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, Denver Contract Detention Facility, Aurora, Colorado, 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.

PETITIONER-PLAINTIFF'S CONSOLIDATED REPLY TO PETITIONER'S FIRST APPLICATION FOR WRIT OF HABEAS CORPUS, MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION, AND MOTION TO CERTIFY CLASS

This Court – like dozens of others – should grant *habeas* relief to Plaintiff-Petitioner ("Plaintiff") and further certify a class of similarly-situated noncitizens to declare Defendants-Respondents' ("Defendants") new interpretation of the Immigration and Nationality Act (INA)'s detention provisions illegal.

I. INTRODUCTION

Before Plaintiff filed this case, federal courts across the country overwhelmingly agreed: Defendants' policy of categorically excluding people who entered without inspection from bond eligibility is unlawful. ECF 14, n. 1. Since then, this emphatic judicial consensus continues to reject Defendants' position,[1] even after the Board of Immigration Appeals (BIA) adopted Defendants' incorrect interpretation of the law for the agency. *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025).[2]

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[1] *E.g.*, *Jose J.O.E. v. Bondi*, --- F. Supp.3d ----, No. 25-cv-3051, 2025 WL 246670 (D. Minn. Aug. 27, 2025); *Vasquez Garcia et al. v. Noem*, No. 25-cv-02180-DMS-MMP, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025); *Doe v. Moniz*, No. 1:25-cv-12094, 2025 WL 2576819 (D. Mass. Sept. 5, 2025); *Francisco T. v. Bondi*, --- F. Supp.3d ----, No. 25-cv-3219, 2025 WL 2629839 (D. Minn. Sept. 5, 2025). *See also Palma Perez v. Berg*, --- F.Supp.3d --- , 2025 WL 2531566 (D. Neb. Sept. 3, 2025); *Cortes Fernandez v. Lyons*, No. 8:25-cv-506, 2025 WL 2531539 (D. Neb. Sept. 3, 2025); *Carmona-Lorenzo v. Trump*, No. 4:25-cv-3172, 2025 WL 2531521 (D. Neb. Sept. 3, 2025); *Hernandez Nieves v. Kaiser*, No. 25-cv-06921, 2025 WL 2533110 (N.D. Cal Sept. 3, 2025); *Lopez Santos v. Noem*, 25-CV-01193, 2025 WL 2642278 (W.D. La. Sept. 11, 2025); *Velasquez Salazar v. Dedos*, No. 1:25-cv-835, 2025 WL 2676729 (D. N.M. Sept. 17, 2025); *infra* at n. 2.

[2] *Zaragoza Mosqueda v. Noem*, No. 5:25-cv-02304, 2025 WL 2591530 (C.D. Cal. Sept. 8, 2025); *Sampiao v. Hyde*, --- F.Supp.3d ---, 2025 WL 2607924 (D. Mass. Sept. 9, 2025); *Pizzaro Reyes v. Raycraft*, No. 25-cv-12546, 2025 WL 2609425 (E.D. Mich. Sept. 9, 2025); *Cuevas Guzman v. Andrews*, No. 1:25-cv-01015, 2025 WL 2617256, (E.D. Cal. Sept. 9, 2025); *Salcedo Aceros v. Kaiser*, No 25-cv-06924, 2025 WL 2637503 (N.D. Cal. Sept. 12, 2025); *Barrera v. Tindall*, No. 3:25-cv-00541, 2025 WL 2690565 (W.D. Ky. Sept. 19, 2025); *Chafla v. Scott*, 2:25-cv-00437, 2025 WL 2688541 (D. Me. Sept. 21, 2025). *See also Hinestroza v. Kaiser*, No. 25-cv-07559, 2025 WL 2606983 (N.D. Cal. Sept. 9, 2025); *Jimenez v. FCI Berlin, Warden*, --- F.Supp.3d ---, 2025 WL 2639390 (D. N.H. Sept.

The District of Colorado (Sweeney, J.) also recently rejected the government's construction of § 1225(b)(2). *Garcia Cortes v. Noem*, No. 25-cv-02677-CNS, 2025 WL 2652880, *3 (D. Colo. Sept. 16, 2025).

Defendants' Response ignores all these decisions and instead presses the same arguments that have now been rejected dozens of times. This Court should join the overwhelming consensus and order a bond hearing for Plaintiff and certify the class.[3]

II. THIS COURT HAS JURISDICTION TO GRANT THE REQUESTED RELIEF

Supreme Court precedent is clear: the INA's jurisdictional bars do not apply when a noncitizen "challenges the statutory framework that permits his detention without bail." *Demore v. Kim*, 538 U.S. 510, 517 (2003). The Court reaffirmed in *Jennings v. Rodriguez*, that it would be "absurd" to deprive district courts of jurisdiction over detention-related claims as that effectively makes illegal detention claims "unreviewable." 583 U.S. 281, 293 (2018). A proper "narrow reading" of the jurisdiction stripping provisions, *see Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 487 (1999), confirms this Court retains jurisdiction over Plaintiff's claims related to his *detention* without bond.

First, 8 U.S.C. § 1252(a)(5) explicitly does not limit any "habeas corpus provision."

9, 2025); Ex. 1, *Lamidi v. FCI Berlin*, No. 25-cv-297, ECF 14 (D. N.H. Sept. 15, 2025); *Maldonado Vasquez v. Feeley*, 2:25-cv-01542, 2025 WL 2676082 (D. Nev. Sept. 17, 2025); *Lepe v. Andrews*, --- F.Supp.3d ----, No. 1:25-cv-01163, 2025 WL 2716910 (E.D. Cal. Sept. 23, 2025); Ex. 4, *Rivera Zumba v. Bondi*, No. 25-cv-14626, ECF 31 (D. N.J. Sept. 26, 2025).

[3] Upon certification, Plaintiff intends to file a motion for partial summary judgment seeking class-wide declaratory relief, similar to what the plaintiff class did following certification of a similarly-defined regional class of immigration detainees in Washington. *See Rodriguez Vasquez v. Bostock*, 349 F.R.D. 333 (W.D. Wash. 2025).

Id. It only governs a final "order of removal." *Id*. Plaintiff only seeks review of his detention, not any removal order. *Ferry v. Gonzales*, 457 F.3d 1117, 1131 (10th Cir. 2006).

Second, 8 U.S.C. § 1252(b)(9) limits judicial review to "a final order" of "any action taken or proceeding brought to remove a [noncitizen]." The Supreme Court held § 1252(b)(9) does not prevent hearing detention-related claims: when noncitizens "are not asking for review of an order of removal" but instead are "challenging the decision to … deny them bond hearings," "§ 1252(b)(9) does not present a jurisdictional bar." *Nielsen v. Preap*, 586 U.S. 392, 402 (2019) (citing *Jennings*, 583 U.S. 281, cleaned up). Indeed, when Congress added § 1252(b)(9) to the INA, it stated "nothing in the amendment would preclude habeas review over challenges to detention" – which is precisely the claim here. *Kong v. U.S.*, 62 F.4th 608, 614 (1st Cir. 2023) (citing H.R. Rep. No. 109-72, at 175 (2005) (Conf. Rep.), cleaned up).

Finally, 8 U.S.C. § 1252(g) only strips federal courts of jurisdiction over claims "arising from the decision … to [1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders." None of these apply in this case. Courts consistently hold this language does not limit their ability to hear detention claims either. The First Circuit in *Kong* explained "illegal detention [claims] are plainly collateral to ICE's prosecutorial decision[making]," which § 1252(g) insulates, and thus § 1252(g) "does not bar judicial review of [petitioner's] challenge to the lawfulness of his detention." 62 F.4th at 617. Other courts agree.[4] Defendants' argument that the statutory basis for "commenc[ing]" removal

[4] *E.g.*, *Ozturk v. Hyde*, 136 F.4th 382, 400 (2nd Cir. 2025); *Arce v. U.S.*, 899 F.3d 796 (9th Cir. 2018); *Madu v. Att'y Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006); *Garcia v. Att'y Gen.*, 553 F.3d 724, 729 (3d Cir. 2009).

proceedings includes a discretionary choice between §§ 1225 and 1226 is irrelevant here because (1) that is actually a choice between *detention* (not *removal*) provisions, *and* (2) because Defendants even "commence[d]" proceedings against Plaintiff under § 1226. *See* ECF 26-1, ¶ 7. Even the Eleventh Circuit in *Alvarez v. ICE* – cited by *Defendants* (ECF 26, p. 10) – held district courts can review whether "the agency had no statutory ground on which to detain [noncitizens]." 818 F.3d 1194, 1205 (11th Cir. 2016). That is precisely the review Plaintiff requests here. *See also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 19 (2020) (§ 1252(b)(9) and (g) do not bar relief under the APA).

The litany of cases rejecting Defendants' merits position – including from the District of Colorado – also reject that District Courts cannot hear detention-related claims.[5]

III. PLAINTIFF SATISFIES THE REQUIREMENTS FOR PRELIMINARY RELIEF BECAUSE HE CAN ONLY BE DETAINED PURSUANT TO 8 U.S.C. § 1226

Even if certain injunctions still must meet heightened standards after *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008),[6] Plaintiff's relief is not disfavored. But Plaintiff does not seek a "disfavored" injunction even under pre-*Winter* caselaw – he seeks to preserve the *status quo* from "the last uncontested period." *Evans v. Fogarty*, 44

[5] *Garcia Cortes*, 2025 WL 2652880, **1-2; *Benitez v. Noem*, No. 5:25-cv-02190, ECF 11, at 3 (C.D. Cal. Aug. 26, 2025); *Aguilar Maldonado v. Olson*, --- F.Supp.3d ----, 2025 WL 2374411, **5-8 (D. Minn. Aug. 15, 2025); *Jose J.O.E.*, 2025 WL 2466670, *7; *Vasquez Garcia*, 2025 WL 2549431, **3-4.

[6] The Supreme Court set out the familiar four-element test for preliminary relief in *Winter* – with no other requirements. 555 U.S. at 20. The Tenth Circuit now acknowledges the *Winter* test is exhaustive. *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016). Thus, *Winter* rejects this Circuit's old "disfavored" injunction framework.

Fed. Appx. 924, 928 (10th Cir. 2002). Defendants "misunderstand the legal distinction between injunctions that disturb the status quo and those that do not," *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005), as *status quo* is the "last peaceable uncontested status between the parties before the dispute developed," not the status between the parties when litigation begins. *Id.* at 1260. Detaining Plaintiff under § 1225(b)(2) departs from decades-long practice. *See* ECF 14, pp. 2-4. Plaintiff could have sought bond during the previous *thirty years* – that is the *status quo* he seeks to preserve.

Similarly, the injunction does not mandate new action – it stops Defendants from depriving Plaintiff of the bond hearing he is entitled to absent Defendants' illegal action.

Regardless, Plaintiff satisfies even a heightened standard: he makes a strong showing of likelihood of success on the merits and that the balance of harms tilts to him.

A. **Plaintiff and the Class are Likely to Succeed on the Merits**

Overwhelming authority supports Plaintiff on the merits. *See* ECF 14, n. 1 & *supra* nn. 1-2. In contrast, Defendants' reading of §§ 1225 and 1226 makes portions of the INA meaningless, ignores lengthy regulatory history, makes changes Congress did not intend.

1. Statutory text and context confirm § 1225(b)(2) mandatory detention is limited to noncitizens "seeking admission"

Defendants' interpretation of § 1225 makes large parts of the code meaningless.

Several requirements must be met to apply § 1225(b)(2)'s mandatory detention regime; (1) an "examining immigration officer" (2) must during an "inspection" at the border (3) of an "applicant for admission" (4) who is "seeking admission" (5) conclude the person "is not clearly and beyond a doubt entitled to be admitted." § 1225(b)(2)(A); *Jimenez*, 2025 WL 2639390, *7. Defendants read out three of these five requirements.

Defendants' interpretation renders § 1225(b)(2)'s requirement that an "examining immigration officer" conduct an "inspection" at the border meaningless. *Id*. "[E]xamination is . . . the specific legal process one undergoes while trying to enter the country." *Id*. (citations omitted); 8 C.F.R. § 235.1(a) ("scope of examination" occurs when seeking to "enter the [U.S.]" "at a … port-of-entry …"). "Inspection" requires an active pursuit of entry. *See* 8 U.S.C. § 1225(a)(3) ("All [noncitizens] who are applicants for admission or otherwise seeking admission [to] … the [U.S.] shall be inspected by immigration officers").

Defendants next make superflous § 1225(b)(2)(A)'s requirement that noncitizens be "seeking admission." *Jimenez*, 2025 WL 2639390, *8; *Salcedo Aceros*, 2025 WL 2637503, *10. An applicant for admission is a noncitizen "present in the [U.S.] who has not been admitted or who arrives in the [U.S.]." 8 U.S.C. § 1225(a)(1). Admission is "lawful entry of the [noncitizen] into the [U.S.] after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). "While an applicant for admission has not been 'admitted' to the [U.S.], it does not follow that an applicant for admission continues to be actively seeking … lawful entry" indefinitely. *Jimenez*, 2025 WL 2639390, *8 (citing *Lopez Benitez v. Francis*, --- F.Supp.3d ----, No. 25-civ-5937, 2025 WL 2371588, *6 (S.D. N.Y. Aug. 13, 2025)). "If as the Government argues, all applicants for admission are deemed to be 'seeking admission' for as long as they remain applicants, then the phrase 'seeking admission' would add nothing to" § 1225(b)(2)(A). *Salcedo Aceros*, 2025 WL 2637503, *10. Thus, Defendants render § 1225(b)(2)(A)'s "seeking admission" text meaningless, and ignore the "plain, ordinary meaning of the words 'seeking' and 'admission'." *Lopez Benitez*, 2025 WL 2371588, *7. Defendants also impermissibly read out "entry" from "the

definitions of 'admitted' and 'admission.'" *Chafla*, 2025 WL 2688541, *6.

Defendants' reading relies on the broad definition of "application for admission" at § 1225(a)(1). This definition, however, does not control for § 1225(b)(2), which does not apply to *all* applicants for admission, but only those actively "seeking admission" at the border. *See* 8 U.S.C. § 1225. *See also* H.R. Rep. No. 104-469, pt. 1, at 157–58, 228–29 (1996) (purpose of § 1225 regarding noncitizens arriving at the border). The title of § 1225 includes "arriving" "indicat[ing] that the statute governs 'arriving' noncitizens, not those present already." *Barrera*, 2025 WL 2690565, *4 (citation omitted). A statute's title is "especially valuable where it reinforces what the text's nouns and verbs independently suggest." *Yates v. U.S.*, 574 U.S. 528, 552 (2015) (Alito, J., concurring). The remaining text, focused on crewman or stowaways, further "reinforces the interpretation that [§] 1225 is much more limited in scope than the [government] asserts." *Id*.

Contrary to Defendants' claim, § 1225(b)(1)(A)(iii)(II) does not support their reading. That section concerns mandatory detention of noncitizens in the interior who could be subject to expedited removal. But it actually supports Plaintiff's position under the *expressio unius est exclusio alterius* doctrine. "[W]here Congress includes particular language in one section of a statute but omits it in another section …, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983). Congress' decision to limit mandatory detention to noncitizens who have been in the U.S. for less than two years when Defendants jail them in the interior shows Congress knew when to apply § 1225 mandatory detention to people, and chose not to for Plaintiff. *Id*.

Also unpersuasive is Defendants' position that any redundancy between §§ 1225(b)(2)(A) and 1226(c)(1)(E) "does not mean Section 1225(b)(2)(A) does not still govern the detention of other [noncitizens] who entered without inspection." ECF 26, p. 14. Defendants ignore that "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect," *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995), and "[i]f § 1225(b)(2) already mandated detention of any [noncitizen] who has not been admitted, regardless of how long they have been here, then adding § 1226(c)(1)(E) to the statutory scheme was pointless." *Barrera*, 2025 WL 2690565, *4 (cleaned up). Congress' recent enaction of the Laken Riley Act's (LRA) new detention provisions would be meaningless under the Defendants' interpretation of § 1225(b)(2).

Under Plaintiff's interpretation, however, there is no redundancy because the LRA's amendment to § 1226(c)(1) was designed to address a set of people to whom § 1225 did not apply. *Lopez-Campos v. Raycraft*, --- F.Supp.3d ----, No. 2:25-cv-12486, 2025 WL 2496379, *8 (E.D. Mich. Aug. 29, 2025) (If "Congress had intended for [§] 1225 to govern all noncitizens present in the country, who had not been admitted, then it would not have recently" enacted new mandatory detention provisions); *Lopez Benitez*, 2025 WL 2371588, *4 (§§ 1225(b)(2) & 1226 are "mutually exclusive"). Defendants also ignore that while limited redundancy may occur, it is a "cardinal rule of statutory interpretation that no provision should be construed to be *entirely* redundant," as Defendants do here. *Kungys v. U.S.*, 485 U.S. 759, 778 (1988) (emphasis added).

But this Court does not even need to look at the recent amendments to reach this conclusion. The plain text of § 1226 has applied to noncitizens seeking admission since

its inception. 8 U.S.C. § 1226(c)(1)(A), (D). It makes no sense that Congress enacted IIRIRA in 1996 to mandate detention for a group of noncitizens in § 1225(b)(2)(A) and at the same time provided for discretionary detention for the same group under § 1226(a).

2. Defendants ignore legislative history and the agency's interpretation

The implementing regulations further support Plaintiff: § 1225(b)(2)(A) applies to noncitizens only while arriving in the U.S. 8 C.F.R. § 235.3(c)(1) (§1225(b) applies to "any arriving [noncitizen] who appears to the inspection officer to be inadmissible"). "The regulation thus contemplates that 'applicants *seeking admission*' are a subset of applicants 'roughly interchangeable' with 'arriving [noncitizens].'" *Salcedo Aceros*, 2025 WL 2637503, *10 (quoting *Martinez v. Hyde*, --- F.Supp.3d ----, No. 25-11613, 2025 WL 2084238, *6 (D. Mass. July 24, 2025), emphasis in original). *See also* 8 C.F.R. § 1.2 (defining "arriving [noncitizen]" as applicant for admission "coming or attempting to come into the [U.S.] at a port-of-entry"). This is consistent with EOIR's statement promulgating the regulations, which have not been amended since: "[i]nadmissible [noncitizens], … have available to them bond redetermination hearings …, while arriving [noncitizens] do not." *Inspection and Expedited Removal of Aliens*, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997). *Compare* 8 C.F.R. § 1003.19(h)(2) *with* Procedures for the Detention and Release of Criminal Aliens, 63 Fed. Reg. 27441, 27448 (May 18, 1998).

Contrary to Defendants' assertion, acknowledging § 1225(b)(2)(A)'s limited application to noncitizens *arriving* in the U.S. does not incorrectly restrict its breadth.

> [Section] 1225(b)(2) applies to arriving noncitizens who are inadmissible on grounds other than 8 U.S.C. § 1182(a)(6)(C) or 1182(a)(7) (which are the grounds that put an arriving noncitizen on the track for expedited removal). The statute governing inadmissibility lists ten grounds for inadmissibility,

> many of which have distinct sub-grounds. *See* 8 U.S.C. § 1182(a)(1)-(10). There are thus arriving noncitizens inadmissible on these other bases who would fall under Section 1225(b)(2), as opposed to Section 1225(b)(1).

Salcedo Aceros, 2025 WL 2637503, *11. That also includes lawful permanent residents "seeking admission" who fall within the six categories in 8 U.S.C. § 1101(a)(13)(C)(i)–(vi). Section 1225(b)(2) plays many roles, but detaining Plaintiff without bond is not one.

Defendants' assertion that Plaintiff is presently "seeking admission" because he has a pending U-Visa application is wrong. Plaintiff seeks an opportunity "to obtain a lawful means to remain" in the U.S, rather than "seek[] admission" to the U.S. *Lopez-Benitez*, 2025 WL 2371588, at 6 n.7. Section 1225(b)(2)(A) must be read in context and to give meaning to all its terms: it addresses inspections by immigration officers, authorizing determinations to place people not "clearly and beyond a doubt entitled to be admitted" in removal proceedings. This does not apply to noncitizens who are not being inspected at the border and are already in removal proceedings. This is consistent with Congress' intent that the IIRIRA's then-new § 1226(a) preserved "the authority of the Attorney General to arrest, detain, *and release on bond* a[] [noncitizen] who is not lawfully in the United States." H.R. Rep. No. 104-469, pt. 1, at 229 (emphasis added).

3. The IIRIRA's intent to edit the distinction between "entry" and "admission" has no effect on Plaintiff's bond eligibility

The IIRIRA substituted "admission" for "entry" to address the distinction between noncitizens who "effected an 'entry' into the U.S. [and] were subject to deportation proceedings, while those who had not made an 'entry' were subject to 'more summary' exclusion proceedings." *Salcedo Aceros*, 2025 WL 2637503, *11. As Defendants concede, however, "IIRIRA was intended to replace *certain aspects* of the current 'entry

doctrine[,]'" not all of it. ECF 26, at 16 (emphasis added, citing H.R. Rep. No. 104-469, pt. 1, at 225 (1995)). "In making these changes, Congress did not fully disrupt the old system, including the system of detention and release" on bond:

> In fact, according to the legislative record, 'Section [1226(a)] restates the current provisions in section 242(a)(1) regarding the authority of the Attorney General to arrest, detain, and release on bond a [noncitizen] who is not lawfully in the United States.' … Congress' concern about adjusting the law in some respects to reduce inequities in the removal process did not mean Congress intended to entirely up-end the existing detention regime by subjecting all inadmissible noncitizens to mandatory detention, a seismic shift in the established policy and practice of allowing discretionary release under Section 1226a – the scope of which Congress did not alter.

Salcedo Aceros, 2025 WL 2637503, *12 (quoting H.R. Rep. 104-469, 229).

Defendants' past explicit rejection of excluding people who entered without inspection from bond eligibility supports Plaintiff's petition. After the IIRIRA's passage, then-Attorney General Janet Reno proposed a rule that all "[i]nadmissible [noncitizens] in removal proceedings" be ineligible for bond. *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal*, 62 Fed. Reg. 444, 483 (Jan. 3, 1997). After receiving comments, General Reno deleted that proposed provision and replaced it with one applying only to "[a]rriving [noncitizens], as described in § 1.1(q) of this chapter." 62 Fed. Reg. 10312, 10361 (March 6, 1997). As she explained, "[t]he effect of this change is that inadmissible [noncitizens], … have available to them bond hearings …, while arriving [noncitizens] do not." *Id*. at 10323. Defendants' response, ECF 26, pp. 17–18, that the agency did not comprehensively consider its decision to permit bond hearings for noncitizens who entered without inspection is simply erroneous.

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Thus, as Plaintiff's detention is governed by § 1226(a), not § 1225(b)(2), he is

entitled to a bond hearing, and has made a strong showing he will succeed on the merits. Defendants offer no argument for why this relief is inappropriate, save their flawed contention that he is detained under § 1225(b)(2).[7]

B. **Plaintiff's Continued Detention is an Irreparable Harm and the Remaining Equities Favor Plaintiff**

Defendants assert that if detention during a pending *habeas* matter is irreparable harm, then most *habeas* petitioners are entitled to such relief. That should be so when petitioners *are being held unlawfully*, like Plaintiff and the class. Plaintiff's injury is profound and strikes at the heart the Due Process Clause. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). The loss at issue here is actual, certain, and indeed, the greatest loss Plaintiff could suffer short of life: lost liberty. Not a single day of freedom can ever be returned once unlawfully taken, requiring preliminary relief. *See* ECF 14, pp. 13-14.

An injunction will not prevent Defendants from "carrying out their statutory obligations" (ECF 26, pp. 22-23) because if Plaintiff succeeds on the merits then the government is acting *contrary to* its statutory authority. Here, relief does not prevent the government from "effectuating statutes enacted by representatives of its people," *Trump v. CASA, Inc.*, 606 U.S. 831, 861 (2025), because Congress, the "representatives of its

[7] Similarly, an injunction preventing Defendants from transferring Plaintiff out of Colorado is necessary to effectuate this Court's jurisdiction. This Court has the power to issue it, pursuant to the equitable and flexible nature of *habeas* relief and the All Writs Act. *See Ozturk,* 136 F.4th at 395-96 (2nd Cir. 2025). Plaintiff's presence in Colorado facilitates his ability to work with his attorneys, and will expedite this matter, which any transfer would interrupt. The government does not permit detained people to communicate with counsel during transfers and declines to specify how long "transfer" may take, or how many transfers it may effectuate. *Id.* at 393. Judge Gallagher recently entered this relief *ex parte*. Ex. 5, *Moya Pineda v. Baltasar*, No. 25-cv-02955, Doc. 10 (D. Colo. Sept. 25, 2025).

people," "enacted" a statute – § 1226(a)(2) – that requires the opposite of what the government is doing. *See supra* at § III(A). Congress said as much. *See* ECF 14, p. 4 (citing H.R. Rep. No. 104-469, pt. 1, at 229 (1996)). As § 1225 provides no legal authority to detain Plaintiff, the Court is merely "enjoining what [is] likely unlawful [action] promulgated by the executive branch to encroach on congressional legislative power" and thus "serv[ing] the public interest." *Albuquerque v. Barr*, 515 F.Supp.3d 1163, 1181 (D. N.M. 2021). If agency action is *ultra vires* – like here – an injunction does not (and cannot) harm the government. *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013). "There is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters v. Newby*, 838 F.3d 1, 78 (D.C. Cir. 2016).

IV. THE COURT SHOULD CERTIFY THE CLASS

A. The Court Should Certify the Class Without Delay

At this time, Plaintiff seeks to certify a class under Rule 23 based on the Court's APA and federal question jurisdiction to declare Defendants' detention policy is unlawful as to similarly-situated noncitizens in Colorado. *See* ECF 6, Am Compl, pp. 25-26 & *supra* n. 3.[8] Rather than defer, the Court should certify the requested class *post haste*. *D.B.U.*

[8] Defendants meritlessly fault Plaintiff for not properly serving the Amended Complaint. Plaintiff took the required steps to effectuate service. Under Rule 4(b), Plaintiff requested the clerk issue a summons. ECF 11. To date, the clerk has not done so. Plaintiff's counsel nonetheless emailed the Amended Complaint to the U.S. Attorney's Office. Ex. 2, Email from T. Macdonald to K. Traskos, Sept. 3, 2025. The "United States and Its Agencies … Officers, or Employees" "must" be served by "deliver[ing] a copy of the summons and of the complaint to the [U.S.] attorney." FED. R. CIV. P. 4(i)(1)(A)(i). Defendants have now been served the Amended Complaint as Plaintiff mailed it to them (though Plaintiff still awaits issuance of the summons). *See* Ex. 3, Decl of K. Narberes. Defendants' counsel cites to the Amended Complaint (*see* ECF 26, p. 27), demonstrating there is no prejudice.

v. Trump, 349 F.R.D. 228, 235 (D. Colo. 2025) (certifying class of immigration detainees). Indeed, Rule 23(c)(1)(A) requires the Court to "determine whether to certify the action as a class action" "[a]t an early practicable time."

Simply, Plaintiff does not ask the Court to "enjoin" or "restrain" operations of the INA and thus run afoul of 8 U.S.C. § 1252(f)(1). The putative class only asks the Court to "[d]eclare" Defendants' practice violates the INA, and "[s]et aside" their unlawful detention policy under the APA. ECF 6, pp. 25-26. District Courts "ha[ve] jurisdiction to entertain the plaintiffs' request for declaratory relief" despite § 1252(f). *Nielsen*, 586 U.S. at 402. "Section 1252(f)(1) is straightforward," and limits only lower courts' "jurisdiction or authority to enjoin or restrain the operation of" specific INA detention provisions. *Gonzalez v. ICE*, 975 F.3d 788, 812 (9th Cir. 2020). While the Supreme Court holds § 1252(f)(1) prohibits class-wide *injunctive* relief regarding INA detention provisions, *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022), § 1252(f)(1) does not bar other forms of relief. Courts agree § 1252(f)(1) does not bar class-wide declaratory relief or APA vacatur.[9]

Contrary to Defendants' assertion, the pending class certification motion in *Maldando Bautista v. Noem* is no barrier to certification either. Defendants do not (and cannot) assert this Court is unable to resolve the issue for a regional class. Indeed, Defendants argue the *Maldonado Bautista* class should not be certified either. No. 5:25-cv-01873-SSS-BFM, ECF 59, pp. 14-15 (C.D. Cal.). Permitting the government to defer

[9] *See*, *e.g.*, *Al Otro Lado v. EOIR*, 138 F.4th 1102, 1123-24 (9th Cir. 2025); *Brito v. Garland*, 22 F.4th 240, 251-52 (1st Cir. 2021); *Alli v. Decker*, 650 F.3d 1007, 1012-13 (3d Cir. 2011); *Make the Road N.Y. v. Wolf*, 962 F.3d 612, 635 (D.C. Cir. 2020). *See also Nat'l TPS All. v. Noem*, 773 F.Supp.3d 807, 826 (N.D. Cal. 2025) (collecting cases holding APA vacatur is available remedy despite § 1252(f)(1)).

certification here while arguing the *Maldonado Bautista* court cannot declare its detention practice illegal nationwide (*id.* at pp. 24-27) lets Defendants have their cake and eat it too. The government cites *no* authority holding the existence of a proposed class in another district precludes this Court from certifying a class here. When Rule 23's requirements are met, a plaintiff is "entitl[ed] … to pursue [their] claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

B. The Putative Class Satisfies the Requirements of Rule 23

Defendants only contest that Plaintiff is not common or typical, and nods that the class may not be sufficiently numerous. These arguments are wrong. As Plaintiff has shown that the class meets Rule 23's requirements, certification is required. *Id*.

1. The proposed class satisfies the conditions of Rule 23(a).

Defendants' position on commonality and typicality relies on two unavailing arguments. First, they claim the class definition could be read to include individuals who have *not* been denied a bond hearing – but that is obviously not Plaintiff's intent. Second, even if class members do bear some differences, those variations do not legally matter.

As to the first argument, the requested class-wide relief is clearly sought only for people who did not receive bond hearings. As Plaintiff seeks only a declaration that similarly-situated people are entitled to a bond hearing, that a few class members may have previously received one is of no import. Nonetheless, if modifying the class definition language makes this basic premise explicit, Plaintiff has no opposition, and the Court has discretion to modify the definition. *Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999).

As to the second, the law is crystal clear that differences among class members

defeat neither commonality or typicality, so long as their claims raise a single common question. When certifying a similarly-defined regional class, the Western District of Washington correctly recognized "Rule 23(a)(1) does not demand uniformity." *Rodriguez Vasquez v. Bostock*, 349 F.R.D. 333, 354 (W.D. Wash. 2025) (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2022), abrogated on other grounds by *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022)). Here, the proposed class raises at least the one common question: whether § 1225 requires mandatory detention for noncitizens who entered without inspection and were not apprehended on arrival – the heart of Plaintiff's claim. This common question of law is ideally suited for class-wide resolution.

The factual distinctions that Defendants allege divide the class, ECF 26, pp. 27-28, do not alter the analysis. First, Defendants argue that Plaintiff's claim is not common or typical because he is presently in custody in Colorado, while the class definition covers all persons whose cases may be heard in Colorado, and IJs may hear cases by teleconference from other jurisdictions (such as a Colorado-based IJ hearing a case elsewhere). But "if the [noncitizen] is detained," federal regulations grant authority to review a bond determination "to the Immigration Court having jurisdiction over the place of detention." 8 C.F.R. 1003.19(c)(1). This Court has jurisdiction over the Immigration Courts hearing bond determinations in Colorado and thus can declare that noncitizens detained in Colorado (who are not subject to the other mandatory detention provisions) have access to bond. If necessary, the class definition could be modified to clarify it only includes people who have been or will be "detained by ICE *in Colorado*." *See Davoll*, 194 F.3d at 1146. Plaintiff's claim is common and typical because class relief requires

detention in Colorado.

Second, Defendants wrongly assert the class is overinclusive because it covers people DHS *alleges* entered without inspection, rather than only people who actually did. But the illegal policy is denying bond hearings when Defendants imprison people *based solely on DHS' inspection allegation*. *That* is the class-wide wrong to be declared unlawful.

Finally, Defendants wrongly assert Plaintiff's claim is not typical because he submitted a U-Visa application before his detention and "if that application is granted, Petitioner would have lawful status in the [U.S.]." ECF 25, p. 28. Respondents fail to explain why that fact makes any difference – particularly given the reality that even if his application were granted, he would not receive it for decades.[10] Nonetheless, this argument is a red herring. That Plaintiff now seeks "a lawful means to *remain*," rather than "seek[] admission" to the country does not change the government's alleged basis for his detention. *See Lopez-Benitez*, 2025 WL 2371588, at 6 n.7 (emphasis in original) (citation omitted); *Jimenez*, 2025 WL 2639390, *8. "Because 1225(b)(2)(A) applies to applicants for admission *who are seeking to enter the [U.S.]*, it cannot apply to [Plaintiff], who has already entered the country and has been residing here." *Jimenez*, 2025 WL 2639390, *8. Plaintiff's pending application to remain does not magically put him back on the country's front door. As the court in *Lopez Benitez* explained:

> [S]omeone who enters a movie theater without purchasing a ticket and then proceeds to sit through the first few minutes of a film would not ordinarily

[10] *See Undocumented Victims of Crime May Receive Paths to Citizenship*, 9NEWS (Jan. 6, 2025), https://perma.cc/ES6E-7FVN (USCIS has 300,000 pending applications, yet annually approves only 10,000 applications, making the wait time 30 years).

> then be described as 'seeking admission' . . . Even if that person … offered to pay for a ticket … one would say that they had entered unlawfully but now seek a lawful means of remaining there.

2025 WL 2371588, *7. Because Plaintiff remains incarcerated because of Defendants' incorrect reinterpretation of the INA, his claim is typical of the class.

Defendants also suggest Plaintiff may not be able to demonstrate numerosity if the class definition is modified. But that ignores two essential factors.

First, Defendants do not dispute immigration courts in Colorado reached bond determinations thousands of times in the preceding few years, and that in the vast majority of those cases the noncitizens were only eligible for bond under § 1226. *See* ECF 15, p. 7 & Ex. ECF 15-3, ¶ 8. This past practice likely severely undercounts the number of people detained now, because ICE is now arresting triple the number of people from just a year ago.[11] Defendants new policy denies the vast majority of these people access to bond going forward, even if a few people presently detained people received a bond hearing before the policy change. This is compounded by *Matter of Yajure Hurtado*, 29 I.&N. Dec. 216 (BIA 2025), which IJs hearing cases in Colorado will apply and will increase the number of people wrongly subjected to mandatory detention.

Second, even if the class was presently composed of only a small number of people – though it is not – the class includes people who "will have" removal proceedings in the future. Including "unknown, unnamed future members" – like the class here – weighs heavily in favor of certification. *Colo. Cross Disability Coal. v. Abercrombie & Fitch*

[11] ECF 15, p. 7, citing M. Singh et al., *How Trump Has Supercharged the Immigration Crackdown – In Data*, THE GUARDIAN (July 23, 2025), https://perma.cc/T2VU-5ZZH.

Co., 765 F.3d 1205, 1215 (10th Cir. 2014). Even assuming *arguendo* (and without evidence) that a large number of presently detained people previously received bond hearings, *Matter of Yajure Hurtado* would reduce the number of future detainees who would receive bond hearings while being class members to zero.

For all these reasons, Defendants' commonality and typicality arguments are without merit. And because their gesture toward disputing numerosity is premised solely on those unavailing arguments, it should also be rejected.

2. This case presents the paradigmatic Rule 23(b)(2) class.

When parties opposing certification "act[] … on grounds that apply generally to the class, so that final . . . declaratory relief is appropriate respecting the class as a whole," and "a single . . . declaratory judgment would provide relief to each member of the class," Rule 23(b)(2) is satisfied. *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

Here, Plaintiff seeks to certify a class challenging Defendants' new policies and practices in Colorado of unlawfully subjecting him to mandatory detention under § 1225(b)(2)(A), even though class members are eligible for bond under § 1226(a). In Defendants' view, every detained immigrant must file their own individual *habeas* petition to challenges this policy. This would unnecessarily flood the courts. Indeed, similarly-situated individuals have already filed dozens of cases around the country, including in this Court, to challenge the same policy. *See* ECF 14, p. 2 n. 1 & *supra* nn. 1-2. This situation underscores how Plaintiff presents a classic case for Rule 23(b)(2) class treatment: Defendants act on grounds generally applicable to the class, and a declaration that class members are subject to § 1226(a) would provide relief to the class as a whole.

Defendants next suggest the proposed class cannot satisfy Rule 23(b)(2) because individual members may need to bring their own *habeas* claims even after winning declaratory relief. This is wrong. First, Rule 23(b)(2) is disjunctive, requiring *either* "final injunctive relief *or* corresponding declaratory relief" (emphasis added). "[T]he rule does not require both forms of relief be sought and a class action seeking solely declaratory relief may be certified under subdivision (b)(2)." Wright & Miller, 7AA FED. PRAC. & PROC. CIV. § 1775 (3d ed.); *see also Wal-Mart Stores*, 564 U.S. at 360. Second, as noted above, courts agree that § 1252(f)(1) does not bar class-wide declaratory relief. *See supra* at § IV(A). It is also well established that class-wide declaratory relief does not preclude members from bringing their own actions for injunctive relief. RESTATEMENT (SECOND) OF JUDGMENTS § 33 (1982). On the contrary, 28 U.S.C. § 2202 expressly authorizes courts to award any "[f]urther necessary or proper relief based on a declaratory judgment." Finally, in this case, even the government acknowledges it must comply with a declaratory judgment, ECF 26, pp. 25–26, such that no follow-on injunctions should be necessary. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.). As such, considering the pure legal issues here on a class-wide basis will *avoid* an onslaught of individual petitions. This Court should resolve the pure legal issues here class-wide to provide clarity on the crucial questions presented.

V. CONCLUSION

The Court should order Defendants to provide Plaintiff a bond hearing within seven days and certify the proposed class. Should the Court certify the class, Plaintiff will promptly seek partial summary judgment for declaratory relief on its behalf.

Dated: September 26, 2025.

Respectfully submitted,

s/ Scott Medlock

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notifications of such filing to all counsel of record.

/s/ Scott Medlock
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