

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JORGE MANUEL MONTENEGRO BOHORQUEZ,

Petitioner

V.

MARTIN L. FRINK, et al.,
Respondents,

Civil Action No. 4:26-cv-02280

**PETITIONER'S REPLY TO RESPONDENTS' RESPONSE TO
ORDER TO SHOW CAUSE**

I. INTRODUCTION

Petitioner accepts the Court's order as framing the question to be decided. Petitioner does not ask this Court to revisit *Buenrostro-Mendez v. Bondi*, 166 F.4th 494 (5th Cir. 2026). Petitioner does not ask the Court to depart from its own decisions in *Ordonez v. Frink*, No. 4:25-cv-06386, 2026 WL 143153 (S.D. Tex. Jan. 20, 2026), or *Penafiel Clavijo v. Thompson*, No. 4:26-cv-01454 (S.D. Tex. Mar. 26, 2026). Petitioner asks the Court to decide a narrower question those rulings did not reach: whether mandatory detention under §1225(b)(2)(A), as applied to a noncitizen whom ICE released in November 2021, who remained at liberty and compliant for more than three and a half years, whom ICE re-detained at a voluntary check-in based solely on a change in enforcement policy, and whose detention has now passed the presumptively reasonable six-month period recognized in *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), comports with the Fifth Amendment. On the facts of this case, it does not.

II. THE COURT'S RECENT DECISIONS DO NOT FORECLOSE THIS PETITION

Respondents rest their four pages of argument almost entirely on *Buenrostro-Mendez* and on this Court's two recent decisions. Petitioner accepts the force of each and does not press the statutory, Fourth Amendment, or facial due process claims those decisions resolved. The question that remains is whether *Penafiel Clavijo*'s substantive due process holding reaches the materially different facts presented here.

It does not. This Court's holding in *Penafiel Clavijo* was expressly cabined. The Court held that pre-removal-order detention without a bond hearing did not violate substantive due process "where not exceeding the presumptively reasonable six-month period enunciated in *Zadvydas*." Order at 1–2 (Mar. 30, 2026). That qualifier is not decorative. It is the line the Court drew. Petitioner's detention is on the other side of it.

III. PETITIONER'S DETENTION HAS NOW EXCEEDED THE ZADVYDAS PERIOD

ICE took Petitioner into custody on September 4, 2025. Dkt. 5 at 2; Govt. Ex. 3. Seven months and six days have passed. The presumptively reasonable period recognized in *Zadvydas*, and on which this Court relied in *Penafiel Clavijo*, elapsed on March 4, 2026.

The trajectory removes any doubt. The Immigration Judge denied relief on March 17, 2026. Petitioner noticed an appeal to the Board of Immigration Appeals on March 27, 2026. Dkt. 5 at 2; Govt. Ex. 5. The appeal is pending. The government does not represent that briefing is complete, that argument has been scheduled, or that decision is imminent. BIA appeals routinely take nine to twenty-four months to resolve. Absent this Court's intervention, Petitioner will remain detained under §1225(b)(2)(A) not for seven months but for a year, perhaps longer, with no neutral decision-maker ever having asked whether his detention serves any legitimate purpose.

Cross the six-month line, and the constitutional calculus shifts. *Zadvydas*, 533 U.S. at 701. The government must then show, before a neutral adjudicator, that continued detention remains reasonable. The government's response does neither. It acknowledges that the BIA appeal is pending. It offers no timeline. It argues only that the delay should be blamed on Petitioner himself. That argument has a name, and it has a problem. See Part V, *infra*.

IV. AS APPLIED, §1225(b)(2)(A) CANNOT CONSTITUTIONALLY SUSTAIN THIS DETENTION

Even if the six-month line had not been crossed, Petitioner would be entitled to relief. His case is the as-applied challenge *Buenrostro-Mendez* did not address, *Demore v. Kim* did not foreclose, and this Court's prior decisions did not reach.

A. Justice Kennedy's concurrence in *Demore* is the controlling rule under *Marks*.

Demore v. Kim, 538 U.S. 510 (2003), upheld mandatory detention under §1226(c) against a facial due process challenge. No opinion in *Demore* commanded a majority on the constitutional question. Justice Kennedy, concurring, supplied the fifth vote, and his opinion controls under *Marks v. United States*, 430 U.S. 188, 193 (1977), as the narrowest rationale supporting the judgment. Justice Kennedy wrote that a noncitizen "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

Buenrostro-Mendez did not displace Kennedy's rule. *Buenrostro-Mendez* answered a statutory question: whether §1225(b)(2)(A) authorizes mandatory detention of noncitizens present without admission. 166 F.4th at 502–08. It did not hold that such detention is immune from as-applied constitutional challenge. The Fifth Circuit expressly noted that constitutional

concerns about prolonged §1225(b)(2)(A) detention were “wholly speculative” on the record before it. *Id.* at 21. Petitioner’s case makes those concerns concrete.

B. Petitioner’s continued detention is both unreasonable and unjustified.

Justice Kennedy’s two criteria are satisfied. The detention is unreasonable because it has now passed the *Zadvydas* line with a projected endpoint measured in years, not months. It is unjustified because the sole ground for mandatory detention, the manner of Petitioner’s entry in October 2021, bears no rational connection to the only legitimate purposes civil detention may serve: preventing flight and protecting the community. *United States v. Salerno*, 481 U.S. 739, 748 (1987). The government does not claim Petitioner is a flight risk. It does not claim he is dangerous. It cannot. ICE itself, applying its own standards, determined in November 2021 that Petitioner was suitable for release on parole. Govt. Ex. 2. Petitioner then spent more than three and a half years proving that determination correct: no criminal record, no missed check-ins, no missed court dates, stable residence, stable family. He was re-detained on September 4, 2025, not because he had done anything wrong, but because he appeared at a scheduled check-in after the government changed its mind about the statutory theory of his detention.

A detention system that punishes those who comply, yet fails to capture those who flee, has lost any connection to the purposes that justify civil detention.

C. Mathews balancing confirms the result.

Under *Mathews v. Eldridge*, 424 U.S. 319 (1976), the private interest is physical liberty — the most fundamental interest the Constitution protects. The risk of erroneous deprivation is total: no decision-maker has ever considered whether Petitioner, individually, needs to be detained. The probable value of a hearing is substantial and the marginal cost to the government is minimal. Immigration judges conduct bond hearings every day under §1226(a), including for

noncitizens whose equities are materially weaker than Petitioner's. The government's interest in "uniform application" of §1225(b)(2)(A) cannot outweigh a liberty interest the Constitution protects. The balance is not close.

D. Connecticut Department of Public Safety v. Doe does not help Respondents.

The government has argued, in sister cases, that an individualized hearing would be a "bootless exercise" under *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003). It would not be. *Connecticut DPS* held that procedural due process does not require a hearing on a fact that is legally irrelevant to the challenged scheme. There, current dangerousness was irrelevant to sex-offender registration, which turned only on the fact of conviction. *Id.* at 7. Immigration detention is different. Flight risk and dangerousness are not irrelevant to immigration detention; under *Salerno*, they are the only facts that can justify it. A hearing on those facts is the opposite of bootless.

V. THE GOVERNMENT'S EQUITABLE-TOLLING ARGUMENT HAS NO MERIT

Respondents argue that any delay "attributable to the exercise of [Petitioner's] right to pursue a BIA [appeal] should not be attributed to the Federal Respondents." Dkt. 5 at 3. They cite *Abu-Hamdah v. Vergara*, No. 1:25-cv-00142, 2025 WL 4089348 (S.D. Tex. Aug. 25, 2025), and *Lawal v. Lynch*, 156 F. Supp. 3d 846 (S.D. Tex. 2016) (Rosenthal, J.). Those cases do not do the work Respondents ask of them.

First, *Abu-Hamdah* and *Lawal* arise in the §1231 post-removal-order context. The detention clock in those cases begins only after an administratively final order of removal, and *Zadvydas*'s equitable-tolling framework was developed to address bad-faith delay of that clock.

Petitioner is detained under §1225(b)(2)(A), pre-final order. The §1231 tolling framework does not transplant, and neither decision suggests otherwise.

Second, even in the §1231 context, tolling is not automatic. It applies where a petitioner “prolongs his detention and delays his removal” — language that presupposes manipulation or frivolous immigration filings. Respondents do not allege either. They could not. Petitioner was granted a credible fear interview. He pursued asylum, withholding, and protection under the Convention Against Torture. The Immigration Judge denied those claims on March 17, 2026; Petitioner noticed his appeal ten days later. Exercising the statutory right of appeal that the INA itself creates is not manipulation.

Third, Respondents’ position would convert every §1225(b)(2)(A) detainee who exercises appellate rights into a perpetual detainee. That is not equitable tolling. It is indefinite detention by another name, and it is the precise result *Zadvydas* forbids.

VI. CONCLUSION

Petitioner does not ask this Court to rewrite *Buenrostro-Mendez* or to revisit its own recent decisions. He asks only that the Court apply the limits those decisions drew. *Penafiel* *Clavijo* held the line at six months. Petitioner is past it. *Demore*’s Kennedy concurrence, controlling under *Marks*, reserved the individual case where continued detention becomes unreasonable and unjustified. This is that case.

Petitioner respectfully requests that the Court grant the writ and order his immediate release on reasonable conditions of supervision, or, in the alternative, order Respondents to provide Petitioner with an individualized bond hearing before a neutral decision-maker within seven (7) days.

Respectfully submitted,

/s/ Matthew R. Mendez

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CERTIFICATE OF SERVICE

On April 10, 2026 Counsel for Plaintiff served a copy of the attached document via email, in compliance with Rule 4 of Federal Rules of Civil Procedure, upon the Respondent, Todd Blanche, in his Official Capacity as Attorney General of the United States, at USATXS.CivilNotice@usdoj.gov.

/S/ Matthew Mendez

04/10/2026

