UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOSE ARNULFO GUERRERO ORELLANA, on behalf of himself and others similarly situated, Petitioner-Plaintiff, v. ANTONE MONIZ, Superintendent, Plymouth County Correctional Facility, et al., Respondents-Defendants.	Case No. 25-12664-PBS **EXPEDITED OPPOSITION REQUESTED**

MEMORANDUM IN SUPPORT OF PETITIONER-PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND CLASS CERTIFICATION
AND IN OPPOSITION TO RESPONDENTS-DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This Court has already ruled that *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 228 (B.I.A. 2025), is contrary to law. *See* SJ Order (D.E. 112) at 13-19; PI Order (D.E. 54) at 24 n.4. The Court entered a final class-wide declaratory judgment rejecting the government's current no-bond policy as contrary to the governing statute. *See* Partial Final Judgment (D.E. 113).

The operative complaint also raises a separate claim under the Administrative Procedure Act. *See* Am. Pet. & Comp. (D.E. 10) ¶¶ 55-57 (Count V). The Court reserved judgment on that count in order to assess whether the declaratory judgment alone would resolve the parties' dispute. See Class Cert. Order. (D.E. 81) at 10 ("The Court will address whether the class should be certified with regard to . . . APA claims at a later stage should it become necessary to do so to resolve this case.").

This case returns to the Court because of the government's systematic refusal to honor and follow this Court's declaration. There is no dispute that the Department of Justice has instructed the Immigration Judges to disregard this Court's declaration and deny bond hearings pursuant to *Hurtado*. The Chief Immigration Judge herself communicated this instruction to all Immigration Judges via a January 13, 2026 email (filed at D.E. 134-1). The result is that the class members have been thrust back to square one—they are being systematically and arbitrarily deprived of their freedom, in violation of their rights as finally declared by an Article III court.

As laid out in the Chief Immigration Judge's email, the government is actively relying on the fact that *Hurtado* has not been vacated to justify ignoring this Court's final declaration. Contrary to the hodgepodge of arguments raised by the government, this Court can remedy that immediately. 8 U.S.C. § 1252(f)(1) poses no bar to vacatur because it is, as all courts to address this issue have held, a substantively different remedy from injunctive relief. *Hurtado* is a

reviewable, final agency action and lies squarely within this Court's statutory review authority under the APA. The Court has already ruled that *Hurtado* is contrary to law. Nothing more is required to vacate it forthwith. And because *Hurtado* is the authority on which the government relies to perpetuate its unlawful detention policy, APA vacatur will provide immediate, necessary, meaningful relief to class members.

Accordingly, Petitioner-Plaintiff ("Plaintiff") respectfully requests that the Court deny Defendants' motion to dismiss Counts II-V, grant class-wide partial summary judgment on Count V in favor of the class insofar as that Count asserts *Hurtado* is contrary to statute, and vacate and set aside *Hurtado* as contrary to law, in violation of the APA. Additionally, although vacatur does not require a certified class, Plaintiff requests that the Court also certify a class (mirroring the current class definition), appoint Mr. Guerrero Orellana as class representative, and appoint current class counsel to represent the additional class for Count V in order to deny the government any further purported basis to ignore the Court's rulings. Lastly, Plaintiff requests that the court's order and vacatur be entered as a partial final judgment, pursuant to Rule 54(b).

Given the ongoing harm to class members, Plaintiff also requests that the government be ordered to respond to this motion on an expedited basis—on or before February 10, 2026—which the government opposes.

STATEMENT OF FACTS

On December 19, 2025, this Court entered a partial final judgment declaring, in essence, that members of the certified class are subject to detention under 8 U.S.C. § 1226(a) and consequently must receive bond hearings upon request. Partial Final Judgment (D.E. 113) at 1–4.

The Department of Justice nevertheless instructed the Immigration Judges not to provide such hearings. Specifically, on January 13, 2026, Chief Immigration Judge Teresa Riley instructed

all immigration judges by email that *Hurtado* "remains binding precedent on agency adjudications," because declaratory relief "does not purport to vacate, stay, or enjoin" *Hurtado*. *See* Statement of Uncontroverted Facts ("SUF") ¶ 27. The Immigration Judges are generally following that instruction to deny bond hearings to class members in this case. SUF ¶¶ 29-33. At least one Immigration Judge who was continuing to provide bond hearings to class members was subsequently removed from hearing detained cases. SUF ¶¶ 32-33. It thus appears that the Department of Justice is systematically violating the class members' rights articulated in the Court's final declaration, using the fact that *Hurtado* was not formally vacated under the APA as a proverbial fig leaf. The Court can fix that now.

ARGUMENT

I. DEFENDANTS' DETENTION POLICY EMBODIED IN *HURTADO* SHOULD BE VACATED UNDER THE APA.

Under the APA, courts must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"; "contrary to constitutional right, power, privilege, or immunity"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)-(C). In this context, "a motion for summary judgment is simply a vehicle to tee up a case for judicial review." *See New York v. Trump*, C.A. No. 25-11221-PBS, 2025 U.S. Dist. LEXIS 252857, at *25 (D. Mass. Dec. 8, 2025).

A. The Court Has Already Ruled that *Hurtado* Is Unlawful.

This Court already ruled on statutory grounds that *Hurtado* is contrary to law. *See* SJ Order (D.E. 112) at 13-19; PI Order (D.E. 54) at 24 n.4. Because *Hurtado* violates the statutes governing immigration detention, it also violates the APA. *See* 5 U.S.C. § 706(2); *FCC v. NextWave Pers. Communs. Inc.*, 537 U.S. 293, 300 (2003) (agency action violates the APA if it violates "any law").

B. The APA Authorizes Review and Vacatur of *Hurtado*.

BIA decisions and policies are reviewable under the APA. *See, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 52 (2011). The BIA's orders of removal are reviewed via a Petition for Review to the appropriate court of appeals. *See* 8 U.S.C. § 1252(a)(5). In contrast, detention orders are reviewed by the district courts through petitions for writs of habeas corpus, insofar as they raise questions that are independent of removal such as the availability of bail. *See Hernandez v. Gonzales*, 424 F.3d 42, (1st Cir. 2005); *see also Kong v. United States*, 62 F.4th 608, 614-615 (1st Cir. 2023); *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007); *Brito v. Barr*, 415 F. Supp. 3d 258, 268 (D. Mass. 2019) (APA review of BIA detention policy in district court), partly vacated on other grounds (*Brito v. Garland*, 22 F.4th 240 (1st Cir. 2021)). Here, the Court has already ruled that challenging the governments new no-bond policy is not a collateral attack on removal proceedings and is appropriately adjudicated by this Court. *See* PI Order (D.E 54) at 9-10.

The APA entitles a claimant to obtain relief from "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, provided the agency action is not committed to agency discretion by law and no statute precludes judicial review. *Id.* § 701(a)(1)-(2). *Hurtado* does not fall into either exception. There is a "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), and the agency-discretion exception is thus "very narrow," applicable only in "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (cleaned up) (internal quotation omitted). That is not the case here. Nor are there statutory provisions precluding judicial review. Under § 704 of the APA, only a "special and adequate review procedure" specifically designated by Congress for review of an agency action is sufficient to oust

a district court of its normal jurisdiction under the APA. *See Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988). Congress has not created any such procedure for BIA decisions denying bond, such as *Hurtado*.

Accordingly, where APA review applies to *Hurtado*, where this Court is empowered to conduct that review, and where this Court has found the BIA's decision to be unlawful, the Court can and should vacate *Hurtado* under the APA. *See* 5 U.S.C. § 706(2) (authorizing reviewing court to "set aside" unlawful agency actions); *New York*, 2025 U.S. Dist. LEXIS 252857, at *54 ("The ordinary result in response to finding an agency action unlawful is that the action is vacated . . . ." (internal quotation and brackets omitted)). As with its prior declaration, the Court should enter its APA ruling and vacatur order as a partial final judgment under Rule 54(b), which would ensure the government will acknowledge its finality and permit an immediate appeal, should any party choose to pursue one. *See* Dec. 19 Order (D.E. 112) at 21 (addressing Rule 54(b) standard).

C. The Government's Arguments Against Vacatur of *Hurtado* Are Wrong.

In its motion to dismiss, the government raises several arguments against APA vacatur of *Hurtado*. The government argues (a) that APA relief is foreclosed by 8 U.S.C. § 1252(f)(1); (b) that *Hurtado* is not "ripe" for review; (c) that APA relief is unnecessary; and (d) that vacatur would "not provide meaningful additional relief." Gov't Mem. (D.E. 138) at 16-20. The government's arguments are wrong.

i. <u>APA vacatur is not foreclosed by § 1252(f)(1).</u>

The Court may vacate *Hurtado* as contrary to law pursuant to § 706. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court *shall* "hold unlawful and set aside agency action . . . found to be . . . not in accordance with the law.") (emphasis added). "The Federal Government and the federal courts have long understood §706(2) to authorize vacatur of unlawful agency rules,"

Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 826 (2024) (Kavanaugh, J., concurring), and vacatur is not barred by 8 U.S.C. § 1252(f)(1).

Section 1252(f)(1) does not purport to repeal any portion of the APA and says nothing about vacatur. Rather, Section 1252(f)(1) divests courts, other than the Supreme Court, of jurisdiction to "enjoin or restrain *the operation of*" certain provisions of the INA. 8 U.S.C. §1252(f)(1) (emphasis added). The Supreme Court interpreted this language in *Garland v. Gonzalez* and explained that "the 'operation of' (a thing) means the functioning of or working of (that thing)," and, "[t]he way in which laws ordinarily 'work' or 'function' is through *the actions of officials* or other persons who implement them." 596 U.S. 543, 549 (2022) (emphasis added). Thus, the Court concluded, "§1252(f)(1) generally prohibits lower courts from entering *injunctions* that order *federal officials to take or to refrain from taking actions* to enforce, implement, or otherwise carry out the specified statutory provisions." *Id.* at 550 (emphasis added). Section 1252(f)'s subtitle—"[l]imit on injunctive relief"—confirms this interpretation. *See Biden v. Texas*, 597 U.S. 785, 142 (2022) ("By its plain terms, and even by its title, [Section 1252(f)(1)] is nothing more or less than a limit on injunctive relief.") (alteration in original) (quoting *Reno v. American-Arab Anti-Discrimination Comm*., 525 U.S. 471, 481 (1999)); *Brito v. Garland*, 22 F.4th at 251 ("Section 1252(f)(1)'s title—'[l]imit on injunctive relief—provides the first indication of the section's limited scope.") (citation omitted).

Vacatur is not injunctive relief. "[W]hen a court vacates an agency rule, it nullifies the action and removes its legal force." *Illinois v. FEMA*, No. 25-206 WES, 2025 U.S. Dist. LEXIS 187601, at *45 (D.R.I. Sept. 24, 2025); *see Ass'n of Am. Univs. v. DOD*, No. 25-11740-BEM, 2025 U.S. Dist. LEXIS 201095, at *65 (D. Mass. Oct. 10, 2025) ("To 'set aside' agency action is 'to annul or vacate' it.") (quoting Black's Law Dictionary). By nullifying the agency's purported

source of authority, vacatur restores the prior legal regime unless and until the agency "seek[s] to confront the problem anew." *Orr v. Trump*, 778 F. Supp. 3d 394, 431 (D. Mass. 2025) (quoting *Am. Great Lakes Ports Ass'n v. Zukunft*, 301 F. Supp. 3d 99, 103-04 (D.D.C. 2018), *aff'd sub nom. Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 447 U.S. App. D.C. 250 (D.C. Cir. 2020)); *see also United Steel v. MSHA*, 925 F.3d 1279, 1287 (2019) (vacatur "automatically resurrects" agency's last valid policy). It does *not* order agency officers to act or refrain from acting. *E.g.*, *Ass'n of Am. Univs. v. DOD*, No. 25-11740-BEM, 2025 U.S. Dist. LEXIS 201095, at *68 (D. Mass. Oct. 10, 2025) ("Vacatur is not 'a coercive order against the Government, but rather . . . [a] setting aside of the source of the Government's authority' to act.") (quoting *Nken v. Holder*, 556 U.S. 418, 429 (2009)).

Courts have thus consistently found that § 1252(f)(1) does not apply to requests for vacatur pursuant to § 706. *See, e.g, Make the Rd. N.Y. v. Noem*, No. 25-5320, 2025 U.S. App. LEXIS 31160, at *45 (D.C. Cir. Nov. 22, 2025) (eventual vacatur pursuant to § 706 not barred by § 1252(f)(1) because "it will not 'enjoin' or 'restrain' the actions of individual officials"); *Bautista v. Santacruz*, No. 5:25-cv-01873-SSS-BFM, 2025 U.S. Dist. LEXIS 262265, at *45 (C.D. Cal. Dec. 18, 2025) (vacating DHS's July 2025 Memo, finding statutory text, judicial precedent, and academic accounts demonstrate that "§ 1252(f)(1) bars injunctive relief, not vacatur"); *A.C.R. v. Noem*, No. 25-CV-3962 (EK)(TAM), 2025 U.S. Dist. LEXIS 228076, at *22 (E.D.N.Y. Nov. 19, 2025) ("Lower courts have consistently held that Section 1252(f) does not apply to actions brought under Sections 705 and 706 of the APA.") (collecting cases). Vacatur is consequently available.

ii. *Hurtado* is a final agency action and is ripe for review.

Hurtado is a reviewable final agency action. The APA defines "agency action" to "includ[e] the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or

denial thereof." 5 U.S.C. § 551(13). The term "action" is "meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (citation omitted). An agency action is "final" if (1) the action marks the "consummation" of the agency's decisionmaking process, and (2) the action is one by which "rights or obligations have been determined, or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotations omitted). This "inquiry seeks to distinguish a tentative agency position from the situation where the agency views its deliberative process as sufficiently final to demand compliance with its announced position." *Her Majesty the Queen v. EPA,* 912 F.2d 1525, 1531 (D.C. Cir. 1990) (internal quotations omitted).

Hurtado possesses all the hallmarks of final agency action. First, there is no doubt that the BIA, by issuing *Hurtado*, has completed its decision-making process, where it stated a "definitive stance" directing that all noncitizens who originally entered without inspection shall be detained under 8 U.S.C. § 1225(b)(2) without access to a bond hearing. SUF ¶¶ 12-13. The Department of Justice, through the Chief Immigration Judge, ordered all Immigration Judges to continue complying with *Hurtado* earlier this month. SUF ¶ 27.

Second, *Hurtado* has determined the rights and legal consequences of literally thousands of people: since the BIA issued *Hurtado*, countless individuals have been detained under § 1225(b)(2) and unlawfully denied bond hearings. *See, e.g.*, *Barco Mercado v. Francis*, No. 25-6582, 2025 WL 3295903, at *4 (S.D.N.Y. Nov. 26, 2025). Habeas petitions in this District continue to accumulate at a dizzying clip—dozens in the last week alone. *Hurtado* is plainly the "consummation" of Defendants' decision-making process from which "legal consequences" have begun to flow. *See Orr*, 778 F. Supp. 3d at 422 (agency defendants' Passport Policy removing

option to reflect gender identity on passport); *see also Pinchi v. Noem*, 2025 U.S. Dist. LEXIS 265062, at *69 (Dec. 19, 2025) (DHS's re-detention policy).

Defendants contend that there is no final agency action and that Plaintiff's APA claim is not ripe for decision, because *Hurtado* has not had legal consequences as to Plaintiff. *See* Opp. at 20. They are wrong. There is no question that *Hurtado* has applied and continues to apply to Plaintiff, who was able to seek release on bond only by obtaining preliminary relief from this Court. *See* PI Order (D.E. 54). The government is contesting that order on appeal, and no final individual habeas relief has entered. His claim, and the claims of the class, are unquestionably ripe. A ripeness inquiry is "designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies," evaluating "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (citation omitted). Plaintiff's APA claim meets both prongs. Where Defendants have continued to deny bond hearings to detainees based on *Hurtado*, there is no "further factual development [that] would significantly advance [the court's] ability to deal with the legal issues presented." *See id.* at 812 (internal quotations omitted). And in stark contrast to the challenged agency regulation in *National Park Hospitality Association* that did not create "adverse effects of a strictly legal kind," *Hurtado* has resulted in the arbitrary detention and denial of bond hearings of detainees in the thousands, and will continue to beget "irremediably adverse consequences" for many more—including class members in this case—with each additional day *Hurtado* remains in effect. *See id.* Surely no decision is more ripe than one that is actively keeping thousands of people in jail, that literally resulted in the named petitioner's incarceration for a period of weeks, and that would send him straight back to jail if this case ended in the current posture.

Finally, Defendants, without pointing to any caselaw or authority, contend that Plaintiff has not exhausted his administrative remedies. Opp. at 20. This Court has already determined that no exhaustion requirement should be applied, recognizing that the BIA made its position "crystal clear" in *Hurtado* that "further agency proceedings would be futile," and requiring Plaintiff to exhaust administrative remedies would "subject him to irreparable harm in the form of his ongoing detention." *See* PI Order at 12 n.2 (citations omitted).

iii. There are no other adequate remedies.

The government argues that APA review is precluded by the existence of an adequate habeas remedy, pursuant to 5 U.S.C. § 704. D.E. 138 at 17. The government appears to rely principally on *Trump v. J.G.G.*, but nothing in that decision forbids evaluating detention challenges like Plaintiff's under APA standards. *See* 604 U.S. 670, 671-74 (2025). The Supreme Court decided *J.G.G.* essentially on venue grounds, because the plaintiffs were confined in Texas, yet sued in the District of Columbia. *See id. Trump v. J.G.G.* is also inapplicable because that holding arises from the Alien Enemies Act context, "a statute which largely precludes judicial review," and under which challenges to removal "must be brought in habeas." 604 U.S. at 672. That has no bearing on cases addressing removal orders or detention under the INA, *see, e.g.*, *Shaughnessy v. Pedreiro*, 349 U.S. 48, 49–52 (1955) (APA's "generous review" provisions applied in immigration challenges); *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 591 U.S. 1, 16–17 (2020) ("The APA establishes a 'basic presumption of judicial review[.]'"); *Maldonado Bautista*, 2025 U.S. Dist. LEXIS 262265, at *38 ("APA and habeas review may coexist." (internal quotation omitted)).

Indeed, as multiple courts have recognized, APA vacatur and habeas are not mutually exclusive. *See R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 185-86 (D.D.C. 2015) ("APA and habeas

review may coexist.") (citation omitted); *Valez-Chavez v. McHenry*, 549 F. Supp. 3d 300, 306 (S.D.N.Y. 2021) ("Nothing in the text of the writ of habeas corpus, or the legislative history relied on by the government, demonstrates . . . that Congress created the writ as a special and adequate review procedure within the meaning of 5 U.S.C. § 704."). The government's citation to *N.H. Lottery Comm'n v. Rosen* only underscores this point. There, the District Court's grant of relief under the APA was vacated only because "the remedy provided by the Declaratory Judgment Act is adequate under the circumstances." 986 F.3d 38, 62 (1st Cir. 2021). That is plainly not the case here, where the administration has instructed the immigration courts to decline to recognize this Court's declaratory judgment as stating the requirements of the law.

Indeed, it is notable that, while the government argues there is an "adequate remedy" other than APA relief, the government never really says what that is. The government has taken the position that both class-wide injunctive and declaratory relief are unavailable. *See* SJ Opp. (D.E. 95) at 24-27. The Department of Justice has instructed the Immigration Judges to ignore the declaration that has already entered. SUF ¶¶ 27-28. At the same time, the government is arguing that class members are barred from filing individual habeas petitions. *See* Gov't Notice (D.E. 143) (arguing individual class member claims are barred, and stating this will be asserted in response to future class member habeas petitions); Class Cert. Opp. (D.E. 64) at 14. And in all events, individual petitions are generally not a realistic option for class members, many of whom are unrepresented, do not speak English, and are being rapidly transferred to draconian detention camps far from their family and resources. In essence, the government's position seems to be that it should be allowed to unlawfully jail the class members, without any remedy for the people being illegally stripped of their freedom. As explained above, that is surely not the law.

iv. Vacatur would provide meaningful relief.

Defendants contend that vacatur of *Hurtado* would "not provide meaningful additional relief" because "it would [] do nothing to alter DHS or immigration judges' underlying ability to determine the proper statutory detention authority when making custody determinations." D.E. 138 at 19. But vacatur of *Hurtado* would do exactly that.

Despite this Court's declaration that Plaintiff and class members "are subject to detention under 8 U.S.C. § 1226(a), including access to consideration for release on bond and/or conditions before immigration officers and Immigration Judges," D.E. 112 at 27, Immigration Judges are continuing to rely on *Hurtado* as grounds for denying bond hearings to class members. SUF ¶¶ 29-33. Vacating *Hurtado* would revoke the agency's purported source of authority for refusing to follow the law as declared by this Court. SUF ¶ 27. At least per DOJ's reasoning, vacatur would restore immigration judges' ability to follow the law as declared, and as it was previously understood and consistently applied by immigration judges for decades. SUF ¶ 27-28. Indeed, in the *Maldonado Bautista* litigation in California, the Court vacated DHS's July 8, 2025 memo asserting no-bond detention, and the government reports that it is no longer relying on that July 8 memo for guidance. *See* Jan. 20, 2026 Response to Court Order (D.E. 103), *Maldonado Bautista v. Noem*, No. 25-1873 (C.D. Cal.). Vacatur of Hurtado should achieve a similar effect. And, without vacatur, Plaintiff and class members are all but guaranteed to be unlawfully denied bond hearings to which they are entitled. SUF ¶¶ 27-33.

II. THE SCOPE OF APA VACATUR EXTENDS BEYOND THE PARTIES.

The APA directs courts to "hold unlawful and set aside agency actions, findings, and conclusions found to be [] (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . .". 5 U.S.C. § 706(2). "When a reviewing court determines that agency

regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.,* 603 U.S. 799, 831 (2024) (Kavanaugh, J., concurring) (quoting *Harmon v. Thornburgh,* 878 F.2d 484, 495, n. 21 (D.C. Cir. 1989)). The law is clear that when a court vacates an agency action, the vacatur applies to *all* individuals affected by the agency action, and "not only those formally before the court." *See D.A.M. v. Barr*, 486 F. Supp. 3d 404, 415 (D.D.C. 2020); *see also O.A. v. Trump*, 404 F. Supp. 3d 109, 154-55 (D.D.C. 2019) (stating that defendants' contention that vacatur remedy should be limited to plaintiffs in the action is "at odds with settled precedent").

Therefore, if the Court grants partial summary judgment for Plaintiff on Count V by vacating and setting aside *Hurtado* as contrary to law under the APA, immigration courts can no longer rely on *Hurtado* to deny bond hearings to noncitizens arrested inside the United States, who fall under the purview of 8 U.S.C. § 1226. Vacatur of *Hurtado* would provide necessary relief to *all* noncitizens subject to mandatory detention under the unlawful detention policy, regardless of whether they are parties to this action.

III. ALTHOUGH CLASS CERTIFICATION IS NOT REQUIRED FOR THE APA CLAIM, THE COURT SHOULD CERTIFY A CLASS TO DENY THE GOVERNMENT ANY PRETEXT TO PREVENT CLASS MEMBERS FROM OBTAINING RELIEF.

As explained *supra* Section II, class certification is not required for class members to obtain relief from vacatur of *Hurtado* under the APA. However, Defendants have made their position clear that vacatur could not provide any additional relief, in part because "no class has been certified with respect to [the APA] claim." *See* Def.'s Mem. (D.E. 138) at 18. To ensure that the absence of a class is not used by the government to erroneously erect a barrier to class members obtaining relief from vacatur of *Hurtado,* the Court should certify a class for Count V.

The class should be certified as to Count V for the same reasons the Court certified the class as to Count I. *See generally* Class Cert. Order. The class satisfies the requirements of Rule 23(a) as to Count V. First, the class easily clears the "low threshold" for numerosity, evidenced by Defendants' service of class notice on over 180 detainees—which accounts only for individuals who became class members after October 30, 2025. *See* D.E. 128 at 2; *Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014) ("[A] class size of forty or more will generally suffice in the First Circuit.") (citation omitted). Second, where the existence of even one common question satisfies commonality, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011), the class shares a common question capable of classwide resolution, because immigration courts continue to apply *Hurtado* to subject all class members to mandatory detention without a bond hearing. *See* Class Cert. Order at 21. Third, the class meets typicality, because Plaintiff is "press[ing] the same [APA] claim on behalf of himself and the class as a whole" and "will work to benefit the entire class through the pursuit of their own goals." *See* Class Cert. Order at 25; *Bowers v. Russell*, 766 F. Supp. 3d 136, 148 (D. Mass. 2025) (quoting *In re Pharm. Indus. Average Wholesale Price Litig*., 230 F.R.D. 61, 78 (D. Mass. 2005)). Fourth, Plaintiff is an adequate class representative for the APA claim, because he shares a "common interest [with] the entire class in challenging the government's uniform policy" embodied in *Hurtado*, and the interests of Plaintiff and the class are perfectly aligned. *See* Class Cert. Order at 28-29.

The class satisfies the requirements of Rule 23(b): where *Hurtado* applies to all class members, the "indivisible nature" of the APA relief such as vacatur can be provided "only as to all of the class members or as to none of them." *See* Class Cert. Order at 29; *Wal-Mart*, 564 U.S. at 360; *Gutierrez v. Noem*, No. 25 - 1766 (SLS), 2025 LX 577107, at *33 (D.D.C. Dec. 5, 2025) ("Courts . . . have certified claims seeking APA relief such as vacatur under Rule 23(b)(2)")

(collecting cases). The definition and scope of the APA class can and should be identical to the class presently certified, Mr. Guerrero Orellana should be appointed class representative, and current class counsel should be appointed to represent the additional class.

IV. DEFENDANTS' MOTION TO DISMISS IS MERITLESS, AND RESOLUTION OF COUNTS II-IV SHOULD BE HELD IN ABEYANCE PENDING RESOLUTION OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT V.

For the reasons stated above, the Court should deny Defendant's motion to dismiss Count V, enter partial final judgment in favor of Plaintiff and the class on Count V, and vacate *Hurtado*. To expedite resolution of Plaintiff's motion for partial summary judgment on Count V, and to reduce the administrative burden on this Court resulting from Defendants' continuing violation of class members' rights, Jan. 20, 2026 Tr. at 8:21-9:20, Plaintiff respectfully requests that the Court hold Counts II-IV in abeyance pending resolution of Plaintiff's partial motion for summary judgment on Count V and evaluation of whether vacatur results in bond hearings for the class. To the extent the Court does not hold Defendants' motion to dismiss Counts II-IV in abeyance, it should deny Defendants' motion in its entirety.

A. The Court Should Hold Defendants' Motion to Dismiss Counts II-IV In Abeyance Pending Resolution of Plaintiff's Motion for Partial Summary Judgment on Count V.

Defendants suggest holding Plaintiff's constitutional claims in abeyance "pending the filing of a notice of appeal [(which has now occurred)] and any resolution of a potential appeal from the partial final judgment." D.E. at 12. As explained below, Plaintiff's constitutional claims do not rise and fall with the statutory count that this Court already decided. However, because the requested vacatur of *Hurtado* would provide meaningful relief to class members, and to expedite resolution of Plaintiff's request for such relief, Plaintiff requests holding Defendants' motion to

dismiss Counts II-IV in abeyance, including suspending all further briefing on this issue, pending resolution of Plaintiff's motion for partial summary judgment on Count V and an opportunity to evaluate whether vacatur has resulted in relief to the class. *Cf. Hullum v. Mici*, No. 23-10082-PBS, 2024 U.S. Dist. LEXIS 134146, at *4 (D. Mass. July 30, 2024) (holding motion to dismiss claims in abeyance pending resolution of motion for partial summary judgment). This case can and should be resolved purely on the statutory and APA grounds, but in the event of remand, the parties can take positions at that time on next steps for the constitutional claims.

B. Defendants' Motion to Dismiss Is Meritless.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true" to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiff's complaint details the Defendants' policy of systematically subjecting class members to mandatory detention, *see* D.E. 10, and Defendants' policy continues to deprive class members of protected liberty interests without due process of law. SUF ¶¶ 26-33. Defendants' motion should be denied.

i. This Court has jurisdiction.

The Court has repeatedly ruled that it has jurisdiction to decide these claims. *See* D.E. 54 at 8-11 (rejecting applicability of §§ 1252(b)(9), 1252(g) and 1252(a)(2)(B)(ii)); D.E. 112 at 11-15 (rejecting applicability of § 1252(e)(1)(B)); D.E. 112 at 11-13 (rejecting applicability of §§ 1252(b)(9), 1252(g), and 1252(e)). Sections 1252(a)(5), 1252(b)(9) and 1252(g) do not bar review because the class challenges the legality of their detention—not removal orders or discretionary choices to commence, adjudicate, or execute removal. *See* D.E. 101 at 9; D.E. 54 at 8-11; D.E. 112 at 11-13. Defendants' jurisdictional arguments continue to lack merit, for the reasons previously briefed by Plaintiff and stated by the Court in its prior rulings.

ii. Defendants misunderstand the Doctrine of Constitutional Avoidance.

As a threshold matter, Defendants suggest this case can be disposed without needing to decide Plaintiff's constitutional due process claims because the Court resolved Count I in Plaintiff's favor. D.E. 138 at 11. But this Court's partial final judgement and declaration that Defendants' detention policy violates the INA and its implementing regulations did not as a practical matter resolve or remedy Plaintiff's constitutional claims. SUF ¶¶ 26-31. Rather, following this Court's declaration, Defendants explicitly directed immigration judges to continue to follow *Hurtado* and unlawfully deny bond hearings to class members, and immigration judges have been doing just that. *Id.* None of the cases cited by Defendants suggest any Court should dismiss constitutional claims where the undisputed evidence demonstrates a party's active decision to ignore an Article III court's declaration of the law and, consequently, to commit ongoing violations of constitutional rights. *See Marasco & Nesselbush, LLP v. Collins*, 6 F.4th 150, 178-79 (2021) (declining to reach equal protection and due process claims only because APA relief "adequately" addressed plaintiff's requests for declaratory relief); *Davis v. Grimes*, 9 F. Supp. 3d 12 (D. Mass. 2014) (denying cross-motions for summary judgment on constitutional claims); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 446 (deciding constitutional issues where "statutory holdings would not have supported all the relief granted"); *South Carolina v. United States*, No. 1:16-cv-00391-JMC, 2017 U.S. Dist. LEXIS 35946, at *100 (D.S.C. Mar. 14, 2017) (constitutional claims were "entirely dependent" on statutory claims). Rather, where constitutional claims remain unresolved despite resolution of statutory claims, applying the doctrine of constitutional avoidance is inappropriate. *See Lyng*, 485 U.S. at 446.

iii. Plaintiff sufficiently pled constitutional claims.

Although the Court could vacate *Hurtado* purely because it is contrary to statute, it is clear that *Hurtado* is also unconstitutional. The Fifth Amendment's Due Process Clause specifically forbids the Government to "deprive[]" any "person . . . of . . . liberty . . . without due process of law." U.S. Const. amend. V. "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (collecting cases); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"); *Hernandez-Lara v. Lyons*, 10 F.4th 19, 29 (1st Cir. 2021).[1]

The First Circuit has held that, for people like these class members, the Due Process clause requires a bond hearing with strong procedural protections. *See Hernandez-Lara*, 10 F.4th at 41; *Doe v. Tompkins*, 11 F.4th 1, 2 (1st Cir. 2021); *Brito v. Garland*, 22 F.4th 240, 256-57 (1st Cir. 2021). In *Hernandez-Lara*, the First Circuit considered the case of a noncitizen who, like the class members, "entered the United States . . . without being admitted or paroled" and was later detained in New England, and who alleged that the bond hearing that she had received was constitutionally inadequate because the burden of proof had been placed on her to show that she did not pose a danger to the community or a flight risk in order to be released. *Hernandez-Lara*, 10 F.4th at 23-

[1] The Supreme Court has held that arriving noncitizens "on the threshold" have more limited Due Process rights, *see DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020), but such noncitizens are already excluded from the class. Indeed, *Thuraissigiam* confirmed that noncitizens "in this country have due process rights." Id. at 107. And that case addressed the process due before removing a noncitizen, not the process due before detaining them. See id. at 127 & n.21 (explaining Court had "no occasion to consider such arguments" regarding "unauthorized executive detention").

24. Acknowledging the importance of the liberty interests at stake, the First Circuit held that she was entitled to a bond hearing with certain procedural protections as a matter of constitutional due process. *Id.* at 41. Then, in *Brito v. Garland*, the First Circuit affirmed identical declaratory relief for a class of detainees held under § 1226(a), *see* 22 F.4th 240, which, as properly interpreted at the time, included people exactly like the class members in this case.

And, conversely, the Supreme Court has repeatedly held that the Due Process clause certainly forbids people inside the United States from being detained with no process *at all*—the exact approach *Hurtado* purports to mandate. *See Addington v. Texas*, 441 U.S. 418, 425 (1979) (collecting cases); *see also United States v. Salerno*, 481 U.S. 739, 755 (1987) (requiring individualized hearing and strong procedural protections for detention of people charged with federal crimes); *Foucha v. Louisiana,* 504 U.S. 71, 81-83 (1992) (same for civil commitment for mental illness); *Kansas v. Hendricks,* 521 U.S. 346, 357 (1997) (same for commitment of sex offenders). For this reason as well, *Hurtado* is unlawful.[2]

Even if this Court had not already declared that class members are entitled to a bond hearing pursuant to § 1226(a), *Demore v. Kim*, 538 U.S. 510 (2003) would not control. The petitioner in *Demore* was detained pursuant to 8 U.S.C. § 1226(c)—not § 1226(a), or even § 1225(b)(2)—for a brief period of time after receiving the full process in the criminal system and having conceded removability. *Id.* at 530. Similarly, *Zadvydas* found six months of detention presumptively permissible, but only *after* the person had received the full administrative process and a final order of removal. *See Zadvydas*, 53 U.S. at 701. In contrast, these class members face

[2] Procedural due process challenges in the detention context are decided on a "categorical basis" and do not require inquiry into the particular circumstances of individuals within the class. *See Hernandez-Lara*, 10 F.4th at 44-45; *see also Brito v. Garland*, 22 F.4th at 256 (affirming class-wide declaratory relief for procedural due process detention claim).

potentially years of detention with no process at all—merely an accusation by the Executive that they are noncitizens subject to removal. Defendants' arguments based on *Demore* and *Zadvydas* are inapposite.

Similarly, the two detention cases cited by Defendants are irrelevant. One involved a person with a final order of removal arrested at the border, whose claim was governed by *Zadvydas*. S*ee Dambrosio v. McDonald*, No. 25-10782, 2025 U.S. Dist. LEXIS 67848, at *4-6 (D. Mass. Apr. 9, 2025). The other is Judge Gorton's initial decision in July 2025 that a person arrested inside the United States was detained pursuant to § 1225(b)(2) and *Zadvydas*—a position he correctly revised in October when he agreed with this Court's statutory interpretation, rejected *Hurtado*, and ordered a bond hearing under *Hernandez-Lara*. *Compare Pena v. Hyde*, No. 25-11983-NMG, 2025 WL 2108913 (D. Mass. Jul. 28, 2025), *with Zamora v. Noem*, No. 25-12750-NMG, 2025 WL 2958879, at *2 & n.1 (D. Mass. Oct. 17, 2025). And certainly none of the cases cited by the government purports to contradict the First Circuit's reasoning in *Hernandez-Lara* that it is precisely *because* the deprivation of liberty during removal proceedings can be quite lengthy, that strong due process protections are required in the form of a bond hearing. *See* 10 F.4th at 30.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court: (a) hold Defendants' motion to dismiss Counts II-IV in abeyance until resolution of Plaintiff's pending motion for partial summary judgment on Count V, or, alternatively, deny Defendants' motion to dismiss Counts II-IV; (b) deny Defendants' motion to dismiss Count V; and (c) certify an APA class, grant partial summary judgment on Count V that *Hurtado* violates the APA, vacate *Matter of Hurtado*, and enter those orders as a partial final judgment under Rule 54(b).

Respectfully submitted,

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Dated: January 27, 2026

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document will be served on counsel for all parties through the Court's CM/ECF system.

Date: January 27, 2026

/s/ Gilleun Kang
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