothy R. Macdonald

Sara R. Neel

Emma Mclean-Riggs

Anna I. Kurtz

ACLU FOUNDATION OF COLORADO

303 E. 17th Avenue

Denver, CO 80203

(720) 248-0553

smedlock@aclu-co.org

tmacdonald@aclu-co.org

sneel@aclu-co.org

emcleanriggs@aclu-co.org

akurtz@aclu-co.org

Michael K.T. Tan

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION

425 California Street, Suite 700

San Francisco, CA 94104

(415) 343-0770

m.tan@aclu.org

Anand Balakrishnan

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION

125 Broad Street, 18th Floor

New York, NY 10004

(212) 549-2660

abalakrishnan@aclu.org

s/ Hans Meyer  
Hans Meyer  
Conor T. Gleason  
The Meyer Law Office  
PO Box 40394  
Denver, CO 80204  
(303) 831 0817  
hans@themeyerlawoffice.com  
conor@themeyerlawoffice.com

ATTORNEYS FOR PLAINTIFF-PETITIONER  
AND THE PUTATIVE CLASS

**CERTIFICATE OF SERVICE**

I hereby certify that on November 19, 2025, I electronically filed the foregoing **PLAINTIFF'S REPLY TO 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