

**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

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

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## INTRODUCTION

Multiple courts have found the government’s new “no bond” policy is amenable to APA review, and no Court of Appeals has held otherwise. *See Jacobo Ramirez v. Noem*, No. 25-02136, 2026 WL 310090, at \*14-17, 23-24 (D. Nev. Feb. 5, 2026) (denying motion to dismiss APA claim challenging BIA’s *Hurtado* decision and certifying class); *Bautista v. Santacruz*, No. 25-1873, 2025 WL 3713987, at \*15-22 (C.D. Cal. Dec. 18, 2025) (holding APA review available and vacating July 2025 DHS “no bond” policy memo). This Court has already declared that the BIA’s reasoning in *Hurtado* is contrary to law. Yet the current remedy is plainly inadequate because the government has ordered the immigration judges (“IJs”) to ignore this Court’s final declaratory judgment, and it does not genuinely dispute engaging in other tactics to compromise the IJs’ independence and legal compliance, such as removing an IJ who was providing bond hearings from all detained cases. *See* Plaintiff’s Response to Respondents-Defendants’ (“Defendants”) Statement of Uncontroverted Facts (“PSOF”) ¶ 32.

Class members arrested inside the United States based on mere allegations in civil immigration proceedings are, quite literally, being deprived of their liberty for extended periods of time with no due process of law, in violation of law, and contrary to the final judgment of an Article III court of what the law is. It is difficult to imagine a case where APA vacatur is more necessary or more justified. And one could hardly conceive of a scenario more offensive to the fundamental principles of fairness, liberty, and justice embodied in the Due Process Clause. Petitioner-Plaintiff (“Plaintiff”) respectfully requests that the Court deny the government’s motion to dismiss the remaining counts, and enter a partial final judgment vacating *Hurtado*, both universally and separately for a certified class defined identically to the existing class.

**ARGUMENT**

**I. THE COURT SHOULD VACATE *HURTADO* UNDER THE APA.**

**A. The Ability of Some People to File Individual Habeas Cases Does Not Preclude APA Review.**

Defendants argue that the government’s policy of unlawful detention of class members may be “adequately” addressed by individual habeas petitions, limiting review pursuant to 5 U.S.C. § 704. This argument misstates the applicable standard under the APA and misconstrues the remedy that Plaintiff seeks, namely vacatur of the underlying policy—which is distinct from writs of habeas corpus that individual petitioners receive through their habeas petitions. That alone is sufficient reason to reject the government’s position. *Jacobo Ramirez*, 2026 WL 310090, at \*24 (distinguishing habeas relief from vacatur). Additionally, not everybody affected by this policy can practically access the courts to file a habeas petition—whether due to lack of counsel, language barriers, rapid transfer to squalid detention camps in distant locations, or innumerable other obstacles. Some lucky individuals can file before they find themselves in a jail or tent far from their home, their resources, and their lawyers. But if the mere fact that people affected by a policy can theoretically seek some individual relief bars APA review of the policy itself, then APA vacatur would largely become a dead letter. *See Garro Pinchi v. Noem*, No. 25-05632, 2025 WL 3691938, at \*24-25 (N.D. Cal. Dec. 19, 2025) (finding habeas remedy inadequate where petitioners would be permitted to challenge their detention, but not the agency action pursuant to which they were detained in the first place); *see also New York v. Trump*, No. 25-11221, 2025 WL 3514301, at \*17-18 (D. Mass. Dec. 8, 2025) (rejecting narrower, individualized APA relief in favor of the “ordinary” vacatur remedy). Moreover, the government does not—and cannot—explain a logical basis for claiming that individual habeas petitions are the exclusive answer to this problem,

while it simultaneously argues that individual habeas petitions are barred. *See* D.E. 143 at 2-3; D.E. 64.

The availability of habeas does not bar an APA claim pursuant to § 704, which would occur only where—unlike here—Congress has clearly evinced an intent to bar APA review. The government’s attempt to limit the standard set out in *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988), neglects a long line of Supreme Court precedent holding that “the Administrative Procedure Act’s ‘generous review provisions’ must be given a ‘hospitable interpretation.’” *Abbott Laby’s v. Gardner*, 387 U.S. 136, 140 (1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).<sup>1</sup> “When considering whether an alternative remedy is ‘adequate’ and therefore preclusive of APA review, we look for ‘clear and convincing evidence’ of ‘legislative intent’ to create a special, alternative remedy and thereby bar APA review.” *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 846 F.3d 1235, 1244 (D.C. Cir. 2017) (quoting *Garcia v. Vilsack*, 563 F.3d 519, 523 (2009)).

Defendants fall far short of making a “clear and convincing” showing that habeas was intended to bar APA review. Courts across the country have held that APA review may move forward alongside the existence of habeas procedures. *See* D.E. 158 at 18-19 (citing *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 185-86 (D.D.C. 2015)); *Valez-Chavez v. McHenry*, 549 F. Supp. 3d 300, 306 (S.D.N.Y. 2021)); *see also Aracely R. v. Nielsen*, 319 F. Supp. 3d 110, 126–27, 140 (D.D.C. 2018) (holding APA claim challenging immigration detention proceeding not barred by availability of habeas in the absence of “clear and convincing evidence of legislative intent to

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<sup>1</sup> *Town of Sandford v. United States* does not hold otherwise. 140 F.3d 20 (1st Cir. 1998). In that case, the plaintiff abandoned its right to judicial review of its claim when it discharged the lien it intended to claim on. The Court held that its subsequent attempt to bring an APA claim was an attempt to “[h]ave[] one’s cake and eat[] it too.”

create a special, alternative remedy.”); *Jacobo Ramirez*, 2026 WL 310090, at \*24 (holding release from detention via individual habeas petition to be distinct from APA challenge to detention policies). Defendants do not address these holdings in its brief and cite no cases where a court squarely held that the existence of habeas review precludes APA relief. Instead, the government’s position appears to compare apples and oranges: habeas is a type of *case* in which various claims can be raised, and APA review is a type of *claim* to be raised within a case. It would not make sense to hold that the ability to file a habeas petition *as a vehicle to raise claims* precludes including an APA violation as one of them. *See, e.g., Y-Z-L-H- v. Bostock*, 792 F. Supp. 3d 1123 (D. Or. 2025) (granting habeas relief on substantive APA grounds); *Putnam v. Winn*, 441 F. Supp. 2d 253, 254-56 (D. Mass. 2006) (finding APA claim may be brought through § 2241 petition).

Indeed, a habeas petition without an APA claim is plainly inadequate to provide the relief that Plaintiff seeks—namely, vacatur of final agency action that is being applied *to him* as contrary to law. This is not the same “genre” of relief as ordinarily provided by other claims that can be included in a habeas action. *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009). That is because the APA confers upon a reviewing court the power to vacate agency action. *See Ass’n of Am. Univs. v. DOD*, No. 25-11740, 2025 U.S. Dist. LEXIS 201095, at \*69 (D. Mass. Oct. 10, 2025) (noting the “overwhelming consensus” among federal courts that vacatur of agency action is available under the APA in addition to individually limited relief); *see also New York v. Trump*, No. 2511221, 2025 WL 3514301, at \*17-18 (D. Mass. Dec. 8, 2025)). Vacatur is unlike other remedies typically granted by other claims in a habeas petition because it operates directly upon the challenged agency action, “‘setting aside . . . the source of the Government’s authority’ to act.” *Assn. of Am. Univs.*, 2025 U.S. Dist. LEXIS 201095, at \*68 (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009)). Such a remedy is necessary here because the immigration courts have

maintained that the declaratory judgment already entered by this Court is not binding upon them as it “does not purport to vacate, stay, or enjoin *Yajure Hurtado*.” D.E. 159 ¶¶ 27-33.

In any event, it is impossible to square the government’s position here with the position it has promised to take when individual habeas petitions are actually filed. Specifically, the government has informed this Court that it takes the opposite position, arguing that class members cannot seek individual habeas relief pursuant to the doctrines of *res judicata* and claim splitting. See D.E. 143 at 2-3; D.E. 64. The government’s assertion that individual habeas petitions are unavailable to petitioners while simultaneously insisting that the existence of individual habeas review meets the demanding standard to displace APA review is a classic, and unpersuasive, “bait-and-switch” argument.

**B. *Hurtado* Is Final Agency Action—To Plaintiff, To The Proposed Class, and To “All Aliens Who Are Present In The United States Without Inspection And Admission.”**

*Hurtado* is a final agency action reviewable under the APA. *Jacobo Ramirez*, 2026 WL 310090, at \*15 (citing *Judulang v. Holder*, 565 U.S. 42, 52-53 (2011) (“[T]he Court finds . . . that the BIA’s precedential decision in *Hurtado* is a final agency action reviewable under the APA.”)). Defendants contend that because plaintiffs “generally” challenge the application of an agency decision to their own case under the APA, an agency action like *Hurtado* is not “final” as to non-parties to that adjudication. D.E. 165 (“Opp.”) at 20. But while the *Hurtado* decision had implications for the noncitizen in that particular case, the government concedes that it “operates as precedent” for everybody else, too. Opp. at 20. Indeed, in this case, the government “admit[s]” that it has instructed the IJs to apply *Hurtado* as “binding precedent.” PSOF ¶¶ 27-28. Where the agency has chosen to use the adjudication process to create a policy that binds third parties (here, literally thousands of people), it can hardly argue that those third parties are barred from asserting

their rights under the APA’s statutory standards limiting agency action. *See Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 603 U.S. 799, 824 (2024) (citation and internal quotation marks omitted) (“[T]he APA’s basic presumption [is] that anyone injured by agency action should have access to judicial review.”); *see also Teva Pharms. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1312-15 (D.C. Cir. 2010) (holding third-party challenge to agency adjudication was justiciable as “it makes no difference to the ‘injury’ inquiry whether the agency adopted the policy at issue in an adjudication, a rulemaking, a guidance document, or indeed by ouija board”).

The government asserts, without citing any relevant authority, that plaintiffs may not challenge the BIA’s precedential adjudication outside of their own case. *Opp.* at 20-21. This argument disregards the unique structure for review of BIA decisions. While individual *removal* decisions are challenged through the petition for review (PFR) process in the Court of Appeals, the INA does not bar habeas review of BIA decisions that fall outside of the PFR process, such as those on *detention*. *See Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018) (explaining why 8 U.S.C. § 1252(b)(9) does not channel detention challenges into the PFR process). Indeed, courts routinely vacate or enjoin decisions of the BIA when they fall outside the PFR process. *See, e.g., Padilla v. Immigr. & Customs Enf’t*, 953 F.3d 1134, 1141 (9th Cir. 2020) (affirming in part injunction against application of BIA decision that held individuals who passed their credible fear interviews were no longer bond-eligible), *cert. granted, judgment vacated on other grounds*, 141 S. Ct. 1041 (2021); *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 190 (D.D.C. 2015) (enjoining detention policy that relied on BIA decision holding that deterrence of mass migration should be considered in custody determinations). Thus, this Court can review and vacate *Hurtado*, which prescribed a uniform policy of *detention* of noncitizens, under the APA.

Defendants also fundamentally misapprehend the finality inquiry under *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The requirement that an agency action mark the “consummation of the agency’s decisionmaking process” is to ensure that the agency action is not merely tentative or interlocutory in nature. *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 598 (2016). Defendants try to introduce a new requirement—that the challenging party be party to the original BIA decision—but neither case on which they rely suggest anything of the sort. The First Circuit in *Harper v. Werfel* found that there was no “consummation” of decisionmaking because the IRS had merely issued a *summons* to the plaintiff for investigation and did not implicate any final adjudication. 118 F.4th 100, 116 (1st Cir. 2024). Similarly, *Naik v. Dir. U.S. Citizenship & Immigr. Servs. Vt.* involved an individual seeking appellate review of a denial of his I-130 petition while the USCIS’s final decision on remand from the BIA was still pending. 575 F. App’x 88, 92 (3d Cir. 2014). Both cases only further illustrate that the finality inquiry turns on whether the agency action is merely tentative or pending. Importantly, neither case applies to the circumstances presented here: a precedential agency decision that compels application of a uniform policy to *all* noncitizens. Opp. at 12. There is no indication that *Hurtado* will be disturbed absent vacatur, and that decision has determined, and will continue to determine, the rights and legal consequences of thousands of individuals. *See Bennett*, 520 U.S. at 178; *Orr v. Trump*, 778 F. Supp. 3d 394, 422 (D. Mass. 2025).

Finally, Defendants maintain that *Hurtado* operates as precedent on statutory detention authority and strips IJs of authority to hear or grant bond to *all* noncitizens, *see* Opp. at 12, 20, but in the same breadth argue that there is no finality because Plaintiff or class members may not ever have the *Hurtado* decision directly applied to them by an IJ. Opp. at 21. Defendants cannot, and should not, have it both ways. By their own words, the BIA “engaged in a thorough analysis of

the statutory language and historical context and concluded that § 1225(b)(2)'s mandatory detention regime applies to *all* aliens who are present in the United States without inspection and admission.” Opp. at 12. There is no question, then, that *Hurtado* is the precedential decision and agency action that applies to all those present in the United States without inspection and admission—including Plaintiff and class members—and purports to mandate their detention without bond. The possibility that class members may have different outcomes at bond hearings, Opp. at 21, is inapposite: they are unable to reach this stage precisely *because of Hurtado*. See D.E. 81 at 24 (finding common legal question that binds the class). Defendants’ arguments against finality are meritless, and the Court can review and should vacate *Hurtado* under the APA.

**C. Defendants’ Appeal of the Court’s Preliminary Injunction and Declaratory Judgment Orders Did Not Divest Court of Jurisdiction Over Remaining Claims.**

Defendants have filed notices of appeal with respect to this Court’s grant of a preliminary injunction and partial final judgment in favor of Plaintiff and the class on Count I. D.E. 98 & 145. The filing of the notices of appeal vested the appellate court with jurisdiction to alter those two judgments, but it did not divest this Court of jurisdiction to decide the remaining claims. See *Contour Design, Inc. v. Chance Mold Steel Co.*, 649 F.3d 31, 34 (1st Cir. 2011) (“True, once an appeal has been taken, a district court ordinarily may not alter the *judgment* under review, without leave of the appellate court. However, in most respects and absent a stay, further proceedings in the same controversy often may continue in the district court while an appeal in an earlier phase is pending.”) (emphasis added) (citations omitted).

Defendants cite only one case where the district court was divested of jurisdiction by an appeal—*Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504 (1st Cir. 1997)—and that case is inapposite. The appellants in *Bradford* challenged the district court’s

denial of a stay, so continuation of the district court proceedings would have interfered with the appellant's right to an appellate decision on whether the case should continue at all. *Id.* at 505. By contrast, the Court's resolution of Plaintiff's APA claim would not interfere with Defendants' appellate rights because Defendants are not seeking appellate resolution of Plaintiff's APA claims. *See Contour*, 649 F.3d at 34 (appeal of preliminary injunction does not divest trial court of jurisdiction over permanent injunction); *In re Old Cold, LLC*, 976 F.3d 107, 117 (1st Cir. 2020) (no interference with appellate rights where district court could not disturb relief requested on appeal).<sup>2</sup> Resolution of Plaintiff's APA claim through vacatur merely flows from this Court's pronouncements of the rights of the class and granting summary judgment on it would not alter the issues on appeal. *See Bautista v. Santacruz*, 2025 WL 3713987, at \*22 ("Vacatur necessarily follows from a declaration that an agency policy is unlawful.").

Moreover, "because the judge-made divestiture rule isn't based on a statute, it's not a hard-and-fast jurisdictional rule." *United States v. Rodriguez-Rosado*, 909 F.3d 472, 477 (1st Cir. 2018). "[I]ts application turns on concerns of efficiency and isn't mandatory." *Id.* at 478. As such, district courts can continue to exercise jurisdiction where doing so may avoid piecemeal appeals. *See City of Bangor v. Citizen Commc'ns. Co.*, No. 02-183, 2007 WL 4233094, at \*1 (D. Me. Nov. 28, 2007). Such is the case here. Plaintiff filed the present motion because Defendants have refused to follow the law as declared by the Court, insisting *Hurtado* remains binding on IJs in the absence of vacatur. PSOF ¶¶ 26-34. Under these circumstances, application of the divestiture doctrine is unwarranted and may in fact impede appellate resolution of a matter of significant public concern.

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<sup>2</sup> Nor does the Fifth Circuit's decision in *Buenrostro-Mendez v. Bondi*, Nos. 25-20496, 25-40701, 2026 WL 323330 (5th Cir. Feb. 6, 2026) warrant abdication of jurisdiction over Plaintiff's APA claim. That decision did not address APA vacatur and it is not binding on this Court.

**D. Vacatur of a BIA Decision Does Not Violate § 1252(f)(1).**

As previously explained, vacatur does not “enjoin or restrain the operation of” the covered provisions of the INA because it is directed to the agency’s purported source of authority, not agency officials. *See* D.E. 158 at 14-15 (collecting cases). As such, courts have consistently found that § 1252(f)(1) does not apply to requests for vacatur pursuant to 5 U.S.C. § 706. *Id.* at 15. Defendants cite no case holding otherwise.

Vacatur is not coercive relief. It does not force Defendants to promulgate a new policy. It merely restores the prior legal regime—under which IJs were free to follow the law as declared and as it was previously understood and consistently applied by IJs for decades, PSOF ¶¶ 27-28—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 (D.C. Cir. 2020)); *see Jacobo Ramirez*, 2026 WL 310090, at \*23 (“By its plain terms, a set aside’ under § 706 of the APA ‘does not affect the Government’s future actions. It merely declares that a past agency action was unlawful and returns the world to the status quo, before that unlawful action.’”) (quoting *Nat’l TPS All. v. Noem*, No. 25-5724, 2026 U.S. App. LEXIS 2164, at \*31 (9th Cir. Jan. 28, 2026)) (internal citation omitted); *see also Bautista*, 2025 WL 3713987, at \*18 (vacatur “nullif[ies] the originating source of the agency’s unlawful conduct, and it does so without directly interfering with the enforcement of contested statutes or ordinances”). Any inability “to issue guidance that accords with [Defendants’] view of how the detention statutes operate,” D.E. 165 at 24, is thus not, as Defendants suggest, a consequence of vacatur, but rather a consequence of needing to promulgate guidance that accords with the law.

**E. The Court Should Not Hold Plaintiff's Motion in Abeyance.**

Because of Defendants' refusal to follow the law as declared by this Court and insistence that *Hurtado* remains binding on IJs, class members have been forced to file habeas petitions to effectuate their rights, creating further uncertainty for members of the certified class. *See, e.g., Pereira v. Moniz*, No. 26-10008, 2026 U.S. Dist. LEXIS 24083, at \*4 (D. Mass. Feb. 5, 2026); *Paredes v. Moniz*, No. 26-10335, 2026 U.S. Dist. LEXIS 24085, at \*3 n.2 (D. Mass. Feb. 5, 2026). Vacatur of *Hurtado* and restoration of Defendants' prior policy of providing class members with bond hearings will thus mitigate the confusion that Defendants' unlawful practice has sowed. The Court should reject Defendants' arguments to the contrary, and it should not hold Plaintiff's motion in abeyance.

**II. THE COURT SHOULD CERTIFY A RULE 23(b)(2) CLASS FOR THE APA CLAIM.**

Class certification is not required for class members to obtain relief from vacatur of *Hurtado* under the APA. *See* D.E. 158 at 20-21. But because the government does not necessarily agree with that position, to ensure that Defendants do not weaponize the absence of a class to again order the IJs to ignore the Court's ruling, the Court should certify a class for the APA claim so that *at least* those class members can be assured that vacatur applies to them.

Defendants argue against class certification by rehashing meritless arguments that this Court has already rejected. *Opp.* at 24-27; *see generally* Class Cert. Order, D.E. 81. First, the Court has already rejected the argument that 8 U.S.C. § 1252(e)(3) and §1252(e)(1)(B)'s bar to class certification applies to the class members' statutory claim, because the mandatory detention provision of § 1225(b)(2)(A) does not apply to class members. Class Cert. Order at 12-14. Defendants' argument as to the APA claim fails for the same reason. *See id.*; *see also* *Jacobo*

*Ramirez v. Noem*, 2026 WL 310090, at \*10-14 (holding that § 1252(e) did not bar the class’s claims).

Second, Defendants argue that commonality is lacking for the APA claim—raising “materially different circumstances” of class members based on the class definition—but does not explain why it would defeat commonality as to the APA claim when the Court found no barrier for the statutory claim. *See* Opp. at 25; Class Cert. Order at 20-24. Like the statutory claim, the APA claim presents the common question capable of class-wide resolution, where immigration courts continue to apply *Hurtado* to subject all class members to mandatory detention without a bond hearing. *See* Class Cert. Order at 21; D.E. 158 at 22. And even assuming, as Defendants contend, that some class members are ultimately denied a bond hearing on some basis other than *Hurtado*, the fact remains that *Hurtado* still applies in full force to them. Opp. at 12 (“[Section] 1225(b)(2)’s mandatory detention regime applies to *all* aliens who are present in the United States without inspection and admission.”). Because vacatur of *Hurtado* would effectively remove the wholesale denial of bond hearings to *all* impacted noncitizens, vacatur would generate a “common answer[] apt to drive the resolution of the litigation” and afford class-wide relief. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Third, Defendants argue that the class fails to meet Rule 23(b)(2) requirements because Rule 23(b)(2) makes no express reference to the availability of APA vacatur as a remedy. Opp. at 26-27. It is absurd to suggest that a remedy is foreclosed in absence of express reference to it. Contrary to Defendants’ meritless proposition, numerous courts have interpreted Rule 23(b)(2) to permit certification of a class seeking APA vacatur as a remedy. *See, e.g., Jacobo Ramirez*, 2026 WL 310090, at \*22-24 (certifying class as to APA claim); *Orr v. Trump*, 786 F. Supp. 3d 397, 422 (D. Mass. 2025) (same); *Refugee & Immigrant Ctr. for Educ. & Legal Services v. Noem*, 793 F.

Supp. 3d 19, 97-105 (D.D.C. 2025) (same); *Gutierrez v. Noem*, No. 25-1766, 2025 WL 3496390, at \*5-16 (D.D.C. Dec. 5, 2025) (same); *Bautista v. Santacruz*, 2025 WL 3713987, at \*22-32 (same). Further, courts have confirmed that § 1252(f)(1) does not bar class certification for APA relief. *See Jacobo Ramirez*, 2026 WL 310090, at \*22-24; *Bautista*, 2025 WL 3713987, at \*15-22. The Court should certify the class as to the APA claim.

### **III. DUE PROCESS CLAIMS SHOULD NOT BE DISMISSED.**

Defendants do not respond to Plaintiff's due process arguments. This is not just a statutory but a constitutional question, including because the First Circuit has previously held that noncitizens exactly like these class members must receive bond hearings with strong procedural protections under the Fifth Amendment's due process clause. *Hernandez-Lara v. Lyons*, 10 F.4th 19, 23-24 (1st Cir. 2021); *see also Solano v. Mason*, No. 2600045, 2026 WL 311624, at \*17 (S.D.W. Va. Feb. 4, 2026) (granting a similarly situated petitioner's habeas petition on statutory and constitutional due process grounds because the "Court is bound to the well-established Supreme Court precedent that immigrants within the United States are entitled to the full gambit of Fifth Amendment Due Process protections").

This constitutional claim remains live and runs independent of the statutory claim. *See* Exhibit A, Order, *Cumbe Lema v. De Anda-Ybarra*, No. 26-249, at 2-3 (W.D. Tex. Feb. 9, 2026) (where the court granted a similarly situated petitioner's right to a bond hearing on constitutional due process grounds notwithstanding the Fifth Circuit decision because "the *Buenrostro-Mendez* court did not reach the due process question, confining its analysis and holding to statutory interpretation"). Therefore, Plaintiff's due process arguments should not be dismissed and should be held in abeyance until the statutory question is resolved should it be necessary to revisit on remand.

**CONCLUSION**

For the foregoing reasons and those described in the Memorandum in Support of Motion for Partial Summary Judgment, Plaintiff respectfully requests that the Court (a) deny Defendants' motion to dismiss Counts II-IV; and (b) certify an APA class, grant partial summary judgment on Count V that *Hurtado* violates the APA, vacate *Matter of Hurtado* both in general and separately as to the class, and enter those orders as a partial final judgment under Rule 54(b).

Respectfully submitted,

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Dated: February 17, 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: February 17, 2026

/s/ Gilleun Kang  
Gilleun Kang