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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

**M-J-M-A; VICTOR CRUZ GAMEZ,
on behalf of a class of all similarly
situated individuals,**

Petitioner and Plaintiffs,

v.

**LAURA HERMOSILLO; TODD
LYONS; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT;
KRISTI NOEM; U.S. DEPARTMENT
OF HOMELAND SECURITY;
PAMELA BONDI,**

Defendants.

Case No.: 6:25-cv-02011-MTK

**DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
BACKGROUND	2
I. Factual Background	2
II. Procedural History.....	2
LEGAL STANDARD.....	3
ARGUMENT	5
I. Standing.....	5
A. Neither named representative has suffered an injury-in-fact to be a member of the Warrantless Arrest Class	6
i. MJMA.....	7
ii. Victor Cruz Gamez	9
B. Plaintiffs have not met their burden to show there is a policy or practice of conducting unlawful warrantless arrests in Oregon	12
II. The INA bars class-wide injunctive relief	13
III. Plaintiffs fail to meet all Rule 23(a) requirements.....	15
A. Neither proposed class is sufficiently large to warrant class wide relief.....	15
B. The proposed classes lack the commonality required for certification under Rule 23(a)(2).....	16
i. Plaintiffs fail to establish a uniform policy or practice that is common to the proposed classes.....	17
ii. No common questions satisfy commonality for the class claims	18
C. The named representatives' claims are not typical of the Warrantless Arrest Class.....	19

D. Plaintiffs are not adequate representatives of the classes	21
IV. Plaintiffs' classes are impermissible fail-safe classes	22
V. Plaintiffs have not met their burden under Rule 23(b)(2)	23
VI. Plaintiffs have not met their burden under Rule 23(b)(1)(A)	24
CONCLUSION.....	26

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adair v. England</i> , 209 F.R.D. 5 (D.D.C. 2002)	25
<i>Adams v. Williams</i> , 407 U.S. 143 (1972)	8
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	5
<i>AmChem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997)	4, 21
<i>B.D.A.A. v. Bostock</i> , No. 6:25-cv-02062-AA, 2025 WL 3484912 (D. Or. Dec. 4, 2025)	11
<i>Califano v. Yamasaki</i> , 442 U.S. 682 (1979)	4
<i>City of Los Angeles v. Lyons</i> , 461 U.S. 95 (1983)	6
<i>Contreras v. United States</i> , 672 F.2d 307 (2d Cir. 1982)	18
<i>Crawford v. Honig</i> , 37 F.3d 485 (9th Cir. 1994)	21
<i>District of Columbia v. Wesby</i> , 583 U.S. 48 (2018)	7
<i>Ellis v. Costco Wholesale Corp.</i> , 657 F.3d 970 (9th Cir. 2011)	5
<i>Escobar Molina v. U.S. Dep't of Homeland Security</i> , No. CV 25-3417, 2025 WL 3465518 (D.D.C. Dec. 2, 2025)	9, 17, 22, 24
<i>Food & Drug Admin. v. All. for Hippocratic Med.</i> , 602 U.S. 367 (2024)	6
<i>Garland v. Aleman Gonzalez</i> , 596 U.S. 543 (2022)	13, 14, 15
<i>Gen. Tel. Co. of Sw. v. Falcon</i> , 457 U.S. 147 (1982)	4, 20
<i>Gen. Tel. Co. of the Nw., Inc. v. EEOC</i> , 446 U.S. 318 (1980)	15
<i>Hanon v. Dataproducts Corp.</i> , 976 F.2d 497 (9th Cir. 1992)	20
<i>Harik v. Cal. Teachers Ass'n</i> , 326 F.3d 1042 (9th Cir. 2003)	15, 16
<i>Harris v. Palm Springs Alpine Ests., Inc.</i> , 329 F.2d 909 (9th Cir. 1964)	15

<i>Heien v. North Carolina</i> , 574 U.S. 54 (2014)	10
<i>Illinois v. Gates</i> , 462 U. S. 213 (1983)	7
<i>Johnson v. City of Grants Pass</i> , 72 F.4th 868 (9th Cir. 2023).....	15, 16
<i>Juliana v. United States</i> , 947 F.3d 1159 (9th Cir. 2020)	5
<i>Kaley v. United States</i> , 571 U.S. 320 (2014)	7
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992)	6
<i>Melgar v. CSK Auto, Inc.</i> , 681 F. App'x 605 (9th Cir. 2017)	22
<i>Messner v. Northshore Univ. HealthSystem</i> , 669 F.3d 802 (7th Cir. 2012)	22
<i>N.S. v. Dixon</i> , 141 F.4th 279 (D.C. Cir. 2025)	15
<i>Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC</i> , 31 F.4th 651 (9th Cir. 2022).....	4, 22
<i>Reno v. Am.-Arab Anti-Discrimination Comm.</i> , 525 U.S. 471 (1999)	14
<i>Ruiz Torres v. Mercer Canyons Inc.</i> , 835 F.3d 1125 (9th Cir. 2016)	22
<i>Spokeo, Inc. v. Robins</i> , 578 U.S. 330 (2016)	5
<i>Tejeda-Mata v. INS</i> , 626 F.2d 721 (9th Cir. 1980)	7, 9
<i>United Farm Workers v. Noem</i> , 785 F. Supp. 3d 672 (E.D. Cal. 2025).....	17
<i>United States v. Cantu</i> , 519 F.2d 494 (7th Cir. 1975)	19
<i>United States v. Mariscal</i> , 285 F.3d 1127 (9th Cir. 2002)	10
<i>United States v. Miguel</i> , 368 F.3d 1150 (9th Cir. 2004)	10
<i>United States v. Montano</i> , 250 F.3d 709 (9th Cir. 2001)	12
<i>United States v. Murillo-Gonzalez</i> , 524 F.Supp.3d 1139 (D.N.M. 2021).....	18
<i>United States v. Quintana</i> , 623 F.3d 1237 (8th Cir. 2010)	19
<i>United States v. Sharpe</i> , 470 U.S. 675 (1985)	8

<i>Victor G. v. Lyons</i> , No. 26-cv-119, 2026 WL 127733 (D. Minn. Jan. 17, 2026).....	11
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011)	passim
<i>White v. Symetra Assigned Benefits Serv. Co.</i> , 104 F.4th 1182 (9th Cir. 2024).....	4
<i>Wolin v. Jaguar Land Rover N. Am., LLC</i> , 617 F.3d 1168 (9th Cir. 2010)	20
<i>Zimmerman v. Cedars-Sinai Med. Ctr.</i> , No. 5:23-CV-01124, 2024 WL 5274600 (C.D. Cal. Dec. 18, 2024).....	22

Statutes

8 U.S.C. § 1226(a)	11
8 U.S.C. § 1229.....	14
8 U.S.C. § 1252(f)(1).....	13
8 U.S.C. § 1357.....	14
8 U.S.C. § 1357(a)(2)	passim
8 U.S.C. §§ 1221–31	13, 14
8 U.S.C. §§ 1225–1226.....	14

Rules

Fed. R. Civ. P. 23(a)	4
Fed. R. Civ. P. 23(a)(1).....	15
Fed. R. Civ. P. 23(a)(3).....	19
Fed. R. Civ. P. 23(b)(1)(A).....	25, 26
Fed. R. Civ. P. 23(b)(2).....	21, 23, 24

Regulations

8 C.F.R. § 236.21(c)(1).....	11
8 C.F.R. § 287.8(c)(2)(ii)	passim

INTRODUCTION

Petitioner and Plaintiffs MJMA and Victor Cruz Gamez (“Plaintiffs”) seek to certify two classes of individuals who allegedly have been or will be arrested without a warrant in violation of the statute and regulation that govern warrantless immigration arrests. They contend class-wide relief is necessary to vindicate “their rights and liberty in accordance with U.S. law.” ECF 60 at 3. However, since Plaintiffs began pursuing class-wide relief on January 9, 2026, the Department of Homeland Security (“DHS”) through Immigration and Customs Enforcement (“ICE”) Senior Official Performing the Duties of the Director Todd Lyons clarified the agency’s policy and practice in conducting warrantless immigration arrests. Preliminary Injunction Hr’g (Feb. 4, 2026) [hereinafter PI Hr’g], Ex. 1 at 2 [hereinafter “Lyons memo”] (“This memorandum serves as a reminder of this essential authority and provides guidance for the lawful and consistent exercise of warrantless arrest authority for civil violations of immigration laws.”). The Lyons memo, issued on January 28, 2026, definitively directs ICE officers to make probable cause findings in accordance with 8 U.S.C. § 1357(a)(2) and 8 C.F.R. § 287.8(c)(2)(ii). Put simply, the Lyons memo is the very relief Plaintiffs seek in this class action. Plaintiffs now bear the formidable burden of demonstrating why the Court should certify two classes to provide forward-looking relief to the group of people the Lyons memo endeavors to protect. Plaintiffs cannot do so.

First, Plaintiffs lack standing for both classes. Second, the class wide injunctive relief sought is precluded by the Immigration and Nationality Act (“INA”). Third, Plaintiffs do not satisfy the requirements under Rule 23 to certify a class, and

this is especially true in light of the Lyons memo. Fourth, Plaintiffs propose fail-safe classes, which are impermissible. Fifth, Plaintiffs fail to meet their burden under Rule 23(b). Accordingly, the Court should deny Plaintiffs' motion for class certification.

BACKGROUND

I. Factual Background

Defendants incorporate by reference the factual background in their Response in Opposition to Motion for Preliminary Injunction. Dkt. 70 at 10–11.

II. Procedural History

On October 30, 2025, MJMA filed a petition for a writ of habeas corpus challenging her stop, arrest, and resulting detention as unlawful. Dkt. 1. On December 2 and 3, 2025, the Court held a two-day evidentiary hearing during which nine witnesses testified. Before testimony began on December 2, MJMA indicated her intention to supplement her pleading to include class allegations in addition to filing motions to certify a class and for a preliminary injunction. The habeas claims remain pending.

On January 9, 2026, MJMA along with Plaintiff Victor Cruz Gamez, filed four motions: a Motion to Supplement the Pleading, a Motion for a Preliminary Injunction, a Motion for Class Certification, and a Motion to Reset the Briefing Schedule. Plaintiffs' supplemental complaint alleges that Defendants have a policy and practice of making warrantless arrests in Oregon in violation of 8 U.S.C. § 1357(a)(2), 8 C.F.R. § 287.8(c)(2)(ii), the *Accardi* doctrine, and the *Castanon Nava* Broadcast Policy. Dkt. 68 ¶¶ 85–96.

On February 4, 2026, the Court provisionally certified the Unassessed Escape Risk Class and preliminarily enjoined “Defendants and their agents from enforcing their policy or practice of making warrantless civil immigration arrests in the District of Oregon without a pre-arrest individualized determination by the arresting agent of probable cause that the person being arrested is likely to escape before a warrant can be obtained, as required by 8 U.S.C. § 1357(a)(2) and 8 C.F.R. § 287.8(c)(2)(ii).” Dkt. 82 at 2–3.

Before the Court is Plaintiffs’ Motion for Class Certification. Dkt. 60. Plaintiffs move to certify two classes pursuant to Federal Rule of Civil Procedure 23:

WARRANTLESS ARREST CLASS: All person since September 28, 2025, who have been arrested or will be arrested in the District of Oregon for alleged immigration violations without a warrant and without a pre-arrest, individualized assessment of probable cause that the person is in the United States unlawfully and that the person poses a flight risk.

UNASSESSED ESCAPE RISK SUBCLASS: All person since September 28, 2025, who have been arrested or will be arrested in the District of Oregon for alleged immigration violations without a warrant and without a pre-arrest, individualized assessment of probable cause that the person poses a flight risk.

Id. at 2. Plaintiffs request that MJMA and Victor Cruz Gamez be designated as class representatives. *Id.*

LEGAL STANDARD

The class action “is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v.*

Dukes, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). To fall within this narrow exception, Plaintiffs, as the party seeking class certification, must affirmatively demonstrate their compliance with Rule 23 by a preponderance of the evidence. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022). “[A]ctual, not presumed, conformance” with Rule 23 is “indispensable[.]” *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982), and certification is proper only if the Court is satisfied “after a rigorous analysis” that Plaintiffs have shown that each requirement of the rule has been met. *Wal-Mart*, 564 U.S. at 350–51. Thus, Plaintiffs “must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23[.]” *White v. Symetra Assigned Benefits Serv. Co.*, 104 F.4th 1182, 1192 (9th Cir. 2024) (cleaned up).

To merit class certification, Plaintiffs must demonstrate each element of Rule 23(a) is met: (1) the class is so numerous that joinder is impractical (“numerosity”); (2) there are questions of law or fact common to the class (“commonality”); (3) the claims or defenses of the named plaintiff are typical of claims or defenses of the class (“typicality”); and (4) the named plaintiffs and counsel will fairly and adequately protect the interests of the class (“adequacy of representation”). Fed. R. Civ. P. 23(a). Rule 23(a) also requires that “a class representative must be part of the class” he seeks to certify. *Wal-Mart*, 564 U.S. at 349. Additionally, the proposed class must also qualify under one of the subsets of Rule 23(b). *AmChem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

ARGUMENT

I. Standing

A motion to certify a class should be denied when the named plaintiff does not have standing. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978–79 (9th Cir. 2011); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016), *as revised* (May 24, 2016) (“That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class ‘must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.’”) (citation omitted).

“Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood.” *Spokeo*, 578 U.S. at 338. This constitutional limitation requires plaintiffs to demonstrate they have standing to sue so that courts do not operate as an open forum for “general complaints about the way in which government goes about its business.” *Allen v. Wright*, 468 U.S. 737, 760 (1984), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). “To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision.” *Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020).

To establish injury in fact, a plaintiff must show that he suffered “an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc.*, 578 U.S. at 339 (quoting

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)); see *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024) (“[T]he injury must affect ‘the plaintiff in a personal and individual way’ and not be a generalized grievance.”) (quoting *Lujan*, 504 U.S. at 560)). “[W]hen a plaintiff seeks prospective relief such as an injunction, the plaintiff must establish a sufficient likelihood of future injury.” *All. for Hippocratic Med.*, 602 U.S. at 381. “[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983).

Here, the named representatives cannot demonstrate standing for either proposed class. MJMA and Mr. Cruz Gamez have not demonstrated they suffered an injury-in-fact that would make them members of the Warrantless Arrest Class. That is, neither named representative was arrested without a probable cause determination that he or she was “in the United States in violation of any such law or regulation[.]” See 8 U.S.C. § 1357(a)(2). Additionally, Plaintiffs have not demonstrated standing with respect to the Unassessed Escape Risk Class for the same reasons they did not demonstrate standing to establish a likelihood of success on the merits necessary for a preliminary injunction.

A. Neither named representative has suffered an injury-in-fact to be a member of the Warrantless Arrest Class.

Neither MJMA nor Mr. Cruz Gamez are members of Plaintiffs’ Warrantless Arrest Class. Plaintiffs have alleged no facts that indicate they were arrested “without a pre-arrest, individualized assessment of probable cause that the person [was] in the United States unlawfully.”

Under section 1357(a)(2), immigration officials “have power without warrant . . . to arrest any alien in the United States, if [they have] reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest.” *Id.* “The phrase ‘has reason to believe’ has been equated with the constitutional requirement of probable cause.” *Tejeda-Mata v. INS*, 626 F.2d 721, 725 (9th Cir. 1980) (citations omitted).

Establishing probable cause “is not a high bar[.]” *Kaley v. United States*, 571 U.S. 320, 338 (2014). “It ‘requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.’” *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018) (quoting *Illinois v. Gates*, 462 U. S. 213, 243–44 (1983)). “Because probable cause deals with probabilities and depends on the totality of the circumstances, it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules.” *Wesby*, 583 U.S. at 57 (citation modified).

i. MJMA

MJMA is not a member of the Warrantless Arrest Class because she has not demonstrated that officers did not have probable cause that she was in the United States unlawfully before they arrested her. The arresting officers testified how they encountered the van, which was registered to an owner with an immigration history that indicated he was in the country unlawfully, MJMA was traveling during the early morning hours of October 30, 2025, in an agricultural area known to employ people without lawful status. *See* Dkt. 70 at 23–25 (summary of testimony). When

MJMA refused to provide her identity, the officers, having reasonable suspicion that she was in the United States unlawfully, *see* Dkt. 70 at 23–25, were permitted to detain her for an investigatory detention to determine who she was. *See Adams v. Williams*, 407 U.S. 143, 146 (1972) (“A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.”).

During that investigatory detention, facial recognition technology indicated MJMA was a potential match for someone who “could potentially be out of status or have some kind of immigration violation in the system.” MJMA Evidentiary Hr’g 430:21–432:1 (Dec. 3, 2025). As the investigatory detention continued, biometrics then confirmed that MJMA had overstayed her visa and lacked status to remain in the United States. MJMA Evidentiary Hr’g 436:4–13; *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (holding that investigative stop is justified while officers “diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant”). The evidence in the record demonstrates officers had probable cause that MJMA was in the country unlawfully when they arrested her. Therefore, MJMA is not a member of the Warrantless Arrest Class because officers did have probable cause that she was in the country unlawfully when they arrested her.

ii. Victor Cruz Gamez

Mr. Cruz Gamez's own declaration and testimony indicate the officers had probable cause that he was present in the country unlawfully. Mr. Cruz Gamez testified that when he was pulled over, officers asked him multiple times if he was Victor Cruz Gamez. PI Hr'g 25:13–17. It was only after Mr. Cruz Gamez confirmed that he was in fact Victor Cruz Gamez that officers directed him to exit the vehicle. PI Hr'g 26:2–8. Mr. Cruz Gamez then provided officers with his ID card, which further corroborated his identity as Victor Cruz Gamez—the very name officers asked about when they pulled him over. PI Hr'g 26:15–17. When Mr. Cruz Gamez was unable to provide the officers with any evidence that he was lawfully present in the United States, he was handcuffed and placed in the officers' vehicle. PI Hr'g 26:18–28:8. Mr. Cruz Gamez further testified that the officers were looking at a photo and discussing whether Mr. Cruz Gamez was the person they were looking for. PI Hr'g 28:12–20.

Even if the officers were looking for a different Victor Cruz Gamez, that mistake of fact does not negate the probable cause they had that Mr. Cruz Gamez was unlawfully present in the United States. Fourth Amendment precedent is instructive on determining the reasonableness of officers' actions in conducting immigration arrests under 8 U.S.C. § 1357(a)(2). *Tejeda-Mata v. Immigr. & Naturalization Serv.*, 626 F.2d 721, 725 (9th Cir. 1980) (“The phrase ‘has reason to believe’ [in § 1357] has been equated with the constitutional requirement of probable cause.”); *see also Escobar Molina v. U.S. Dep’t of Homeland Security*, No. CV 25-3417,

2025 WL 3465518, at *13 (D.D.C. Dec. 2, 2025) (applying Fourth Amendment arrest standards to warrantless immigration arrest under 8 U.S.C. § 1357(a)(2)). Under the Fourth Amendment, “a search or seizure may be permissible even though the justification for the action includes a reasonable factual mistake.” *Heien v. North Carolina*, 574 U.S. 54, 57 (2014). “A mere mistake of fact will not render a stop illegal, if the objective facts known to the officer gave rise to a reasonable suspicion that criminal activity was afoot.” *United States v. Miguel*, 368 F.3d 1150, 1153 (9th Cir. 2004), *overruled on other grounds by United States v. Gasca-Ruiz*, 852 F.3d 1167 (9th Cir. 2017) (quoting *United States v. Mariscal*, 285 F.3d 1127, 1131 (9th Cir. 2002)).

Here, the objective facts known to the officers when they encountered Mr. Cruz Gamez reasonably gave rise to probable cause. The officers specifically asked for “Victor Cruz Gamez.” That they asked for someone by the same full name as Mr. Cruz Gamez is indicative of the officers’ reasonable belief that the driver of the car was whom they were looking for. Mr. Cruz Gamez was then unable to provide the officers with any evidence that he was in the country lawfully. At that point, officers had developed probable cause that Mr. Cruz Gamez was in the country without lawful status to remain.

Any argument that Mr. Cruz Gamez could not be arrested because he received a bona fide determination and deferred action on his U-visa application also does not undermine the officers’ probable cause. Though not binding precedent, a number of courts, including this District, have held that continued detention is unlawful for individuals who have been granted deferred action on their U-visa applications. *E.g.*,

B.D.A.A. v. Bostock, No. 6:25-cv-02062-AA, 2025 WL 3484912, at *8 (D. Or. Dec. 4, 2025);¹ *Victor G. v. Lyons*, No. 26-cv-119, 2026 WL 127733, at *3 (D. Minn. Jan. 17, 2026). However, arrest and continued detention are two distinct actions under the INA. See 8 U.S.C. § 1226(a) (“On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General (1) may continue to detain the arrested alien; (2) may release the alien . . .”). Mr. Cruz Gamez’s deferred action did not invalidate the officers’ probable cause because deferred action does not preclude arrest. Arrest is a necessary function of placing an individual in removal proceedings, which is also not precluded by receiving deferred action. See *e.g.*, 8 C.F.R. § 236.21(c)(1) (explaining that a grant of DACA “does not preclude DHS from commencing removal proceedings”).

Because the officers had probable cause that Mr. Cruz Gamez was in the United States unlawfully before they arrested him, Mr. Cruz Gamez is not a member of the Warrantless Arrest Class. The Court must deny Plaintiffs’ attempt to certify the Warrantless Arrest Class since neither of their named representatives are class members.

¹ Though *B.D.A.A.* found ICE violated 8 U.S.C. § 1357(a)(2) for not conducting a “flight risk assessment,” the court there did not make a finding that officers did not have probable cause that the petitioner was in the United States in violation of immigration laws. 2025 WL 3484912, at *8. The petitioner’s deferred action was not considered at all in concluding 8 U.S.C. § 1357(a)(2) was violated.

B. Plaintiffs have not met their burden to show there is a policy or practice of conducting unlawful warrantless arrests in Oregon.

Plaintiffs have not established there is a uniform policy or practice that Defendants conduct warrantless immigration arrests without probable cause findings that the alien is unlawfully present in the United States and that there is a reasonable likelihood he will escape before a warrant can be obtained.

In particular, Plaintiffs have not demonstrated that there is a policy or practice to not make the requisite probable cause findings before making a warrantless arrest.² The evidence Plaintiffs rely on consists of media statements, newspaper articles that do not all pertain to arrests in Oregon, and declarations from habeas petitioners. Plaintiffs present testimony from only two individuals who were arrested by immigration officers and allege they are class members—MJMA and Mr. Cruz Gamez. The evidence put forth does not demonstrate that it is more likely than not that a pattern or practice to conduct warrantless arrests without the requisite probable cause findings exist. *See United States v. Montano*, 250 F.3d 709, 713 (9th Cir. 2001) (“Under the preponderance of the evidence standard, the relevant facts must be shown to be more likely true than not.” (citations and quotations omitted)).

² Defendants recognize the Court has already found that Plaintiffs demonstrated standing by establishing a pattern or practice that Defendants conduct “warrantless arrests without individualized determinations of flight risk.” Dkt. 82 at 2. Defendants reassert their previous standing arguments to preserve their appeal rights on the issue. While Defendants raise their standing argument here, they also incorporate by reference the arguments made in their briefing and during the hearing on the preliminary injunction. *See generally* Dkt. 70 at 12–28; PI Hr’g 158:6–180:20.

This is especially true in light of the Lyons memo, which explicitly requires ICE officers to make and document such findings. Similarly, Plaintiffs have not demonstrated that injury is imminent given that the Lyons memo directs ICE officers to do the very thing Plaintiffs allege would cause them injury if not done: make the requisite probable cause determinations before arresting an alien. Plaintiffs have not demonstrated the policy is pretextual, nor have they demonstrated it will be outrightly ignored by immigration officers. Accordingly, the likelihood of a future injury would be speculative at best. Lastly, Plaintiffs have not demonstrated that the constellation of arrests they allege constitutes a policy or practice of not making the requisite probable cause determinations is a final agency action. Again, this is especially true in light of the Lyons memo, which is a clearly defined statement of what the agency's policy is. Because Plaintiffs lack standing, they cannot represent a class.

II. The INA bars class-wide injunctive relief.

Section 1252(f)(1) bars the injunctive relief Plaintiffs seek. That provision states “no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of” all statutory provisions governing the inspection, apprehension, examination, exclusion, or removal of aliens.” 8 U.S.C. § 1252(f)(1). The Supreme Court held that this provision “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.” *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022); *see also* 8 U.S.C. §§ 1221–31 (providing the covered statutory provisions). In *Aleman Gonzalez*, the

Supreme Court made clear that § 1252(f)(1) “prohibits federal courts from granting classwide injunctive relief” but does not preclude injunctive relief on behalf of a particular individual alien. *Id.* (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481–82 (1999)).

“Putting these terms together, § 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. “[T]he operation of the provisions is a reference not just to the statute itself but to the way that it is being carried out.” *Id.* Here, Plaintiffs claim that Defendants are not apprehending, detaining, and commencing removal proceedings against aliens in accordance with the law. Yet, section 1252(f)(1) prohibits class-wide injunctions challenging apprehension and detention of aliens under 8 U.S.C. §§ 1225–1226, as well as initiation of removal proceedings under 8 U.S.C. § 1229. Although Plaintiffs allege violations of 8 U.S.C. § 1357(a)(2), which is not a provision specifically referenced in § 1252(f)(1), the INA’s prohibition on class-wide injunctions under § 1252(f)(1) still applies because enjoining Defendants’ warrantless arrest authority under 8 U.S.C. § 1357 necessarily interferes with operation of sections 1225, 1226, and 1229.

Any restrictions on Defendants abilities to conduct arrests restricts “the way that” sections 1225, 1226, and 1229 are “being carried out” by the Government on a class-wide basis. *Gonzalez*, 596 U.S. at 550. Thus, even if the Court agrees with Plaintiffs that the arrests are unlawful, the Court is “barred by § 1252(f)(1) from

entering a class-wide injunction preventing such arrests and detention.” *N.S. v. Dixon*, 141 F.4th 279, 290 (D.C. Cir. 2025) (citing *Gonzalez*, 596 U.S. at 552–53).

III. Plaintiffs fail to meet all Rule 23(a) requirements.

A. Neither proposed class is sufficiently large to warrant class wide relief.

“To satisfy the numerosity requirement a proposed class must be ‘so numerous that joinder of all members is impracticable.’” *Johnson v. City of Grants Pass*, 72 F.4th 868, 886 (9th Cir. 2023), *rev'd and remanded sub nom. on other grounds by City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520 (2024) (quoting Fed. R. Civ. P. 23(a)(1)). “For purposes of this requirement, ‘impracticability’ does not mean ‘impossibility,’ but only the difficulty or inconvenience of joining all members of the class.” *Id.* (quoting *Harris v. Palm Springs Alpine Ests., Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964) (quotation omitted). “There is no specific number of class members required.” *Id.* (citing *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980)). “However, proposed classes of less than fifteen are too small while classes of more than sixty are sufficiently large.” *Id.* (citing *Harik v. Cal. Teachers Ass’n*, 326 F.3d 1042, 1051–52 (9th Cir. 2003)).

In an attempt to make their class sufficiently large, Plaintiffs conjecture anyone with or without lawful immigration status could be a class member. To support this conclusion, Plaintiffs rely on newspaper articles that detail arrests in other states, not Oregon. Evidence from arrests in other states is not evidence that there is an unlawful policy or practice in Oregon or that individuals would be at risk of such a policy or practice. The mere fact that DHS has increased its immigration

enforcement also does not bear Plaintiffs' burden in demonstrating a sufficient number of people have been or will be arrested in violation of 8 U.S.C. § 1357(a)(2) and 8 C.F.R. § 287.8(c)(2)(ii). Their burden is to show that there is a policy or practice of conducting warrantless arrests without making the requisite probable cause determinations. Without specific evidence about how many allegedly unlawful warrantless arrests have been conducted, the number of overall immigration arrests is meaningless.

Importantly, Plaintiffs have only presented a handful of individuals who were allegedly arrested without the necessary probable cause determinations. Some of that evidence was testimony from third parties who were not the subject of the enforcement action. Even assuming each of those individuals was arrested in violation of the statute, that is not sufficiently large to warrant class-wide relief. *See Harik*, 326 F.3d at 1051–52. In sum, Plaintiffs have failed to demonstrate that either proposed class is “so numerous that joinder of all members is impracticable.” *Johnson*, 72 F.4th at 886.

B. The proposed classes lack the commonality required for certification under Rule 23(a)(2).

“Any competently crafted class complaint literally raises common questions.” *Wal-Mart*, 564 U.S. at 349 (citation omitted). Satisfying the commonality element requires more: a plaintiff must “demonstrate that the class members have suffered the same injury[.]” *Id.* at 349–50 (cleaned up). “What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of

the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” *Id.* at 350 (citation and internal quotations omitted).

i. Plaintiffs fail to establish a uniform policy or practice that is common to the proposed classes.

Plaintiffs have not established there is a uniform policy or practice that Defendants conduct warrantless immigration arrests without probable cause findings that the alien is unlawfully present in the United States and that there is reason to believe he will escape before a warrant can be obtained. Defendants incorporate by reference the arguments made in their briefing and during oral argument on the preliminary injunction.³ *See generally* Dkt. 70; PI Hr’g Tr.

Namely, to the extent Plaintiffs argue that Defendants do not make probable cause determinations of unlawful status and likelihood to escape at all, this is plainly undercut by the issuance of the Lyons memo, which explicitly directs officers to make these determinations. *Contra Escobar Molina*, 2025 WL 3465518, at *33 (finding commonality was met where plaintiffs were challenging “whether defendants were making pre-arrest individualized assessments for flight risk *at all*, across the entire class” (emphasis added)); *United Farm Workers v. Noem*, 785 F. Supp. 3d 672, 725 (E.D. Cal. 2025) (finding commonality was met where plaintiffs contended that Border Patrol was not performing probable cause escape determinations “at all”).

³ Though Defendants recognize the Court has already found that Plaintiffs were likely to succeed on the merits of establishing such a pattern or practice, Defendants seek to preserve their appeal rights on the issue by reasserting those arguments here.

Whether the Lyons memo permissibly interprets what Congress meant by requiring a likelihood to escape determination is not a question to be decided in this class action challenging whether probable cause determinations are made, not whether the factors the officers considered demonstrate an alien is likely to escape before a warrant can be obtained. The memo clearly directs officers to make the very determination Plaintiffs challenge officers do not make.

ii. No common questions satisfy commonality for the class claims.

To the extent Plaintiffs argue that the Lyons memo is the wrong interpretation of the statute and therefore has no bearing on whether there are common questions for the class, they are wrong. Not only does delving into whether the Lyons memo is a lawful interpretation of the statute raise an entirely different question than the one this lawsuit presents, but determining whether arrests were violative of the statute under the Lyons memo is inherently fact specific. Because the Lyons memo does not present a dispositive list of factors for officers to consider, each likelihood to escape determination is necessarily unique.

Take for example an alien who attempts to drive away from an immigration officer during an investigative stop. Fleeing from an officer in a vehicle is indicative of a likelihood to escape before a warrant can be obtained under long-standing precedent and the Lyons memo. *Compare Contreras v. United States*, 672 F.2d 307, 309 (2d Cir. 1982) and *United States v. Murillo-Gonzalez*, 524 F.Supp.3d 1139, 1151 (D.N.M. 2021), *aff'd*, No. 22-2123, 2024 WL 3812480 (10th Cir. Aug. 14, 2024) (citing *United States v. Quintana*, 623 F.3d 1237, 1241 (8th Cir. 2010)), *with* Ex. 1 at 4

(listing “attempts to evade officers” and “the subject’s ability and means to promptly depart the scene of the encounter . . .”). See *United States v. Cantu*, 519 F.2d 494, 497 (7th Cir. 1975) (warrantless arrest was proper for alien in a moving car, who was highly mobile and possessed the capacity to change momentarily their location and direction). An officer could reasonably reach the conclusion that someone who attempts to flee by car would be likely to escape under case law and the Lyons memo. But the only way the Court could determine whether the officer’s conclusion was correct is by analyzing the specific facts and circumstances surrounding the arrest.

Even if the Lyons memo improperly interpreted what Congress intended by requiring a likelihood to escape determination, that does not necessarily mean that all determinations made in accordance with the Lyons memo are unlawful. The Court would have to inquire into the facts and circumstances of each individual arrest to determine whether the factors considered indicated an alien was likely to escape before a warrant could be obtained. Each question Plaintiffs present necessarily requires an individualized determination of the facts and circumstances surrounding every arrest of a putative class member. Because there are no uniform answers to the questions Plaintiffs present, Plaintiffs fail to demonstrate the commonality prong of Rule 23.

C. The named representatives’ claims are not typical of the Warrantless Arrest Class.

Typicality requires a party to show that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). This requirement “assure[s] that the interest of the named

representative aligns with the interests of the class.” *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). “The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Id.* Thus, “a class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” *Falcon*, 457 U.S. at 156. A named plaintiff does not satisfy the typicality requirement when his “unique background and factual situation require him to prepare to meet defenses that are not typical of the defenses which may be raised against other members of the proposed class.” *Hanon*, 976 F.2d at 508.

Plaintiffs seemingly assert that named representatives were arrested without warrants and without the requisite probable cause findings and that they are somehow at risk for the same alleged injury occurring in the future. Dkt. 60 at 13. As discussed above, the named representatives have not demonstrated they were arrested without probable cause determinations that they were in the country unlawfully. *See* Section I *supra*. Accordingly, they lack standing with respect to the Warrantless Arrest Class. This shows named representatives cannot be typical of the members of the Warrantless Arrest Class.

Similarly, because Plaintiffs lack standing with respect to the Unassessed Escape Risk Class for the reasons discussed above as well as those put forth in the

briefing and oral argument on the preliminary injunction, they are not typical of the Unassessed Risk Class.⁴ Plaintiffs fail to demonstrate typicality for either class.

D. Plaintiffs are not adequate representatives of the classes.

For similar reasons, Plaintiffs fail to demonstrate that named representatives are adequate class representatives. Rule 23(a)(4) requires that the named parties be able to “fairly and adequately protect the interests of the class.” *Amchem Prods. Inc.*, 521 U.S. at 625. “A class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *Id.* at 625-26 (cleaned up). The nature of class certification under Rule 23(b)(2) amplifies the need to confirm the commitment of the class representatives, because members of a Rule 23(b)(2) class are not afforded the right to opt out of the class and are bound by any judgment. *See Crawford v. Honig*, 37 F.3d 485, 487 n.2 (9th Cir. 1994), *as amended on denial of reh’g* (Jan. 6, 1995) (“In a Rule 23(b)(2) class action for equitable relief, the due process rights of absent class members generally are satisfied by adequate representation alone.”); *Wal-Mart*, 564 U.S. at 362 (“[Rule 23(b)] provides no opportunity for (b)(1) or (b)(2) class members to opt out[.]”).

For the same reasons Plaintiffs fail to meet the commonality and typicality requirements, named representatives do not fairly and adequately protect the Warrantless Arrest Class’s interests because, at the very least, neither has proven they were arrested without a probable cause determination that they were in the

⁴ *See generally* ECF 70 at 12–28; PI Hr’g 158:6–180:20; *supra* section I.B.

country unlawfully. *See Zimmerman v. Cedars-Sinai Med. Ctr.*, No. 5:23-CV-01124, 2024 WL 5274600, at *9 (C.D. Cal. Dec. 18, 2024), *reconsideration denied*, No. 5:23-CV-01124, 2025 WL 819060 (C.D. Cal. Jan. 30, 2025) (“So the Court begins its adequacy analysis by noting that, for the same reasons Plaintiffs’ claims lack typicality, Plaintiffs are inadequate representatives; they do not have an incentive to pursue claims where they have no injury or where there is little to no overlap in proof.”); *cf. Escobar Molina*, 2025 WL 3465518, at *35 (relying on declarations with specific facts the court thought indicated there was not consideration of escape risk).

IV. Plaintiffs’ classes are impermissible fail-safe classes.

“A court may not . . . create a ‘fail safe’ class that is defined to include only those individuals who were injured by the allegedly unlawful conduct.” *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (citing *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016) (internal quotation marks omitted)); *Melgar v. CSK Auto, Inc.*, 681 F. App’x 605, 607 (9th Cir. 2017) (“A fail-safe class is commonly defined as limiting membership to plaintiffs described by their theory of liability in the class definition such that the definition presupposes success on the merits.”). “Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.” *Olean Wholesale Grocery Coop., Inc.*, 31 F.4th at 669 (citing *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012)).

Here, both classes are impermissible fail-safe classes. *Melgar*, 681 F. App’x at 607 (noting that Ninth Circuit caselaw “appears to disapprove of the premise that

a class can be fail-safe”). To be a member of either class, a putative plaintiff must be arrested in violation of 8 U.S.C. § 1357(a)(2) and 8 C.F.R. § 287.8(c)(2)(ii) because the class definitions incorporate the required probable cause findings of removability and likelihood to escape. The injury—being arrested without either required probable cause determination—defines the class.⁵ Anyone who is a class member is entitled to relief. Plaintiffs cannot prevail on certification for the fail-safe classes they propose.

V. Plaintiffs have not met their burden under Rule 23(b)(2).

A class may be maintained under Rule 23(b)(2) only if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). The requirements cannot be met here.

As discussed at length in Defendants’ written response and oral argument opposing the preliminary injunction, Plaintiffs have not demonstrated that there is a policy or practice that Defendants conduct warrantless arrests in Oregon without making probable cause determinations that individuals are likely to escape before a warrant can be obtained. *See generally* Dkt. 70; PI Hr’g Tr. And since the issuance of the Lyons memo, Plaintiffs have not established such a policy or practice exists. PI Hr’g Tr. The Lyons memo unequivocally directs officers to make such determinations.

⁵ Though the Unassessed Escape Risk Class only requires arrest without a pre-arrest individualized assessment of probable cause that a “person poses a flight risk,” it similarly is a fail-safe class because a failure to make other probable cause finding is dispositive in violating 8 U.S.C. § 1357(a)(2) and 8 C.F.R. § 287.8(c)(2)(ii).

Ex. 1 at 4 (“The immigration laws authorize immigration officers to effectuate civil immigration arrests without a warrant where there is probable cause to believe that: (1) the subject is a removable alien; and (2) the subject is “likely to escape” before a warrant for his arrest can be obtained. These determinations *must* be made before a warrantless arrest is effectuated.” (emphasis added)).

The record is especially devoid of evidence that Defendants do not make probable cause determinations that aliens are unlawfully present in the United States before conducting warrantless arrests. Indeed, named representatives fail to demonstrate they fall into the Warrantless Arrest Class. *See* discussion *supra* Section I.

Any argument that the Lyons memo incorrectly interprets 8 U.S.C. § 1357(a)(2) is not at issue in this case. And even if the Lyons memo misinterprets Congress’s meaning of an escape determination, this argument does not satisfy Rule 23(b)(2). Because there is overlap between the Lyons memo and precedent interpreting 8 U.S.C. § 1357(a)(2) regarding factors considered, the Court would need to individually analyze the factors officers considered in arresting every potential class member. Consequently, Plaintiffs cannot show that a likelihood to escape determination made in conformity with the Lyons memo is a “general policy and practice of conducting warrantless arrests without probable cause” they can challenge. *Escobar Molina*, 2025 WL 3465518, at *35.

VI. Plaintiffs have not met their burden under Rule 23(b)(1)(A).

In addition to Rule 23(b)(2), Plaintiffs claim that they meet Rule 23(b)(1)(A)’s requirements. A class may be maintained under Rule 23(b)(1)(A) only if prosecuting

separate actions “would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct” for the Defendants. In other words, Rule 23(b)(1)(A) “certification is appropriate when the class seeks injunctive or declaratory relief to change an alleged ongoing course of conduct that is either legal or illegal as to all members of the class.” *Adair v. England*, 209 F.R.D. 5, 12 (D.D.C. 2002) (citing 5 Moore’s Federal Practice § 23.41[4] (3d ed. 2000)).

Plaintiffs argue “the instant case presents ‘[a] “core example” of an action under 23(b)(1)(A)” because they purport Defendants have a policy and practice of “mak[ing] warrantless arrests in Oregon without the required probable cause determinations.” Dkt. 60 at 19. Plaintiffs plainly challenge whether probable cause determinations are made, not what those determinations consist of.⁶ In light of the Lyons memo, which clearly directs officers to make the required probable cause determinations, Plaintiffs cannot show relief would “change an alleged ongoing course of conduct that is either legal or illegal as to all members of the class.” *Adair v. England*, 209 F.R.D. 5, 12 (D.D.C. 2002) (citing 5 Moore’s Federal Practice § 23.41[4] (3d ed. 2000)). Indeed, the Lyons memo already provides Plaintiffs with the

⁶ Plaintiffs also argue “[i]ndividual actions challenging and seeking to define the Defendants’ authority to do so present a significant risk of varying adjudications defining obligations and requirements in a manner that is confused and inconsistent, resulting in some individuals being afforded their counsel rights while others are impeded or obstructed from accessing counsel altogether.” Dkt. 60 at 19. Access to counsel is not at issue in the present matter. Plaintiffs do not explain how separate actions challenging whether an individual’s warrantless arrest was conducted with the requisite probable cause determinations “would create a risk of . . . inconsistent or varying adjudications.” See Fed. R. Civ. P. 23(b)(1)(A).

relief they are seeking. And any argument that a determination made in accordance with Lyons memo violates the statute and regulation requires a probing assessment of the factors that officers considered in conducting each individual warrantless arrest. *See supra* Sections III.B.ii., IV. These case-by-case determinations are more appropriate for individual actions. Accordingly, bringing individual actions would not “create a risk of . . . inconsistent or varying adjudications” such that it “would establish incompatible standards of conduct” for Defendants. Fed. R. Civ. P. 23(b)(1)(A).

CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court deny Plaintiffs’ Motion for Class Certification.

Respectfully submitted this 20th day of February, 2026.

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