

No. 26-1027

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REFUGIO RAMIREZ OVANDO, et al.
Plaintiffs-Appellees,

v.

MARKWAYNE MULLIN, in his official capacity, et al.
Defendants-Appellants.

On appeal from the United States District Court
for the District of Colorado
Hon. R. Brooke Jackson
No. 1:25-cv-03183

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INTRODUCTION

Plaintiffs’ answering brief (“AB”) confirms that the preliminary injunction cannot stand. Although Plaintiffs strain to defend it, their arguments only underscore the injunction’s fundamental defects: sweeping classwide relief that rests on speculative injuries, a nonexistent policy, and an unidentified agency action. Because Plaintiffs satisfied none of the requirements for a preliminary injunction or provisional class certification, the district court erred in granting both.

Plaintiffs still cannot demonstrate that any of them has Article III standing for prospective injunctive relief. Their principal answer to the absence of a “certainly impending” future injury, *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401-02 (2013) (citation omitted), is to double down on the past. Plaintiffs invoke past arrests, ankle monitors, and lingering anxiety. But prior encounters with immigration officers do not establish that the named plaintiffs are likely to be arrested again, much less arrested without a warrant and without probable cause.

The remaining threshold barriers to Plaintiffs’ lawsuit remain unanswered. Plaintiffs contend that the Immigration and Nationality Act (INA) does not bar their claims because an arrest neither “commence[s] proceedings” nor “execute[s]” a removal order. 8 U.S.C. §1252(g). That

contention clashes with the decisions of several courts of appeals and ignores the obvious connection between taking an alien into custody and initiating the removal process. The Administrative Procedure Act (APA) provides no alternative route to relief. After all, Plaintiffs challenge an alleged “policy or practice,” AB 44, nowhere written down or memorialized and identify no final agency action to review.

Plaintiffs fare no better defending provisional class certification. Certified without a full opportunity for government response, the proposed class is too indeterminate to meet Rule 23’s ascertainability requirement. Plaintiffs likewise cannot satisfy commonality and typicality by relying on the government’s supposed “complete disregard,” AB 42, of probable cause—a premise belied by the record—and the disputed findings of two out-of-circuit district courts in other cases now on appeal.

The remaining factors further disfavor injunctive relief. Plaintiffs do not dispute that irreparable harm cannot exist without Article III standing. They also fail to explain how an injunction that exceeds the limits of equitable relief and interferes with lawful immigration enforcement can advance the public interest. Plaintiffs and their amici instead resort to policy concerns that cannot substitute for the required equitable showing.

Finally, Plaintiffs confront the injunction’s overbreadth—compounded by the district court’s enforcement order—by retreating to forfeiture. But the government has unmistakably challenged the preliminary injunction in its entirety, including on overbreadth grounds, from the outset. And Plaintiffs’ fixation on putative forfeitures leaves untouched the preliminary injunction’s underlying substantive defect: it sweeps far beyond any relief necessary to redress Plaintiffs’ purported injuries and places all warrantless arrests throughout Colorado under continuing judicial supervision. No principles of Article III or equity permit that extraordinary regime. This Court should accordingly reverse the district court’s grant of a preliminary injunction and provisional class certification.

ARGUMENT

I. PLAINTIFFS CANNOT SATISFY ARTICLE III’S CASE-OR-CONTROVERSY REQUIREMENT

A. Plaintiffs Fail To Establish A Certainly Impending Future Injury

1. All agree that Article III standing for prospective injunctive relief requires a “certainly impending” future injury. *See Clapper*, 568 U.S. at 401-02 (citation omitted). Plaintiffs nevertheless defend the district court’s conclusion that an alleged unwritten policy of Immigration and Customs Enforcement (ICE) to conduct warrantless arrests without probable cause of

escape risk “ensnare[s] Plaintiffs and class members as they go about their daily lives, exposing them to” future injuries. AB 20.

That argument breaks down at its first move. The alleged unwritten policy does not exist, and the only official policies in the record unmistakably require immigration officers to develop probable cause that a “subject is a removable alien” and “‘likely to escape’ before a warrant for his arrest can be obtained.” IV:924¹ (citing 8 U.S.C. §1357(a)(2)). Indeed, formal written policies of the Department of Homeland Security (DHS) have consistently incorporated the requirements of Section 1357 and its implementing regulations.

2. Plaintiffs’ defense of the ruling below additionally overlooks that the district court found only past and “ongoing” injuries. IV:835. Although Plaintiffs contend that they “face a realistic threat of ... a future warrantless arrest,” AB 23, every injury identified by the district court—including “bond, ankle monitors, and adherence to strict reporting requirements,” IV:834—arose from prior arrests. A past injury, without a real and immediate threat of recurrence, does not establish an Article III injury supporting prospective injunctive relief, even if styled as an “ongoing harm[],” IV:860. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 98 (1983) (no standing for prospective

¹ Appendix citations appear in the format “Volume:Page.”

relief despite ongoing physical injury from past chokehold); *contra* AB 27. Indeed, the Supreme Court in *Lyons* assumed that the City authorized the challenged policy but still concluded that the plaintiff's past injuries fell "far short of the allegations that would be necessary to establish a case or controversy" under Article III. *Lyons*, 461 U.S. at 105. Nor does "ongoing fear and anxiety," AB 7; Pub. Just. Amicus Br. 5-6, bridge that gap. See *Clapper*, 568 U.S. at 416 (no standing for "nonparanoid fear"). The Ninth Circuit recently applied those principles in lifting a similar preliminary injunction that rested on "allegations of past harm." *United Farm Workers of Am. v. Mullin*, 2026 U.S. App. LEXIS 25727, at *7 (9th Cir. Aug. 24, 2026).

The individualized circumstances of the named plaintiffs further confirm the remoteness of a future injury. One named plaintiff has received legal status, another has left the District with no concrete intent to return, and warrants have issued for the others. IV:832; V:1017-18; VI:1301-02. Plaintiffs also concede that ICE has never targeted them and that no further encounters have occurred since their arrests. I:124 ¶23; I:132 ¶4; I:144 ¶16; I:150-51 ¶8-13.

Nor can *Shaw v. Smith*, 166 F.4th 61 (10th Cir. 2026), do the work Plaintiffs ask of it. AB 16-18. That case involved a Fourth Amendment challenge to Kansas Highway Patrol's admitted practice of "stop[ping] out-

of-state drivers specifically because they are coming from out of state,” as part of a drug-interdiction effort. *Shaw*, 166 F.4th at 71; see *Vasquez v. Lewis*, 834 F.3d 1132, 1138 (10th Cir. 2016) (stating that the Fourth Amendment generally prohibits “the continued use of state residency as a justification for the fact of or continuation of a stop”). Based on that practice, this Court held that the plaintiffs faced an “inordinately high” prospect of future injury “because they [we]re out-of-state drivers” and accordingly “me[t] the *Lyons* requirements for standing.” *Shaw*, 166 F.4th at 75-78.

The differences between this case and *Shaw* are inescapable. *Shaw* involved a permanent injunction entered after a bench trial and consideration of a full evidentiary record—including substantial expert testimony quantifying the statistical likelihood of a future injury. For instance, according to the plaintiffs’ expert, “[d]espite representing roughly 35 percent of drivers on the road, out-of-state drivers made up 77 percent of total traffic stops and 90 percent of canine sniffs.” *Id.* at 70. And, unlike this case, the existence of the challenged policy in *Shaw* did not depend on a series of speculative inferences; the state highway patrol admitted that it had implemented the policy and trained officers “to use a driver’s state of origin as a factor in determining reasonable suspicion.” *Id.* at 71.

B. Plaintiffs Fail To Demonstrate Traceability And Redressability

Plaintiffs' remaining arguments on Article III standing, AB 27-28, are equally without substance. For starters, Plaintiffs misconstrue the traceability inquiry, arguing that their "ongoing injuries are fairly traceable to their unlawful warrantless arrests." AB 27. To satisfy traceability, "there must be a causal connection between the injury and the conduct complained of" by Plaintiffs. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Here, the relevant connection would be between the asserted threat of a future warrantless arrest without probable cause and ICE's supposed unwritten policy on warrantless arrests. But Plaintiffs instead trace their purported ongoing harms to *past* arrests, explaining that, "[a]bsent an arrest and detention followed by release, plaintiffs would never have been required to wear an ankle monitor or regularly report to authorities." AB 27. That argument misunderstands the traceability analysis and effectively concedes that Plaintiffs face no realistic threat of a future warrantless arrest—much less an unlawful one that stems from the alleged policy.

Redressability presents an independent problem. Plaintiffs contend that their injuries "are ... redressable, as the PI itself makes clear" because the injunction eliminates ankle monitoring, terminates reporting requirements, and restores Plaintiffs "to their original pre-detention

position.” AB 28 (citation omitted). Enjoining a non-existent policy cannot redress alleged injuries from past arrests. The preliminary injunction also sweeps much more broadly and micromanages all warrantless arrests throughout Colorado, sharply departing from the settled principle that prospective injunctive relief “must be tailored to redress the plaintiff’s particular injury.” *Gill v. Whitford*, 585 U.S. 48, 73 (2018).

Nor does *Colorado Cross Disability Coalition v. Abercrombie & Fitch Co.*, 765 F.3d 1205 (10th Cir. 2014), provide a way around that limitation. See AB 29-31. *Abercrombie* addressed a different question: whether a named plaintiff who had standing to challenge accessibility barriers at stores she planned to visit could also seek classwide relief encompassing stores she “d[id] not intend to visit.” *Abercrombie*, 765 F.3d at 1216. In affirming the grant of class certification, this Court held that the injunction’s geographic mismatch with the named plaintiff’s injury implicated “the ability to represent a class under Rule 23,” not standing. *Id.* at 1216-17.

This case is different. Unlike *Abercrombie*, in which the stores allegedly shared a common design, the injunction here does not simply replicate the same relief for the same injury across additional locations. Rather, it regulates arrests involving different officers, circumstances, and asserted injuries. More fundamentally, *Abercrombie* never eliminated

Article III’s independent limits on the relief a federal court may award. *See, e.g., TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). Plaintiffs themselves concede that the named plaintiffs must “establish their own standing to seek injunctive relief.” AB 30. Without a certainly impending future injury, however, all the named plaintiffs lack standing. *See* §I.A, *supra*. And Plaintiffs do not even attempt to explain how unnamed members of an amorphous class satisfy Article III’s requirements for prospective injunctive relief. *See* AB 30-31. Provisional class certification cannot cure a jurisdictional defect or supply a license for broad, statewide relief.

C. Plaintiffs’ Claims Are Moot

In all events, Plaintiffs’ claims are moot. One named plaintiff has obtained legal status, IV:832 n.19, and another has no intent to return to Colorado, V:1017. The existence of administrative warrants for the others further confirms that enjoining future warrantless arrests “will neither presently affect the parties’ rights nor have a more-than-speculative chance of affecting them in the future.” *See LaRoque v. Holder*, 679 F.3d 905, 907 (D.C. Cir. 2012) (citation omitted). Even if a future arrest would not “*necessarily* be pursuant to a warrant,” AB 25, the existence of an administrative warrant—at a minimum—substantially undermines any “real

and immediate” threat of another warrantless arrest. *See Lyons*, 461 U.S. at 103.

Plaintiffs’ efforts to avoid mootness fail. *See* AB 34. The relevant question in determining mootness is whether Plaintiffs retain “a personal stake in the outcome of the lawsuit.” *Brown v. Buhman*, 822 F.3d 1151, 1165 (10th Cir. 2016). Plaintiffs cannot establish a continuing stake merely by asserting that their injuries will recur if this Court vacates the injunction, particularly when intervening events (e.g., obtaining legal status, issuing administrative warrants) have eliminated any realistic prospect of future harm from the supposed policy underlying that injunction.

County of Riverside v. McLaughlin, 500 U.S. 44 (1991), does not undermine that conclusion. AB 34. Although “the termination of a class representative’s claim does not moot the claims of the unnamed members of the class,” *McLaughlin*, 500 U.S. at 51 (citation omitted), provisional class certification does not itself supply a live controversy where none otherwise exists. Simply put, class certification does not dispense with Article III’s case-or-controversy requirement. *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Plaintiffs have offered no evidence that any unnamed class member faces a certainly impending unlawful arrest, leaving no live claim for prospective injunctive relief.

II. THE INA INDEPENDENTLY BARS PLAINTIFFS' CLAIMS

Plaintiffs' argument that Section 1252(g) does not bar their claims, AB 34-37, ignores a practical reality: an arrest often marks the "commencement" of removal proceedings. *See* 8 U.S.C. § 1252(g). The Supreme Court has explained that Section 1252(g) "seems clearly designed to give some measure of protection" to those "discretionary determinations" and to prevent "separate rounds of judicial intervention outside the streamlined process that Congress has designed." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 & n.9 (1999) (citation omitted).

The decision to arrest an alien, either for commencing removal proceedings or executing a removal order, falls squarely within this discretionary scope. Other courts of appeals have agreed. *See, e.g., Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013) ("[C]laims that [the government] illegally procured an arrest warrant, that the agents illegally arrested [the plaintiff], and that the agents illegally detained [the plaintiff] each arise from an action taken to commence removal proceedings."); *Sissoko v. Rocha*, 509 F.3d 947, 950 (9th Cir. 2007) (similar); *Öztürk v. Hyde*, 155 F.4th 187, 190-91 (2d Cir. 2025) (Menashi, J., concurring in denial of reh'g en banc) (similar). And Plaintiffs can challenge their arrests in future removal proceedings. For example, under procedures for the Board of

Immigration Appeals, certain evidence may “be excluded if the ‘circumstances surrounding a particular arrest and interrogation would render use of the evidence obtained thereby fundamentally unfair and in violation of due process requirements of the Fifth Amendment.’” *Luevano v. Holder*, 660 F.3d 1207, 1212 (10th Cir. 2011) (citation omitted).

III. PLAINTIFFS FAIL TO IDENTIFY A CAUSE OF ACTION UNDER THE APA

A. The Alleged Unwritten Policy Does Not Exist

Far from leaving “no doubt” that ICE maintains a policy and practice of conducting warrantless immigration arrests without probable cause, AB 44, the record tells a very different story. Section 1357 and DHS regulations require individualized probable cause of likelihood of escape to conduct a warrantless arrest. 8 U.S.C. §1357(a)(2); 8 C.F.R. §287.8. Additionally, the 2021 Broadcast Statement of Policy and the Lyons Memo implement the legal requirements for and provide guidance on warrantless arrests. *See, e.g.*, VII:1408-10 IV:922-26. Plaintiffs cannot seek APA review of an agency action that never occurred. *See* 5 U.S.C. §551(13) (defining agency action).

The centerpiece of Plaintiffs’ evidence of the alleged unwritten policy is a series of purported statements “by senior immigration officials,” AB 45 (citation omitted), none of which bears the weight Plaintiffs place on it. For instance, Plaintiffs and the district court attribute to ICE’s then-Acting

Director a “statement” that “non-criminals living in the U.S. without authorization will also be taken into custody during arrest operations.” AB 46 (citing IV:824). But the quoted language was a CBS reporter’s characterization of his remarks. *See* IV:824 (citing VII:1563 (CBS news article)). Even on its own terms, however, the statement never mentioned ignoring the statutory requirements for warrantless arrests; it simply affirmed the general and correct principle that aliens who are unlawfully present in the United States are subject to arrest.

Similarly unavailing is Plaintiffs’ reliance on a statement by ICE’s former Denver Field Office Director. That official asserted: if immigration officers “encounter someone who is illegally present during the course of our operations, we’re going to take those people into custody.” IV:824-25; AB 46. Again, that statement says nothing about the scope of immigration arrests or the manner in which immigration officers may take aliens into custody. Plaintiffs’ effort to cast that statement as evidence of a policy or practice of conducting indiscriminate, unlawful arrests also ignores the surrounding context. Immediately after the cited statement, the official discussed the arrest of an illegal alien previously convicted of sexually assaulting a minor. *See* IV:825; *Denver7 Investigates: Embedding with ICE*

During a “High-Stakes” Operation, <https://perma.cc/L4UC-NCR9>, 2:18-2:47 (July 29, 2025) (video of interview).

Nor does Plaintiffs’ invocation of the Administration’s call for vigorous immigration enforcement fare any better. Encouraging immigration officers to arrest more illegal aliens, AB 46, no more directs them to disregard Section 1357 than a police commissioner’s familiar pledge to rid the streets of crime instructs police officers to make arrests without probable cause.

Plaintiffs’ reliance on a handful of district-court decisions cannot fill that evidentiary void. *See* AB 46. Those decisions do not bind this Court, are on appeal, and rely on the same unsupported inferences advanced here.

In sum, Plaintiffs are wrong that the government “wholly ignore[s]” their evidence of the alleged unwritten policy. AB 46. There is no evidence to ignore. Every piece of supposed evidence either rests on mischaracterization or fails to reveal any directive to conduct warrantless arrests without probable cause of escape risk. Plaintiffs’ theory also overlooks the “longstanding presumption of regularity” that attaches to agency conduct. *Hartman v. Moore*, 547 U.S. 250, 263 (2006). Accepting their theory would elevate an alleged unwritten practice—stitched together from speculation, distortion, and vitriol—over the agency’s actual policies on warrantless arrests.

B. The Alleged Agency Action Is Not Final

Even if the asserted policy arose from agency action, that action was not final. *Contra* AB 48. Plaintiffs have marshaled no evidence that the supposed unwritten policy marks the consummation of any agency decision-making process. And any purported unwritten decision to deviate from Section 1357 is not final because on October 22, 2025, ICE published another statement re-adopting the prior Broadcast Statement of Policy. IX:1805-07. DHS issued a separate memorandum as recently as January 28, 2026, which emphasized the need for ICE officers to comply with Section 1357 in conducting warrantless arrests. IV:922-26; *see* VII:1408-10 (2021 Broadcast Statement); VII:1411-12 (June 11, 2025 Broadcast Statement). Thus, the only identifiable products of agency decision-making all point in one direction: adherence to the law, not disregard of it. It belies the record—and defies common sense—to conclude that DHS adopted an unwritten policy contrary to the law while routinely publishing written directives to follow it.

Plaintiffs also have not demonstrated that “direct and appreciable legal consequences” will flow from the alleged unwritten policy. *See U.S. Army Corps. of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 598 (2016). They identify physical injuries, “job loss,” and “trauma” from past arrests as “consequences” of that policy. AB 48. If anything, those are downstream

effects of discrete arrests and do not establish that the alleged policy has any legal force. *Hawkes* illustrates the point. There, the Supreme Court explained that an agency’s determination whether particular property contained “navigable waters” amounted to final agency action because it bound the government in legal proceedings, “create[ed] a five-year safe harbor” for qualifying property owners, “narrow[ed] the field of potential plaintiffs,” and “limit[ed] the potential liability a landowner faces for discharging pollutants without a permit.” *Hawkes*, 578 U.S. at 594, 598-99 (citation omitted).

Nothing comparable follows from the alleged unwritten policy in this case. Assuming it existed, the alleged policy fixes no right or obligation, alters no legal status, and binds neither the agency nor its officers. And immigration officers would face no consequences if they instead decided to comply with Section 1357 by developing probable cause before a warrantless arrest. Asserted harms from individual arrests cannot supply a legal consequence that the alleged unwritten policy fails to impose.

IV. PLAINTIFFS FAIL TO REBUT THE DEFECTS IN THE PROPOSED WARRANTLESS-ARREST CLASS

A. This Court May Review The Provisional Class-Certification Decision

Plaintiffs concede that this Court may review any order—including a class-certification decision—“inextricably intertwined with or critical to

reviewing the preliminary injunction.” AB 2; see *Cummings v. Dean*, 913 F.3d 1227, 1235 (10th Cir. 2019); 16 *Wright & Miller’s Federal Practice & Procedure* §3921.1 (3d ed. Apr. 2026 update) (explaining that review of a preliminary injunction “properly extends to all matters inextricably bound up with the injunction decision,” such as “class action determinations”). The provisional class-certification decision fits comfortably within that category of orders. In granting the preliminary injunction, the district court certified the provisional class to enable the named plaintiffs to obtain District-wide relief. V:987, 999; VI:1234. The district court also concluded that the alleged unwritten policy had “‘direct and appreciable legal consequences’ for the *putative class members* subject to” the preliminary injunction. IV:856 (citation omitted and emphasis added). Thus, the provisional certification order provides the classwide foundation for the very injunction now under review, and severing the two would divorce the injunction from the certification that defines its ultimate reach. Several courts of appeals have exercised jurisdiction in similar circumstances. See, e.g., *Fraihat v. ICE*, 16 F.4th 613, 635 (9th Cir. 2021) (recognizing that “[t]he district court’s class certification ruling depended on, and was in service of, its preliminary injunction”); *Wagner v. Taylor*, 836 F.2d 578, 585-86 (D.C. Cir. 1987) (similar); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 624 (3d Cir. 1996)

(similar); *Atwell v. Gabow*, 311 F. App'x 122, 123-24 (10th Cir. 2009) (similar).

B. The Class Members Lack Article III Standing

At least one class member must establish Article III standing for prospective injunctive relief. *Abercrombie*, 765 F.3d at 1213. But the proposed class members' injuries are even more speculative than those of the named plaintiffs. Because the district court did not find that even the named plaintiffs faced certainly impending warrantless arrests, let alone ones caused by the alleged unwritten policy, there is no basis to believe that immigration officers will arrest any other class member in a way that violates Section 1357.

Nor are Plaintiffs correct that class members must establish Article III standing only in an action for damages. AB 33. In unmistakable terms, the Supreme Court has held that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion*, 594 U.S. at 431. Although the Supreme Court left open whether every class member must demonstrate standing "*before* a court certifies a class," *id.* n.4, it never suggested that the timing of that showing alters the underlying Article III requirement. And, as explained above, *Abercrombie*

cannot save a proposed class defined to include individuals who face no real and imminent threat of future injury. *See* §I.B., *supra*.

C. The Warrantless-Arrest Class Does Not Satisfy Rule 23(a)

Plaintiffs ignore that the district court failed to undertake a “rigorous analysis” of the Rule 23 factors. *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1086 (10th Cir. 2014). Their effort to supply the missing analysis on appeal further reinforces that the Court should reverse the provisional certification order.

1. To start, Plaintiffs minimize the district court’s denial of a meaningful opportunity for the government to oppose class certification. AB 37-38. But the record confirms that the district court instructed the government not to respond to the motion for class certification. IV:967 (“[T]here’s no need for the government to respond on the class action, because I can almost tell you now that that’s unlikely to happen.”).

Plaintiffs’ retreat to the preliminary-injunction hearing as a substitute for an opportunity to oppose class certification is unpersuasive. AB 37-38. When the district court first remarked that it would “consider certifying a class,” the government responded that it was “not prepared ... to address class certification,” given the district court’s prior instructions. V:999. Although the district court later allowed the government to present limited

oral argument on the issue, VI:1399-1401, the government had no opportunity to submit written briefing or introduce evidence in opposition.

2. Plaintiffs also fail to rebut the district court's deficient numerosity finding. They claim to have identified "dozens" of people arrested by immigration officers without probable cause. AB 39-40. Even assuming the assertion is accurate, it does not establish "that joinder of all members is impracticable," Fed. R. Civ. P. 23(a)(1), and the district court never undertook that analysis. *See Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006) (affirming district court determination that 84 putative class members did not satisfy numerosity); IV:837-38. Additionally, the district court likely cannot provide an administrable standard for ascertaining class members who did not receive a pre-arrest finding of probable cause of escape risk because "immigration officers ... use their experience to stop suspected illegal immigrants based on a variety of factors." *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 3 (2025) (Kavanaugh, J., concurring in the grant of the application for stay).

Nor have Plaintiffs offered any "ascertainable numbers constituting the class." *Abercrombie*, 765 F.3d at 1215 (citation omitted). Nothing in the record suggests how many of the roughly 169,000 illegal aliens in Colorado have faced a warrantless arrest, much less one without probable cause of

escape risk. *See Mielo v. Steak ‘n Shake Operations, Inc.*, 897 F.3d 467, 486 (3d Cir. 2018) (no numerosity when proposed class was a subset of the “large number of disabled persons living in the United States”). Plaintiffs compound that defect by defining class membership through the merits question this litigation seeks to resolve. *See Gamboa v. KISS Nutraceuticals*, 777 F. Supp. 3d 1210, 1224 (D. Colo. 2025) (recognizing the problems with “fail-safe” classes).

3. The proposed class likewise lacks commonality and typicality. The district court found commonality because “[t]he harm suffered by the named plaintiffs has been shared by all class members who have similarly been arrested without a valid warrant or a particularized finding of probable cause that they are likely to escape.” IV:839. But sharing a similar injury does not alone demonstrate commonality; rather, certification must resolve “an issue that is central to the validity of each one of the [members’] claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Black Lives Matter L.A. v. City of Los Angeles*, 113 F.4th 1249, 1258-60 (9th Cir. 2024) (concluding that the district court did not identify common evidence that could resolve plaintiffs’ claims in “one stroke”).

The commonality problem is particularly acute in the probable-cause context. After all, each arrest and escape-risk determination turns on a

unique and idiosyncratic mix of facts, including familial ties, employment status, and other community connections. To be sure, Rule 23 does not require every class member to assert an “*identical*” injury. AB 42 (citation omitted). But it does demand a common question capable of a common answer. Fed. R. Civ. P. 23(a)(2). Plaintiffs cannot manufacture commonality by asking whether “ICE has a policy of ignoring the flight-risk inquiry required by” Section 1357. AB 40. Even if the alleged policy existed, whether a particular arrest violates Section 1357 depends on the circumstances of each encounter and thus cannot yield a common answer across the class. More fundamentally, Plaintiffs have not provided “significant proof,” *Wal-Mart*, 564 U.S. at 353, of the alleged policy, especially when the only official policies in the record prescribe the correct legal framework for warrantless arrests. *E.g.*, IV:922-26.

Plaintiffs cannot bridge that gap by invoking the decisions of other district courts. AB 41. Those decisions do not bind this Court, are on appeal, and do not transform the individualized probable-cause inquiry into a question capable of classwide resolution.

For similar reasons, Plaintiffs’ argument that typicality exists because the class members “sustained the same ... course of conduct,” AB 40-41, does not withstand scrutiny. Determining whether members of the provisional

class received a proper escape-risk assessment will require factbound inquires into the circumstances of each arrest, as well as “‘time and effort’ ..., which would come ‘at the expense of issues that are common and controlling for the class.’” *Duncan v. Governor of V.I.*, 48 F.4th 195, 208 (3d Cir. 2022) (citation omitted).

D. The Proposed Class Fails Rule 23(b)(2)

Plaintiffs’ half-hearted defense of the district court’s Rule 23(b)(2) determination cannot sustain certification. They say only that an injunction would benefit every class member. AB 43. Under Rule 23(b)(2), however, the challenged conduct must make final injunctive relief “appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). That cannot happen here. Whether any class member faces an unlawful warrantless arrest implicates individualized circumstances bearing on probable cause and escape risk. *See Shook v. Bd. of Cnty. Comm’rs*, 543 F.3d 597, 604-05 (10th Cir. 2008) (holding that proposed class lacked “cohesiveness” under Rule 23(b) because the relief sought required assessment of individual class members’ particular circumstances). An injunction eliminating the named plaintiffs’ bond and monitoring requirements—and more broadly requiring compliance with the law and production of certain records—may not remedy materially different arrests across the class.

V. THE REMAINING FACTORS DISFAVOR INJUNCTIVE RELIEF

A. Plaintiffs Fail To Establish Irreparable Harm

Although Plaintiffs acknowledge that the district court focused principally on past harm, they insist that the district court adequately addressed future injuries by declaring that “these and similar” harms “are likely to befall” other class members. AB 49 (citation omitted). Even on its own terms, that statement indicates that the named plaintiffs face no irreparable harm without an injunction. A vague prediction about injuries to unidentified class members from conduct only loosely related to an alleged warrantless-arrest policy, States Amicus Br. 13-31; Pub. Just. Amicus Br. 5-6, cannot substitute for an actual showing by named plaintiffs of irreparable harm. Plaintiffs must “establish ... that [they are] *likely* to suffer irreparable harm in the absence of preliminary relief.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008) (emphasis added). A mere “‘possibility’ standard is too lenient.” *Id.* at 22 (citation omitted). To the extent that the district court considered prospective harms at all, it applied—at best—that impermissibly lenient standard. And apart from the bond and monitoring requirements, the injunction does not address any of the purported harms cited by the district court. In all events, without Article III standing for prospective injunctive relief, no irreparable harm exists.

Plaintiffs’ defense of the district court’s burden analysis, AB 50, only confirms the error. Plaintiffs contend that the district court rejected the government’s “argument that future irreparable harm was unlikely because of an allegedly compliant written policy on warrantless arrests ... previously disavowed” by the government “but then reissued to comply with a federal court order just days before the preliminary-injunction hearing.” AB 50. That gets the inquiry backwards. Plaintiffs had to establish likely future injury and irreparable harm; the government did not need to prove that its policies would prevent a future unlawful warrantless arrest. The district court’s conclusion also ignores that ICE’s policies have consistently required immigration officers to develop probable cause of an alien’s escape risk before conducting a warrantless arrest. *See* VII:1408-10 (2021 Broadcast Statement); VII:1411-12 (June 11, 2025 Broadcast Statement); IX:1805-07 (October 22, 2025 Broadcast Statement); IV:922-26 (Lyons Memo). Plaintiffs bore the burden of showing that future warrantless arrests would likely depart from this settled policy and cause irreparable harm. The district court erred by not holding them to it.

B. The Equities Weigh Against A Preliminary Injunction

Nor does the balance of the equities tip in Plaintiffs’ favor. Contrary to Plaintiffs’ contention, the preliminary injunction harms the public, which

has a strong interest in effective immigration enforcement. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Plaintiffs cannot evade that harm by characterizing the injunction as “merely requir[ing]” ICE officers to “comply with the statutory limits on their authority to arrest and detain individuals without a warrant.” AB 51. That logic would justify all manner of follow-the-law injunctions and open the door to pervasive judicial micromanagement of the Executive Branch’s enforcement of federal law. The injunction here thus subjects every warrantless arrest to such supervision, leaving immigration officers to guess whether a court will later conclude that a previous split-second, fact-dependent judgment violated a court order. The inevitable effect is a pervasive chill on lawful immigration enforcement. On the other side of the ledger, “[t]he interests of individuals who are illegally in the country in avoiding being stopped by law enforcement ... is ultimately an interest in evading the law,” which is not “especially weighty.” *Perdomo*, 146 S. Ct. at 5 (Kavanaugh, J., concurring).

VI. THE INJUNCTION IS IMPERMISSIBLY OVERBROAD

A. The Entire Injunction Should Be Vacated

Changing tack, Plaintiffs argue that the government forfeited its challenge to most of the preliminary injunction. AB 51-52. According to Plaintiffs, because the government “attack[s] only one of the four paragraphs in the PI,” the other provisions of the injunction “remain[] in place regardless

of the[] Rule 65(d) challenge.” AB 51-52. That argument mistakes both the record and the nature of the government’s challenge.

The government has consistently opposed the entire preliminary injunction. From the outset, it has repeatedly argued that Plaintiffs lack standing, fail to assert a valid cause of action under the APA, and satisfy none of the requirements for a preliminary injunction. The government also explicitly challenged the overbreadth of the preliminary injunction in the district court, contending that “[t]he District-wide injunction Plaintiffs seek would violate” the limits on “equitable relief” prescribed by the Supreme Court. III:794-95. And in its response before the district court, the government asked the district to deny the motion for preliminary injunction *in its entirety*. IV:797. Thus, “the district court was adequately alerted to the” overbreadth issue. *See United States v. Harrison*, 743 F.3d 760, 763 (10th Cir. 2014).

Those arguments do not somehow preserve three-quarters of an injunction that never should have issued in the first place. The proper remedy is to vacate the whole injunction, especially because Plaintiffs lack standing for prospective injunctive relief. Even if this Court concludes that the government forfeited certain arguments, that rule is relaxed “when the issues involved are questions of law, the proper resolution of which are

beyond reasonable doubt, and the failure to address the issues would result in a miscarriage of justice.” *Xlear, Inc. v. Focus Nutrition, LLC*, 893 F.3d 1227, 1234 (10th Cir. 2018). The district court’s decision to enter an impermissibly overbroad injunction was plain error as well.

Plaintiffs also misunderstand Rule 65’s demand for specificity. They insist that the injunction is “reasonably specific” because it prohibits precise conduct: “effecting a warrantless arrest without first making a probable-cause determination that an individual is likely to escape.” AB 52 (citation omitted). But that defense highlights the problem. The injunction does not merely attempt to restate existing law; it converts those legal requirements into commands enforceable through contempt and other penalties, subjects every probable-cause determination to judicial scrutiny, and chills lawful immigration enforcement. *See* §V.B, *supra*. That is why an injunction must “state its terms specifically.” Fed. R. Civ. P. 65(d)(1)(B); *Vallario v. Vandehey*, 554 F.3d 1259, 1268 (10th Cir. 2009) (recognizing impermissible vagueness of follow-the-law injunctions).

B. The Enforcement Order Confirms The Injunction’s Overbreadth

The enforcement order underscores the injunction’s overbreadth. After all, the injunction’s sweeping overreach and vagueness led to a dispute among the parties, prompting the district court to enter the enforcement

order. Plaintiffs thus miss the point when they argue that the government did “not properly appeal[] that order” or challenge its “factual findings” as “clearly erroneous.” AB 54. The enforcement order purported to merely enforce the existing injunction by prescribing new training protocols, rewriting ICE’s internal policies, and further micromanaging how immigration officers conduct warrantless arrests throughout Colorado. *See* IX:1870-73 (training protocols); IX:1879-82 (reporting requirements); IX:1882-83 (documentation obligations); IX:1868-69 (concluding that the Lyons Memo’s (i) escape-risk “guidance is inconsistent with the PI and may not be included in the training” and (ii) purported “omission” of community ties “is plainly contrary to the PI”). If the preliminary injunction falls, no one disputes that the enforcement order must fall with it.

Plaintiffs’ argument about the 2021 Broadcast Statement of Policy is similarly misplaced. *See* AB 54-55. Plaintiffs contend that the district court could not have erred in imposing the terms of that policy statement on the government because “this policy statement was ICE’s ‘formal policy’ when the PI issued.” AB 54 (citation omitted). But an agency’s discretionary decision to adopt guidance for its officers is a far cry from a federal court’s command to adhere to that guidance on pain of contempt or other consequences. Whether the district court formally “incorporated,” AB 55,

the Broadcast Statement of Policy overlooks a fundamental point: the preliminary injunction supplies the district court and Plaintiffs with an indefinite vehicle to police the substance of ICE's own guidance and to dictate how an agency can train its officers.

More telling is Plaintiffs' tepid response to the Lyons Memo. *See* AB 55. Plaintiffs do not even attempt to defend the district court's analysis of the Lyons Memo, saying only that the Lyons Memo "w[as] not the basis for the ... enforcement order." AB 55. They also fail to explain why an injunction ostensibly aimed at a handful of warrantless arrests came to license the district court to second-guess the agency's description of Section 1357, rewrite its enforcement guidance, and supervise how the agency instructs its officers in Colorado. Plaintiffs' only answer is that, because the Lyons Memo purportedly "conflicted with ICE's prior policy statements" on escape risk, the district court intervened to prevent DHS from training officers "inconsistently with the PI." AB 55. Just as prior agency directives cannot supersede Section 1357, the district court cannot displace the statutory standard reflected in the Lyons Memo simply by declaring the memorandum inconsistent with its own vague, overreaching injunction.

Plaintiffs likewise cannot reduce the enforcement order to a benign clarification. According to Plaintiffs, the district court "did not mandate that

officers *always* consider or exclude certain factors when making” escape-risk determinations, only that DHS “cannot train them in a way that diminishes the importance of certain factors (*e.g.*, community ties) or elevates others.” AB 55. But whether the district court dictated the factors immigration officers must consider or the weight they could attach to them is a distinction without a difference. Either way, the district court prescribed the framework officers must follow in developing probable cause for warrantless arrests. *See, e.g.*, IX: 1868-69 (district court asserting that an alien’s ability to escape in a vehicle must “not overwhelm and supplant the probable cause analysis”).

Worse still, those prescriptions rest on mistaken legal premises. Contrary to Plaintiffs’ and the district court’s view, AB 55-56 & n.16, neither Section 1357 nor its implementing regulations dictate any particular methodology for determining whether an alien presents a likelihood of escape. Courts have therefore allowed immigration officers to consider, among other things, an alien’s: (i) “clear and undisputed” removability, *Contreras v. United States*, 672 F.2d 307, 309 (2d Cir. 1982); (ii) admission of having been “picked up before,” *Aguirre v. INS*, 553 F.2d 501, 502 (5th Cir. 1977); (iii) appearing to be “extremely nervous” or “looking for an opportunity to run,” *United States v. Meza-Campos*, 500 F.2d 33, 34 (9th Cir. 1974); and (iv) “capacity to change momentarily their location and

direction,” including in a vehicle, *United States v. Cantu*, 519 F.2d 494, 497 (7th Cir. 1975).

CONCLUSION

For the foregoing reasons, this Court should reverse the grant of the preliminary injunction and provisional class certification.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 10th Cir. R. 32 because it contains 6,474 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365, Georgia, 14-point type.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on October 5, 2026. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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