IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PLAINTIFFS MOISES JAVIER AGUILAR PERALTA, F.M., S.T., AND JOSE ARMANDO DE LEON ZAPATA, on behalf of themselves and all others similarly situated, Plaintiffs, v. DEPARTMENT OF HOMELAND SECURITY, MARKWAYNE MULLIN, in his official capacity, IMMIGRATION AND CUSTOMS ENFORCEMENT, TODD M. LYONS, in his official capacity, ROBERT LYNCH, in his official capacity, CUSTOMS AND BORDER PROTECTION, RODNEY S. SCOTT, in his official capacity, BORDER PATROL, MICHAEL W. BANKS, in his official capacity, Defendants.	No.: 2:26-cv-00337 District Judge Sarah D. Morrison Magistrate Judge Chelsey M. Vascura **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PROVISIONAL CLASS CERTIFICATION**

INTRODUCTION

This Court should certify Plaintiffs' proposed class. Plaintiffs have standing to bring these claims. The injuries named Plaintiffs suffered as a result of Defendants' policy and practice of conducting unlawful warrantless arrests without a probable cause determination of likelihood of escape required by 8. U.S.C. § 1357(a)(2), which are detailed in Plaintiffs' Response to Defendant's Motion to Dismiss and Reply in Support of Plaintiffs' Motion for a Preliminary Injunction, Dkt. 46, ("Pls.' Reply"), are sufficiently similar to the class as a whole. Defendants'

ongoing policy and practice of individual officers making warrantless immigration arrests based solely on probable cause of an individual's removability establishes that Plaintiffs face a substantial likelihood of future harm. Finally, Defendants' own data and a wealth of media reporting substantiate that the class of individuals injured by Defendants' unlawful arrest policy, pattern and practice in Ohio is sufficiently numerous such that joinder is impracticable.

ARGUMENT

I. Plaintiffs Have Standing to Pursue Their Claims as Class Representatives

As discussed in more detail in Plaintiffs' Reply, Plaintiffs can pursue their claims as class representatives because they have standing to pursue their claims. Pls.' Reply at. p.16-18. Plaintiffs with nine other individuals submitted declarations containing knowledge of immigration arrests that show Defendants have been and continue to effectuate mass civil immigration arrests pursuant to an unlawful policy and practice of making warrantless immigration arrests without determining by probable cause the individual was likely to escape before a warrant could be issued. Plaintiffs also cite numerous statements from Defendants' representatives corroborating the existence of this policy, and courts around the U.S. have found such a policy to exist. *Escobar Molina v. U.S. Dep't of Homeland Sec.*, 811 F. Supp. 3d 1, 43 (D.D.C. 2025) (finding this practice "originates from the top"); *see also Nava v. Dep't of Homeland Sec.*, 435 F. Supp. 3d 880, 901 (N.D. Ill. 2020) (finding inference that "ICE's alleged policy and practice of failing to comply with a specific, mandatory, unambiguous statutory provision" exists); *M-J-M-A- v. Hermosillo*, No. 6:25-CV-02011-MTK, 2026 WL 562063, at *21 (D. Or. 2026) (Defendants' public statements demonstrate "Defendants' decisionmaking process to engage in this unlawful conduct"); *Ramirez Ovando v. Noem*, 810 F. Supp. 3d 1209, 1235 (D. Colo. 2025) (finding "[A]n agency policy of effecting warrantless immigration arrests under § 1357(a)(2) without…individualized flight risk.'").

Plaintiffs' likelihood of being unlawfully arrested again is more than just hypothetical because Defendants act pursuant to an unlawful policy and practice. *See Am. C.L. Union v. Nat'l Sec. Agency*, 493 F.3d 644, 689 n.2 (6th Cir. 2007) ("A 'genuine threat' of enforcement of a policy against a plaintiff who is demonstrably subject to that policy supports standing.").

To be clear, Defendants do not refute Plaintiffs' factual allegations that Defendants effectuate massive numbers of civil immigration arrests without inquiring into well-established escape risk indicators—including indicators this court has noted in previous cases— such as community ties and employment. *See United States v. Pacheco-Alvarez*, 227 F. Supp. 3d 863, 890 (S.D. Ohio 2016). Rather, Defendants rely on the January 28, 2026, Todd Lyons Memorandum ("Lyons Memo"),[1] which "merely serves as a reminder" of federal law, to assert warrantless arrests without escape risk analyses are unlawful. This memo purports to redefine the escape risk criteria so vaguely and broadly they may encompass virtually every immigrant that would be stopped. Lyons Memo, Dkt. 29-3; *see also* Pls' Reply, at p. 8-10. This memo thwarts the very analysis performed by this Court, other federal courts, and even immigration judges, who have historically used "likelihood of escape" and "escape risk" terminology interchangeably. *See Pacheco-Alvarez*, 227 F. Supp. 3d at 889 (discussing the "flight-risk determination" in the INA).

Furthermore, Defendants do not even purport to follow this guidance, which focuses the escape risk analysis on whether the individual "is unlikely to be located at the scene of the encounter *or another clearly identifiable location once an administrative warrant is obtained*." Lyons Memo, at p. 3 (emphasis added). Without asking any questions to ascertain an individual's place of residence, employment, family, or community ties, there can be no significant argument

[1] Memorandum from Todd Lyons, Senior Off. Performing Duties of the Dir. to All ICE Personnel (Jan. 28, 2026), https://immpolicytracking.org/policies/ice-issues-guidance-on-arrest-warrants-and-warrantless-arrests/#/tab-policy-documents.

that Defendants ever attempted to determine whether they could locate Plaintiffs or Declarants at another "identifiable location." *Hussen v. Noem*, -- F.Supp. --, ¶ 46 (D.D.C. 2026) ("I conclude that Defendants have a policy authorizing their officers to arrest individuals without probable cause to believe that the arrestee had committed a crime or was likely to escape before a warrant could be obtained). Rather, the Lyons Memo directs DHS officers to consider factors that go solely to whether the person is removable as evidence of an individual's likelihood of escape when making a warrantless arrest. Lyons Memo, 2-5.

The Lyons Memo only supports what the record overwhelmingly establishes: Defendants have a policy and practice of making warrantless arrests without probable cause of likelihood of escape. Plaintiffs' affidavits demonstrate all four have been injured as a result of that policy. Decl. of F.M., Dkt. No. 12-1; Decl. of S.T., Dkt. No. 12-4; Decl. of Peralta, Dkt. No. 12-3; Decl. of Zapata, Dkt. No. 12-2. While past injury is not sufficient, alone, for standing, it does constitute "evidence bearing on whether there is a real and immediate threat of repeated injury.'" *Grendell v. Ohio Supreme Ct.*, 252 F.3d 828, 833 (6th Cir. 2001) (quoting *Lyons*, 461 U.S. at 102). As such, Plaintiffs have standing to litigate this case as class representatives.

II. Section 1252(f)(1) Does Not Bar Classwide Injunctive Relief

Eight U.S.C. § 1252(f)(1) does not prohibit this Court from ordering classwide injunctive relief. As a threshold matter, Defendants argue in their Opposition, Dkt. 29, that § 1252(f)(1) prohibits "class-wide orders that enjoin or restrain" certain policies and practices. Defendants do not acknowledge the application of § 1252(f)(1) to Plaintiffs' other requested remedies: a declaratory judgment, vacatur of agency action, and the expungement of records collected and maintained about Plaintiffs and class members. Dkt. 1, p. 34. By failing to argue the application of

§ 1252(f)(1) to Plaintiffs' other claims, Defendants concede that § 1252(f)(1) does not wholesale bar class certification in those claims.

Defendants rightly concede that § 1252(f)(1) does not bar Plaintiffs' request for a stay of agency action under 5 U.S.C. § 705, vacatur of Defendants' policy and practice, and a declaratory judgment. Every court that have addressed this issue concluded § 1252(f)(1) does not apply to stays and vacatur of agency action under the APA. Section 1252(f)(1) is "nothing more or less than a limit on injunctive relief." *Reno*, 525 U.S. at 481. Nor do Defendants, as noted above, contend that it prohibits Plaintiffs' other requested relief in their Complaint, such as classwide declaratory relief. *See also N.S.*, 141 F.4th at 290 n.7 ("This court has stated . . . that § 1252(f)(1) 'does not proscribe issuance of a declaratory judgment[.]'") (quoting *Make the Rd. New York v. Wolf*, 962 F.3d 612, 635 (D.C. Cir. 2020)).

Defendants concede that 8 U.S.C. § 1357(a)(2), the statute at issue and under which Plaintiffs' claims fall, is not covered by § 1252(f)(1). Defendants argue classwide injunctive relief is nevertheless barred by § 1252(f)(1) because Plaintiffs' claims implicate other statutes covered by § 1252(f)(1), namely, 8 U.S.C. §§ 1226 and 1229. Both claims are unfounded.

Section 1226 cannot be invoked to bar Plaintiffs' § 1357(a)(2) claims. Section 1226 covers civil immigration arrests pursuant to a warrant, 8 U.S.C. § 1226(a), arrests made after revocation of bond or parole, 8 U.S.C. § 1226(b), and mandatory detention protocols for arrests made pursuant to detainer requests (which require probable cause determinations) for individuals in criminal custody, 8 U.S.C. § 1226(c)-(d). Section 1229 governs the initiation of removal proceedings, which Plaintiffs do not address at all in any of their claims. Plaintiffs seek classwide injunctive relief is limited to enjoining Defendants' unlawful policy and practice of making warrantless arrests without probable cause determination of escape risk in violation of § 1357(a)(2). The relief

Plaintiffs request would not "enjoin or restrain the operation" of any covered provision, including §§ 1226 and 1229. Further, many courts have found that, where a court requires the government to comply with § 1357(a)(2), such collateral effects, such as prompting DHS to rely more on administrative warrants under § 1226(a), do not run afoul of § 1252(f)(1). *See Castanon-Nava v. U.S. Dep't of Homeland Sec.*, No. 25-3050, 2026 WL 1223250, at *6 (7th Cir. 2026); *Garland v. Aleman Gonzalez*, 596 U.S. 543, 553 n.4 (2022) ("a court may enjoin the unlawful operation of a provision *that is not specified in § 1252(f)(1)* even if that injunction has some collateral effect on the operation of a covered provision") (emphasis in original); *Texas v. U.S. Dep't of Homeland Sec.*, 123 F.4th 186, 209–11 (5th Cir. 2024) (§ 1252(f)(1) does not prohibit injunctive relief to remedy violations of § 1357(a)(3) even if it may have a collateral effect on the government's operations under § 1225 and § 1226); *Noem v. Al Otro Lado*, — U.S. —, 146 S.Ct. 604, 223 (2025) ("Our court has repeatedly held that § 1252(f)(1) does not prohibit an injunction simply because of collateral effects on a covered provision.").

Defendants' reliance on *N.S. v. Dixon*, 141 F.4th 279, 284 (D.C. Cir. 2025) is misplaced. At issue in *Dixon* was whether U.S. Marshalls were authorized to make civil immigration arrests including arrests "made with a warrant pursuant to 1226(a) and the detention of any [noncitizen] charged with any crimes listed in 1226(c)." *Id*. at 290. The plaintiff in *Dixon* was arrested on a criminal violation, a probable cause determination was made that he fell within the mandatory detention provisions of 8 U.S.C. § 1226(c), and a U.S. Marshall made a civil immigration arrest. The issue in *Dixon* addressed whether classwide injunctive relief could bar U.S. Marshalls from making immigration arrests, including those pursuant to criminal convictions requiring mandatory detention under § 1226(c), a statute clearly covered by § 1252(f)(1).

Plaintiffs' proposed class does not implicate statutes covered by § 1252(f)(1). Plaintiffs do not seek to prevent the federal government from exercising authority to make lawful civil immigration arrests, which are distinguishable. *Kidd v. Mayorkas*, 734 F. Supp. 3d 967, 986 (C.D. Cal. 2024)("[t]here is a clear distinction between the authority to issue warrants under 1226(a) and the one to execute arrests under 1357."). Nor do Plaintiffs seek to enjoin Defendants' authority to initiate removal proceedings under 8 U.S.C. § 1229. Plaintiffs seek only to enjoin Defendants' unlawful policy and practice of warrantless immigration arrests without a probable cause determination that the person is likely to escape before a warrant can be issued.

III. Plaintiffs' Class May Be Properly Certified Pursuant to Fed. R. Civ. P. 23(b)

Class certification is appropriate under Rule 23(b)(2) because Defendants have engaged in a policy of conducting warrantless arrests without probable cause determinations that the individual is likely to escape before a warrant can be issued with respect to all members of Plaintiffs proposed class and "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, at 360 (2011) (internal citation omitted).

Eight U.S.C. § 1357(a)(2) and 8 C.F.R. § 287.8(c)(2)(ii) mandate immigration officials making a warrantless arrest have probable cause that the person is (1) present in the United States in violation of immigration laws and (2) likely to escape before a warrant can be obtained. The probable cause determinations are necessary and separate. 8 C.F.R. § 287.8(c)(2)(ii). Although establishing probable cause is "not a high bar[,]" *Kaley v. United States*, 571 U.S. 320, 338 (2014), it requires "more than a mere suspicion[.]" *United States v. Alfano*, 838 F.2d 158, 162 (6th Cir. 1988) (internal citations omitted). While numerous factors may be considered in probable cause analysis of escape risk, community ties have consistently been held as relevant to this

determination. *Escobar Molina*, 811 F.Supp 3d at 31, *United States v. Abdi*, 2005 WL 6119695, at *6 (S.D. Ohio 2005), rev'd on other grounds, 463 F.3d 547 (6th Cir. 2006) (no probable cause for flight risk where defendant, inter alia, owned business and lived with his then-pregnant wife and two children); *Pacheco-Alvarez*, 227 F. Supp. 3d at 890 (no probable cause of flight risk where defendant had a stable job, lived with fiancée, and helped raise her kids).

Where Defendants attempt to show their undertaking of probable cause determinations and the "fact-intensive" nature of class members' cases, Defendants assert facts, arguably mustered as post hoc bases, that demonstrate their failure to assess probable cause determination of escape risk. Defendants repeatedly conflate removability factors with escape risk factors and others point to highly vague, attenuated, and post-arrest factors.[2] *See* Pls' Reply, at 7-16.

In addition to ignoring the law, *see supra* p. 3-4, Defendants' analysis of escape risk is so malleable it may be effectively construed against and beyond any alien unlawfully present. Such application treats this prong of the law as "mere verbiage" and "render[s] the limitations on warrantless arrests created by 8 U.S.C. §§ 1226(a) and 1357(a)(2) meaningless." *Pacheco-Alvarez*, 227 F.Supp 3d at 889 *citing* 8 U.S.C. § 1357(a)(2) and *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1007 (N.D. Ill. 2016). Defendants may refer to these assessments as probable cause determinations of escape risk, but they are not. Their focus on individualized facts to oppose class certification

[2] Where Defendants state criteria other than immigration law violations, they use vague allegations of *knowledge* of arbitrary investigations into removability, Decl. of Steven Vorholt, Doc. #29-2, at ¶) 9-12, the act of driving a vehicle *formerly registered* to another person who was an associate of another person alleged to be a member of Tren de Aragua, Decl. of Steven Vorholt, Doc.# 29-2 at ¶) 5-8, and an unspecified narcotics investigation for which no criminal charges are referenced despite allegations of a powdery substance observed post-arrest. Decl. of Steven Vorholt, Doc. # 29-2 at ¶) 9-15. Defendants also use "reluctance" to answer questions, despite Defendants referring to these encounters as consensual, when during a "consensual encounter," officers "may generally ask questions of that individual . . . as long as the police do not convey a message that compliance with their requests is required." *Florida. v. Bostick*, 501 U.S. 429, 435 (1991).

misses the point of Defendants' policy and practice which affects class members regardless of individual circumstances and is "generally applicable to the class." *Steele v. United States*, 159 F. Supp. 3d 73, at 81 (D.D.C. 2016) (internal citations omitted).

Plaintiffs' grounds for relief are premised on Defendants' failure to conduct probable cause determinations of escape risk at all. Plaintiffs' proposed class members are unified by the common injury of warrantless arrests without probable cause determinations of escape risk and Defendants' overarching unlawful policy impacts class members as a whole.

IV. Rule 23(a) Requirements Are Satisfied In This Case

Defendants' policy and practice of making warrantless arrests without a probable cause determination that a person is likely to escape before a warrant can be issued impacts and injures class members regardless of individual circumstances and has been adequately shown by Plaintiffs. Defendants' January 2026 "Lyons Memo," Lyons Memo at 2-5, demonstrates this policy which parallels Defendants' practices of conflating § 1357(a)(2) probable cause determinations and expanding the definition of escape risk to a definition that may foreseeably include *any* encounter. *See supra* p. 3-4; Pls' Reply at p. 8-10. Plaintiffs have further established a sample of class members unified in their injury and impact from Defendants' policy and practice of conducting warrantless arrests without probable cause determinations of escape risk, regardless of individual circumstances. F.M. Decl. Dkt. 12-1, ¶¶ 14-16.; Zapata Decl. Dkt. 12-2, ¶ 20-22; Peralta Decl., Dkt. 12-3, ¶¶ 51-53; S.T. Decl., Dkt. 12-4 ¶ 31; Velasquez Decl., Dkt. 12-8, ¶ 20-22, 32; I.A. Decl., Dkt. 12-10, ¶ 21; Y.R. Decl., Dkt. 12-11 ¶ 25. Finally, Defendants' own declarations demonstrate a disregard of the requirements of § 1357(a)(2), as they reference factors relevant only to removability prior to arrest.

Plaintiffs satisfy the requirements of Rule 23(a) necessary for class certification. On numerosity, Plaintiffs have established Defendants' policy and practice of making warrantless arrests without a probable cause determination of escape risk against class members, regardless of individual facts, as explained above. Furthermore, this policy and practice has been maintained amid thousands[3] of ICE arrests in Ohio since April 22, 2025, substantiating Plaintiffs' assertion that impracticability of joinder is certain here. *Golden v. City of Columbus*, 404 F.3d 950, 966 (6th Cir. 2005). "Plaintiffs need not demonstrate that it would be impossible to join all the putative class members; rather, they need simply show that joinder would be difficult or inconvenient." *Swigart v. Fifth Third Bank*, 288 F.R.D. 177, 183 (S.D. Ohio 2012). Accordingly, numerosity is established.

As to commonality, Defendants' established policy affects and injures all class members regardless of individual facts or circumstances, and "is the focus of the litigation." *Graham v. Chumleys of Columbus, LLC*, No. 2:15-CV-136, 2016 WL 11787458, at *3 (S.D. Ohio 2016) (internal citations omitted). Individuals need not be "identically situated" and the questions pertaining to Defendants' policy are "substantially related to the resolution of the litigation" such that commonality is met. *Swigart*, 288 F.R.D. at 183 (internal citations omitted).

Like commonality, the underlying facts need not be exactly the same to establish Plaintiff's claims are typical of the class as a whole "provided there is a common element of fact or law." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quoting *Senter*, 532 F.2d at 525

[3] Danae King, *'Wrong place, wrong time?' Over 500 Ohio ICE arrests were 'collateral'*, COLUMBUS DISPATCH (Apr. 10, 2026), https://www.dispatch.com/story/news/politics/2026/04/10/ice-arrests-skyrocket-including-thosedetained-as-collateral/89523780007/; Lynn Tramonte, *Hearing on Federal Civil Immigration Enforcement Proposed Code Changes,* Testimony before Columbus Cty. Council R. & P. Comm., *at p.2, (*Feb. 17, 2026), https://static1.squarespace.com/static/68460a37f903140728c2ab29/t/699706e54923ab32bb4497c8/1771505381430/Final+Hearing+Document_LAT+Version.docx.pdf.

n.31). Commonality and typicality do not require filtering which class members' circumstances validated a probable cause determination, as individual factors which may support a probable cause finding are separate from whether a probable cause assessment was made. *See id.* Plaintiffs' class maintain common elements necessary for satisfying typicality here – that is, that they were all arrested without a warrant or probable cause determination that they were likely to escape before a warrant could be issued. Accordingly, typicality is met here.

Plaintiffs' class representatives share the same interest and injury as other members of the class as required by Fed. R. Civ. P. 23(a), as the existence of this policy imposes substantial likelihood of arrest and re-arrest, and therefore adequacy is satisfied here.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for provisional class certification and appoint class counsel.

Dated: May 18, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2026, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

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