Practice Advisory:
Habeas in the Fifth Circuit After *Buenrostro*[1]
February 23, 2026

I. Introduction

Until 2025, noncitizens who entered the United States without inspection and were later detained and placed in removal proceedings were generally considered subject to discretionary detention under 8 U.S.C. § 1226(a), and were therefore able to seek release on bond. Last July, however, the Department of Homeland Security (DHS) suddenly changed course, issuing a policy claiming that all noncitizens not lawfully admitted into the country are instead mandatorily detained under 8 U.S.C. § 1225(b)(2)(A) and are therefore ineligible for bond. In September 2025, the Board of Immigration Appeals (BIA) issued a precedential decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), cementing DHS's novel position into law.

Federal district courts across the country began receiving an onslaught of habeas petitions challenging the detention of thousands of noncitizens under the government's new interpretation of these statutes. These courts overwhelmingly agreed that the position the government had held for decades was the correct one: noncitizens detained in the interior of the United States, who do not have certain disqualifying criminal history, are subject to discretionary detention under 8 U.S.C. § 1226(a) and therefore cannot be denied a bond hearing. The government appealed many of these decisions to the circuit courts, however, and most of these appeals are still pending.[2]

On February 6, 2026, the Fifth Circuit became the first circuit court to weigh in on this issue, in *Buenrostro-Mendez v. Bondi*, No. 25-cv-20496, 2026 WL 323330 (5th Cir. Feb. 6, 2026) ("*Buenrostro*"). In a split decision with a strong dissent, the Fifth Circuit sided with DHS and the BIA to determine that all noncitizens who are present in the United States without lawful admission are subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A) during removal proceedings, rather than discretionary detention under § 1226(a). The decision overruled dozens of district court opinions in the Fifth interpreting 8 U.S.C. §§ 1225 and 1226.

On February 18, 2026, the Central District of California issued an order vacating *Yajure Hurtado*, part of its enforcement of a prior classwide declaratory judgment finding—directly contrary to the Fifth Circuit in *Buenrostro*—that 8 U.S.C. § 1226(a), not § 1225(b)(2)(A), applies to class members nationwide. *See Maldonado Bautista et al., v. Santacruz Jr. et al.*, No. 25-01873, ECF No. 116 (C.D. Cal. Feb. 18, 2026). The court ordered that all class members receive individualized notice that they "may be unlawfully detained and may seek release on bond or

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[2] The American Immigration Council and University of Iowa Federal Impact Litigation Clinic are tracking the lead appeals pending in nearly every circuit court here.

conditional parole under 8 U.S.C. § 1226(a)." *Id.* However, while the *Maldonado Bautista* ruling does apply to class members nationwide, the government is likely to assert that both immigration courts and federal district courts in the Fifth Circuit are bound by the statutory interpretation in *Buenrostro*.[3]

Nonetheless, after *Buenrostro*, habeas options still exist for noncitizens detained in the Fifth Circuit who were not legally admitted into the United States. This practice advisory discusses the habeas claims that remain available in district courts within the Fifth Circuit, suggests strategies for dealing with the statutory claim struck down in *Buenrostro*, and considers the government's likely responses to alternative claims.

II. Potential Arguments and Strategy post-*Buenrostro*

The National Immigration Project suggests a three-part approach to habeas petitions filed in district courts that are bound by *Buenrostro*: (A) lead with non-statutory claims, (B) preserve the statutory claim given the fast-evolving legal landscape, and (C) anticipate how the government's arguments will change now that petitioners are considered detained under § 1225(b)(2)(A).

A. Lead with Non-Statutory Claims

Buenrostro was a statutory interpretation opinion only. It did not consider any due process issues. *See* Oral Argument, *Buenrostro-Mendez v. Bondi*¸ No. 25-cv-20496, at 44:56–45:11 (5th Cir. Feb. 3, 2026), available at https://www.ca5.uscourts.gov/OralArgRecordings/25/25-20496_2-3- 2026.mp3 ("We have one issue before the Court now: the statutory question. . . . There's not, in other words, a due process claim here."). To differentiate from *Buenrosto*, alternate claims can seek harbor in due process, as well as other constitutional, statutory, and regulatory violations, and even the Administrative Procedure Act (APA). Indeed, even before *Buenrostro*, some district courts within the Fifth Circuit were already granting habeas petitions for similarly-situated petitioners solely on procedural due process grounds, analyzed under *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See, e.g., Lopez-Arevelo v. Ripa*, 801 F. Supp. 3d 668 (W.D. Tex. 2025) (Cardone, J.); *Vieira v. De Anda-Ybarra*, 806 F. Supp. 3d 690 (W.D. Tex. 2025) (Briones, J.); *Hernandez-Fernandez v. Lyons*, No. 25-cv-00773, 2025 WL 2976923 (W.D. Tex. Oct. 21, 2025) (Pullman, J.); *Parada-Hernandez v. Johnson*, No. 25-cv-2729, 2025 WL 3465958 (N.D. Tex. Oct. 29, 2025), *R. & R. adopted*, 2025 WL 3463682 (N.D. Tex. Dec. 2, 2025) (Kinkeade, J.).

For petitions that were already pending prior to *Buenrostro*, some judges are affirmatively issuing orders allowing petitioners to amend to "make a further filing with additional authorities or distinguishing facts," and indicating which further claims may remain viable post-*Buenrostro*. *See, e.g., Landaverde Gonzalez v. Bradford*, No. 26-cv-1125, ECF No. 5 (S.D. Tex. Feb. 17, 2026) (Eskridge, J.). Other petitioners can seek leave to amend pursuant to Fed. R. Civ. P. 15(a). *See also Petty v. Great W. Cas. Co.*, 783 F. App'x 414, 414 (5th Cir. 2019) (confirming Rule 15(a) "evinces a bias in favor of granting leave to amend").

[3] A February 11, 2026, practice advisory on *Maldonado Bautista* is available here. It will likely be updated in the coming weeks following the district court's most recent order.

1. If the petitioner entered the United States without inspection, lived here without detection, and this is their first interaction with the immigration system.

These petitioners are closest factually to *Buenrostro* itself. Rooting these petitioners' petitions in due process is the most direct way to differentiate from *Buenrostro*.

Procedural due process. If a petitioner has lived in the United States for a long time, they can argue their length of residence and ties to the community create a heightened liberty interest, and therefore they are entitled to meaningful process in the form of a bond hearing. Some district judges in the Fifth Circuit have already ordered bond hearings on this basis, notwithstanding *Buenrostro*. *See, e.g., Clemente Ceballos v. Garite*, No. 26-cv-00312, 2026 WL 446509, at *2 n.2 (W.D. Tex. Feb. 10, 2026) (Briones, J.) (holding *Buenrostro* does not change the procedural due process analysis and collecting cases); *Cumbe Lema v. De Anda-Ybarra*, No. 26-cv-249, ECF No. 7 (W.D. Tex. Feb. 9, 2026) (Cardone, J.) (similar).

Substantive due process. Petitioners with strong ties to the community and/or pathways to immigration relief, as well as no or limited criminal history, could also argue that their detention serves no lawful purpose because they are neither a danger or a flight risk. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (the only lawful purposes of immigration detention are to prevent flight risk and danger to the community); *see also Jacobo Ramirez v. Noem*, --- F.Supp.3d ----, 2025 WL 3270137, at *8–9 (D. Nev. Nov. 24, 2025) (finding petitioners who entered without inspection likely to prevail on substantive due process claim). Note, however, that this claim is likely to be more challenging than for other categories of individuals (described below) who have previously been determined not to be a flight risk or danger or who have already been granted certain immigration benefits.

2. If the petitioner was previously detained and released on recognizance.

Procedural due process. Petitioners who were previously apprehended and released on recognizance under 8 C.F.R. § 1236.1(c)(8), which requires a finding that they were not a flight risk or a danger, can argue that they should have been afforded pre-deprivation process *before* being re-detained (*i.e.* a hearing before a neutral arbiter in which the government had to show material changed circumstances justifying their re-detention). *See Morrissey v. Brewer*, 408 U.S. 471 (1972). Some district courts in the Fifth Circuit were also granting habeas petitions on this basis even before *Buenrostro* foreclosed the statutory argument. *See, e.g., Cruz-Reyes v. Bondi*, --- F.Supp.3d ----, 2026 WL 332315, at *5–7 (S.D. Tex. Feb. 3, 2026) (ordering immediate release, as "a post-deprivation bond hearing cannot cure the core violation of Mr. Cruz Reyes's due process rights"); *see also Lopez-Arevelo v. Ripa*, 801 F. Supp. 3d 668, 688 (W.D. Tex. 2025) (ordering a post-deprivation bond hearing for individuals who had been re-detained after release on recognizance); *Parada-Hernandez v. Johnson*, No. 25-cv-2729, 2025 WL 3465958, at *7 (N.D. Tex. Oct. 29, 2025) (same), *R. & R. adopted*, 2025 WL 3463682 (N.D. Tex. Dec. 2, 2025). There is also significant positive out-of-circuit case law supporting this argument. *See, e.g.*, *Ye v.*

Maldonado, No. 25-cv-6417, 2025 WL 3521298 (E.D.N.Y. Dec. 8, 2025) (ordering release of petitioners previously released on recognizance and barring re-detention without pre-deprivation process); *Singh v. Noem*, No. 26-cv-00079, 2026 WL 265670 (W.D. Wash. Feb. 2, 2026) (same); *Singh v. Albarran*, No. 25-cv-02006, 2026 WL 445713 (E.D. Cal. Feb. 17, 2026) (recommending same).

Substantive due process. Petitioners who were previously released on recognizance because there was no lawful purpose for their detention at that time (*e.g.*, they were neither a danger nor a flight risk), and for whom there have been no change in material circumstances since their release, may be able to argue there is no lawful purpose for their detention now. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). This claim has been successfully raised in the context of revocation of an order of supervision, but applies equally to petitioners who were released on recognizance. *See Rodriguez Romero v. Ladwig*, No. 25-cv-1106, 2026 WL 321437 (M.D. La. Feb. 6, 2026); *see also Jacobo Ramirez v. Noem*, --- F.Supp.3d ----, 2025 WL 3270137, at *8–9 (D. Nev. Nov. 24, 2025) (finding petitioners who entered without inspection, some previously released on recognizance, likely to prevail on substantive due process claim).

Administrative Procedure Act. Some courts have found that re-detention of individuals previously released, without material changed circumstances, is arbitrary and capricious in violation of the APA. *See, e.g., Rios v. Noem*, No. 25-cv-2866, 2025 WL 3141207, at *3–4 (S.D. Cal. Nov. 10, 2025); *see also Garro Pinchi v. Noem*, No. 25-cv-05632, 2025 WL 3691938, at *25 (N.D. Cal. Dec. 19, 2025) (finding government policy of re-detaining previously released noncitizens is likely arbitrary and capricious). *But see Santiago v. Noem*, No. 25-cv-361, 2025 WL 2792588, at *5–6 (W.D. Tex. Oct. 2, 2025) (finding decision to detain during removal proceedings not to constitute a final agency action reviewable under the APA).

3. If the petitioner was previously detained and released as an unaccompanied child.

Procedural due process. Petitioners who were previously detained and released to a sponsor[4] as unaccompanied children under the Trafficking Victims Protection Reauthorization Act (TVPRA), 8 U.S.C. § 1232, can make similar arguments to individuals previously released on recognizance. Their prior release also required a finding that they did not present a flight risk or danger. 8 U.S.C. § 1232(c)(2)(A); *see also* 6 U.S.C. § 279(b)(2)(A); 45 C.F.R. § 410.120. Accordingly, they should not be able to be re-detained without meaningful pre-deprivation process. *See, e.g., Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1177 (N.D. Cal. 2017), *aff'd sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018); *Garcia Domingo v. Castro*, No. 25-cv-00979, 2025 WL 2941217 (D.N.M. Oct. 15, 2025); *R.D.T.M. v. Wofford*, No. 25-cv-01141, 2025 WL 2686866 (E.D. Cal. Sept. 18, 2025).

[4] On the other hand, for those who entered the United States as unaccompanied children and were released after aging out of ORR custody at age 18 (rather than released to a sponsor while still a minor), a federal court order prevents ICE from re-detaining them absent materially changed circumstances. *See* Order Granting Motion to Enforce, *Garcia-Ramirez v. ICE*, No. 1:18-cv-00508, ECF No. 436 (D.D.C. Dec. 12, 2025). Practitioners are encouraged to reach out to class counsel at Clearinghouse@immcouncil.org and litigation@immigrantjustice.org.

Substantive due process. If there were no material changed circumstances since their prior release, these petitioners could make similar substantive due process arguments as those who were previously detained and released on recognizance.

Administrative Procedure Act. If there were no material changed circumstances since their prior release, these petitioners could consider making similar APA arbitrary and capricious claims as those who were previously detained and released on recognizance.

4. If the petitioner was previously detained and released on parole.

Procedural due process. Petitioners who were previously apprehended and released on parole under 8 U.S.C. § 1182(d)(5) can make similar arguments to individuals previously released on recognizance, as this statute also only permits a grant of parole upon a finding of no flight risk or danger. 8 C.F.R. § 212.5(b). These petitioners should also consider making arguments that the government failed to comply with the parole revocation procedures under 8 C.F.R. § 212(e)(2)(i) in revoking the individual's parole, violating both due process and the *Accardi* doctrine, which requires administrative agencies to follow their own procedures. *See, e.g.*, *Singh v. Taylor*, --- F.Supp.3d ----, 2026 WL 360913, at *4 (W.D. Tex. Feb. 9, 2026) ("Regardless of whether Petitioner was released on January 7, 2025, under an order of recognizance or parole, Respondents make no contention in their Response that Petitioner was given the required constitutional minima of due process. Assuming Petitioner was previously released on parole, Respondents would have had to comply with the procedures set out in 8 C.F.R. § 212(e)(2)(i)."); *see also Santoya Martinez v. Raycraft*, No. 26-cv-102, 2026 WL 274631 (W.D. Mich. Feb. 3, 2026); *Kudyrkulov v. Martin*, No. 26-cv-3035, 2026 WL 312120 (W.D. Mo. Feb. 5, 2026); *Y-Z-L-H v. Bostock*, 792 F. Supp. 3d 1123 (D. Or. 2025); *Savane v. Francis*, 801 F. Supp. 3d 483 (S.D.N.Y. 2025); *Mata Velasquez v. Kurzdorfer*, 794 F. Supp. 3d 128 (W.D.N.Y. 2025).

Substantive due process. If there were no material changed circumstances since their parole, these petitioners could make similar substantive due process arguments as those who were previously detained and released on recognizance.

Administrative Procedure Act. If there were no material changed circumstances since their prior release, these petitioners could consider making similar APA arbitrary and capricious claims as those who were previously detained and released on recognizance.

5. If the petitioner was previously detained and released on bond.

Procedural due process. Petitioners who were previously detained and released on bond (including following a pre-*Buenrostro* habeas grant in the Fifth Circuit) can similarly argue that they should have been entitled to pre-deprivation process before being re-detained. *See Matter of Sugay*, 17 I&N Dec. 637, 640 (BIA 1981) ("[W]here a previous bond determination has been made by an immigration judge, no change should be made by a District Director absent a change of circumstance."); *dos Santos v. Noem*, No. 25-cv-12052, 2025 WL 2370988, at *9 (D. Mass. Aug. 14, 2025) ("Unless and until ICE carries th[e] burden [to show changed circumstances] at a hearing before an Immigration Judge, dos Santos must be released from custody subject to [his prior] bond order"); *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 970 (N.D. Cal. 2019) (similar).

Substantive due process. If there were no material changed circumstances since their release, these petitioners could consider making similar substantive due process arguments as those who were previously detained and released on recognizance.

Administrative Procedure Act. If there were no material changed circumstances since their prior release, these petitioners could consider making similar APA arbitrary and capricious claims as those who were previously detained and released on recognizance.

6. If the petitioner has certain pending or approved affirmative applications.

Procedural due process. Petitioners who have already passed a rigorous process to obtain some immigration benefit, especially one that protects them from removal (*e.g.*, DACA, U Visa bona fide determination, or another form of deferred action) or provides them a pathway to firm status (*e.g.*, SIJS), can argue that they have a heightened liberty interest—specifically, that they reasonably expected to remain at liberty unless some material circumstance changed after they were granted that benefit. Individuals with deferred action can also argue that the government has no legitimate interest in their detention, as they cannot be removed. *See Santiago v. Noem*, No. 25-cv-361, 2025 WL 2792588 (W.D. Tex. Oct. 2, 2025) (ordering release of an individual with DACA); *see also Forsah R-Z v. Noem*, No. 26-cv-00832, 2026 WL 310069 (E.D. Cal. Feb. 5, 2026) (ordering release of an individual with SIJS deferred action); *B.D.A.A. v. Bostock*, No. 25-cv-02062, 2025 WL 3484912 (D. Or. Dec. 4, 2025) (ordering release of an individual with U Visa bona fide determination).

Substantive due process. Where the petitioner has any form of deferred action, the fact of the deferred action can be relied on primarily to demonstrate that detention serves no lawful purpose where removal is not possible. *See Guerra Leon v. Noem*, No. 25-cv-01495, 2025 WL 4113562 (W.D. La. Oct. 30, 2025) (ordering release of an individual with final removal order and SIJS deferred action); *see also Gamez Lira v. Noem*, No. 25-cv-00855, 2025 WL 2581710, at *2 (D.N.M. Sept. 5, 2025) (finding petitioner in removal proceedings with DACA likely to succeed on substantive due process claim).

7. If the petitioner was arrested without a warrant.

8 U.S.C. § 1357(a)(2) and the Fourth Amendment. If the petitioner was arrested without a warrant, the officer must have "reason to believe" the person is violating immigration laws *and* that the person will likely escape before a warrant is obtained. 8 U.S.C. § 1357(a)(2); *see also* 8 C.F.R. § 287.8(c)(2)(i)-(ii). Similarly, the Fourth Amendment requires a neutral, judicial determination of probable cause either before the arrest, in the form of a warrant, or shortly after the arrest, in the form of a prompt judicial probable cause determination. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

Where these requirements are not followed, the petitioner could bring a warrantless arrest claim arguing violations of the statute, regulations, Fourth Amendment, and APA. *See Rosado v. Figueroa*, No. 25-cv-02157, 2025 WL 2337099, at *18 (D. Ariz. Aug. 11, 2025) (recommending

immediate release because petitioner's "current detention violates her constitutional rights because her arrest was in violation of her Fourth Amendment rights"), *R. & R. adopted sub nom. Rocha Rosado v. Figueroa*, No. 25-cv-02157, 2025 WL 2349133 (D. Ariz. Aug. 13, 2025); *Munoz Materano v. Arteta*, No. 25-cv-6137, 804 F. Supp. 3d 395, 423, 426 (S.D.N.Y. 2025) (finding a violation of the Fourth Amendment where the government lacked justification for arrest); *A.B.D. v. Wamsley*, No. 25-cv-02014, 2026 WL 178306, at *11 (D. Or. Jan. 22, 2026) (finding warrantless arrest violated § 1357(a)(2) and the APA); *see also Gamez Lira v. Noem*, No. 25-cv-00855, 2025 WL 2581710, at *3 (D.N.M. Sept. 5, 2025) (finding petitioner substantially likely to prevail on Fourth Amendment warrantless arrest claim); *Urquilla-Ramos v. Trump*, No. 2:26-cv-00066, 2026 WL 475069, at *5–16 (S.D.W.V. Feb. 19, 2026) (finding petitioner's Fourth Amendment rights were violated when he was arrested by a group of masked agents and ordering release).

Note, however, that relief solely on these grounds may be limited, as the government could subsequently re-detain the petitioner with a warrant.

8. If detention becomes prolonged.

Procedural due process. Where detention under § 1225 has become unreasonably prolonged, a petitioner may argue that the length of detention itself triggers a need for additional process. The viability and scope of relief will depend on the court and the duration of detention. *See, e.g., da Silva v. Nielsen*, No. 18-cv-00932, 2019 WL 13218461 (S.D. Tex. Mar. 29, 2019) (ordering a bond hearing where pre-order detention under § 1225 lasted over a year); *N.Z.M. v. Wolf*, No. 20-cv-24, 2020 WL 2813557 (S.D. Tex. May 28, 2020) (ordering immediate release where pre-order detention under § 1225 lasted two years and three months); *see also* American Immigration Council and the Legal Aid Society, *Detention under INA § 235(b): The Statutory Scheme and Strategies for Release* (Sept. 2025), at 42–45 (collecting prolonged § 1225 prolonged detention cases by circuit).

Substantive due process. The petitioner may also argue that prolonged detention serves no lawful purpose, because as the length of detention grows, the likelihood that civil confinement is serving a lawful purpose must necessarily decrease. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

B. Preserve the Statutory Claim

The § 1225 vs. § 1226 issue is moving quickly and will be decided by other circuit courts soon. District courts outside of the Fifth Circuit have already dismissed *Buenrostro* as a split decision with a strong dissent. En banc rehearing will likely be sought in *Buenrostro*. Because we do not know what the future holds, petitioners in the Fifth Circuit should at least preserve this statutory claim in the alternative, while being candid with the court that *Buenrostro* forecloses relief on this ground for now.

C. Anticipate Government Arguments in Response

Jurisdiction. The government will likely continue to make jurisdictional arguments that 8 U.S.C. § 1252 precludes review of actions taken to arrest, detain, and commence removal proceedings. Petitioners can continue to confirm that a habeas challenge is properly brought as an action challenging unlawful detention—not the underlying immigration proceeding. *Demore v. Kim*, 538 U.S. 510, 516–17 (2003) (recognizing habeas jurisdiction over immigration detention challenges); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001) (same); *Tran v. Mukasey*, 515 F.3d 478, 482 (5th Cir. 2008) (same).

Mezei and Thuraissigiam. The government frequently argues that a person detained under § 1225(b)(2)(A) has no due process rights beyond those provided by statute, reasoning that because they have not been lawfully admitted, they are, under the so-called "entry fiction," still standing on "the threshold of initial entry." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *see also DHS v. Thuraissigiam*, 591 U.S. 103 (2020). Some district courts in the Fifth Circuit have already rejected these arguments, explaining that this principle (1) only limits noncitizens' due process rights regarding deportability, not detention, and (2) does not apply to noncitizens who have significant presence in this country. *See, e.g.*, *Santiago v. Noem*, No. 25-cv-361, 2025 WL 2792588, at *7–10 (W.D. Tex. Oct. 2, 2025); *Vieira v. De Anda-Ybarra*, 806 F. Supp. 3d 690, 698–700 (W.D. Tex. 2025); *Hernandez-Fernandez v. Lyons*, No. 25-cv-00773, 2025 WL 2976923, at *7–8 (W.D. Tex. Oct. 21, 2025); *Parada-Hernandez v. Johnson*, No. 25-cv-2729, 2025 WL 3465958, at *3–4 (N.D. Tex. Oct. 29, 2025), *R. & R. adopted*, 2025 WL 3463682 (N.D. Tex. Dec. 2, 2025). Other district courts in the Fifth Circuit, however, have already begun to adopt the government's position post-*Buenrostro*. *See, e.g.*, *Hernandez Resendiz v. Noem*, No. 25-cv-05940, 2026 WL 445497, at *2 (S.D. Tex. Feb. 17, 2026). For additional helpful caselaw, explanation, and potential replies to these arguments, *see* American Immigration Council and the Legal Aid Society, *Detention under INA § 235(b): The Statutory Scheme and Strategies for Release* (Sept. 2025), at 48 *et seq*.

Note that noncitizens who were paroled under § 1182(d)(5) or whose most recent apprehension was soon after crossing the border may face the most significant hurdles in countering these arguments. These and other petitioners should also try to identify alternative statutory, regulatory, or APA claims (*e.g.*, regarding unlawful parole revocation or warrantless arrest) where possible. Petitioners may also consider arguing that, if anything, *Mezei* and *Thuraissigiam* only limit noncitizens' procedural due process rights, not substantive due process rights. *See, e.g.*, *Gonzalez Aguilar v. Wolf*, 448 F. Supp. 3d 1202, 1207–08 (D.N.M. 2020).

Fourth Amendment. The government has also argued that warrantless arrest or Fourth Amendment challenges cannot be brought in habeas, because the nature of the arrest is not sufficiently linked to the fact of detention. *See Rice v. Gonzalez*, 985 F.3d 1069, 1070 (5th Cir. 2021) (habeas is not available to review questions unrelated to the cause of detention, nor can it be used for any purpose other than granting relief from unlawful imprisonment). Petitioners can emphasize that the Fourth Amendment claim directly challenges the legality of ongoing detention, which resulted from unlawful arrest. *See Munaf v. Geren*, 553 U.S. 674, 693 (2008) ("Habeas is at its core a remedy for unlawful executive detention."); *see also Poree v. Collins*, 866 F.3d 235, 242–43 (5th Cir. 2017).

The government may also argue that the appropriate relief following a warrantless arrest is not release, but more process. The petitioner should be prepared to articulate why release to the status quo ante is appropriate. *Cf. Rodriguez Romero v. Ladwig*, No. 25-cv-1106, 2026 WL 321437, at *8 (M.D. La. Feb. 6, 2026) (stating in the release revocation context that where a rule was intended to "avoid erroneous deprivation of a noncitizen's liberty," then "[n]othing this Court can do can retroactively cure the lack of process resulting in Petitioners' wrongful detention," and therefore ordering release).

The government may further suggest that language from *INS v. Lopez Mendoza*, 468 U.S. 1032, 1039–40 (1984) about "[t]he 'body' or identity of a defendant or respondent" never being "suppressible as a fruit of an unlawful arrest" suggests that release is not an appropriate remedy for a Fourth Amendment violation. *See, e.g.*, *Rodrigues De Oliveira v. Joyce*, No. 25-cv-0029, 2025 WL 1826118, at *5 (D. Me. July 2, 2025) (adopting this position). But *Lopez Mendoza* was not a habeas case and petitioners there did not seek release as a remedy, but termination of their removal proceedings. The Court's language was thus about the inability of individuals to avoid criminal or deportation proceedings entirely based on unlawful arrests—not their inability to avoid unlawful detention. And while release is not typically a remedy for unlawful arrest in the criminal context, these individuals—unlike noncitizens detained under § 1225(b)(2)(A)—are afforded a *Gerstein* hearing within 48 hours of arrest in which the government must justify their detention. Absent such a process, release is arguably an appropriate remedy.

Administrative Procedure Act. In addition to arguing that detention pending removal proceedings is not a final agency action, *see supra*, the government may argue that APA claims are not cognizable in habeas. But the APA itself provides that APA review may proceed in "any applicable form of legal action, including . . . writs of . . . habeas corpus." 5 U.S.C. § 703. Habeas relief is available to any person who is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Nonetheless, some practitioners also choose to style their filings as a "petition/complaint" to avoid this issue.

III. Conclusion

Attorneys should continue to monitor this issue at the Fifth Circuit and beyond. The Fifth Circuit may review *Buenrostro* en banc, while other circuit courts will soon issue their own decisions. If other circuit courts reach the same conclusion as the Fifth Circuit in *Buenrostro*, litigants in those circuits can use the approach recommended in this Practice Advisory for amended or future petitions. As always, attorneys should continue to share their experiences with one another to ensure that detained noncitizens have the best chance to obtain liberty.

Additional Resources

- American Immigration Council and the Legal Aid Society, Detention under INA § 235(b): The Statutory Scheme and Strategies for Release (Sept. 2025).
- Kennedy Center for Human Rights, ACLU of Louisiana, and ACLU of Texas, *Practice Advisory: Seeking Release from Immigration Detention in the Fifth Circuit After* Buenrostro-Mendez v. Bondi (Feb. 2026).
- National Immigration Project, Quick Guide on Habeas for SIJS Youth (updated Feb. 2026).