IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ROLAND F. KUSI, Petitioner,	§ § §	
V.	§	Case No. 3:25-cv-527-KC
KRISTI NOEM, Secretary of the U.S. Department of Homeland Security, et al., Respondents	§ § §	

PETITIONER'S REPLY TO FEDERAL RESPONDENTS' RESPONSE TO WRIT OF HABERAS CORPUS

TO THE HONORABLE KATHLEEN CARDONE, U.S. DISTRICT JUDGE:

ROLAND F. KUSI, Petitioner, through undersigned counsel, files this Reply to Federal Respondents' Response to the Petition for Writ of Habeas Corpus, and shows the Court the following:

I. INTRODUCTION

Petitioner files this Reply to clarify that his detention is governed by 8 U.S.C. § 1226(a), not Section 1225(b)(2), and to rebut Federal Respondents' reliance on *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025), the basis for Immigration Judge's denial of a bond hearing. Petitioner entered the United States on or about November 1, 2022, "arrested" by immigration officials approximately a week later, passed a "credible fear" interview and was provided Notice to Appear at a Chicago, Illinois Immigration Court for December 22, 2022. Notably, the DHS did not designate him as an arriving alien seeking admission in its Notice to Appear. Nor did DHS place him in expedited removal proceedings. ECF No. 1, p. 35; ECF No. 5-2, pp. 1-3 (Exhibit B).

Federal Respondents attempt to recast this case as a challenge to DHS's "initial decision

to detain" Petitioner. ECF No. 5, p. 1. That is not what the Petition raises. Mr. Kusi challenges (1) the Federal Respondents' denial of any constitutionally required bond hearing, (2) violations of the Immigration and Nationality Act, including unlawful application of Section 1225(b)(2)(A) where it does not apply, (3) violations of the Administrative Procedure Act, and (4) violations of the Fifth Amendment Due Process Clause. *See* ECF No. 1, Filed Writ, pp. 1–33.

Importantly, Mr. Kusi does not have a final order of removal. He is not in expedited removal proceedings. He is not an "arriving alien." And he was not apprehended at the border while seeking admission. Federal Respondents' entire jurisdictional and statutory framework relies on misclassifying Petitioner as an "applicant for admission" under Section 1225(b)(2)(A), even though his § 1229a removal proceedings are ongoing. This Court has jurisdiction, and the detention is unlawful.

II. CONTROLLING SUPREME COURT PRECEDENT PROTECTS PETITIONER'S DUE PROCESS RIGHTS

A. The Fifth Amendment Applies to All Persons in the United States.

The Supreme Court has held: "The Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Mr. Kusi is detained at the Montana East Detention Center in El Paso, Texas. Federal Respondents do not challenge that fact.

B. Detention Must Bear a Reasonable Relation to Its Purpose.

The *Zadvydas* Court further held: "Where detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed." *Id.* at 699. In this case, an Immigration Judge determined *Matter of Yajure Hurtado* prohibited any bond hearing. ECF Doc. 1, p. 51. Federal Respondents' continued detention of Mr. Kusi is not "reasonably related to its purpose."

C. Habeas Relief Is Required When Detention Exceeds Statutory Authority.

The *Zadvydas* decision also made clear: "Once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 701. Mr. Kusi does not have a final order of removal. Federal Respondents do not address the absence of "foreseeable removal" for Mr. Kusi in their Response.

III. RESPONDENTS' RELIANCE ON § 1225(b)(2) AND *MATTER OF HURTADO* IS MISPLACED

The Immigration Judge denied bond pursuant to *Matter of Hurtado*, 29 I. & N. Dec. 216, 220 (2025). *Matter of Hurtado* concluded that "aliens … present in the United States without admission are 'seeking admission' under § 235(b)(2)(A)." *Id.* at 220. Respondents rely heavily on the statutory phrase that an alien "present in the United States who has not been admitted shall be deemed an applicant for admission." 8 U.S.C. §1225(a)(1). ECF No. 5, pp. 3-8. However, the statute requires more than mere entry without inspection. It requires the DHS's determination at the time of the encounter, and that the alien be placed into proceedings under Section 1225(b).

Here, DHS issued the NTA under Section 1229a (ECF No. 1, p. 35), not under Section 1225(b). This places Petitioner squarely in Section 1229a proceedings, governed by Section 1226, not Section 1225(b).

Federal Respondents argue Petitioner is now an "applicant for admission" because he once entered unlawfully. But the statutory scheme – interpreted correctly – does not allow DHS to retroactively reclassify a respondent in reopened removal proceedings as an arriving alien for purposes of detention. Federal Respondents' core argument—that Mr. Kusi is detained under Section 1225(b)(2) because he is an "applicant for admission"—collapses once the relevant statutory framework is accurately applied. *See* ECF No. 5, pp. 10-14. Congress constructed two distinct detention regimes, each tied to a specific procedural posture. Which statute governs is not

a matter of agency preference or post hoc recharacterization, but of statutory command. And the statute that governs the detention of a long-term Section 240 non-citizen like Mr. Kusi is 8 U.S.C. § 1226, not Section 1225(b)(2). Federal Respondents' contention to the contrary ignores the text, structure, and purpose of the Immigration and Nationality Act ("INA"), as well as decades of consistent interpretation distinguishing the two detention regimes. Federal Respondents liberally quote from *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008) in support of *Matter of Yajure Hurtado's* runaway holding but are forthcoming that *Martinez* "analyz[ed] a different INA provision not at issue here." ECF No. 5, p. 6. Notably, the Board of Immigration Appeals failed to cite *Martinez* – or its reasoning – in *Matter of Yajure Hurtado*.

1. Congress reserved Section 1225(b)(2) for initial processing during inspection at the border—not for respondents in ongoing Section 240 removal proceedings.

Congress drew a bright line between the detention of "applicants for admission" at or near the border, governed by Section 1225(b), and the detention of noncitizens already present in the United States and placed in removal proceedings, governed by Section 1226. *See Jennings v. Rodriguez*, 583 U.S. 281, 288–90 (2018) (observed that Section 1225(b) applies to aliens seeking admission into the United States, while Section 1226 governs detention of aliens already in the country pending their removal proceedings). The distinction is not a matter of discretion; rather, it reflects fundamentally different statutory purposes.

By contrast, Section 1226(a) provides discretionary detention authority pending a decision on whether the alien is to be removed, expressly encompassing respondents in Section 240 proceedings. *See Jennings*, 583 U.S. at 288 ("Section 1226 generally governs the process of arresting and detaining" aliens who were [inadmissible at the time of entry] pending their removal."). Once DHS files a Notice to Appear under Section 239 of the INA, 8 U.S.C. § 1229, and initiates removal proceedings under Section 240, 8 U.S.C. § 1229a, the detention authority

shifts to 8 U.S.C. § 1226—the statute Congress expressly designed to govern custody during ongoing removal litigation. *Jennings* draws this line sharply:

- **Section 1225** regulates *pre-admission* processing;
- **Section 1226** governs detention "pending a decision on whether the alien is to be removed," i.e., during § 240 proceedings.

See Jennings, 583 U.S. at 288-89.

There is no dispute that DHS served Mr. Kusi with a Notice to Appear in 2022, charging him under Section 212(a)(6)(A)(i) of the INA. Nor is there a dispute that that EOIR docketed the case and set hearings. These are the hallmarks of Section 240, 8 U.S.C. § 1229a proceedings. Nothing in the record suggests that DHS ever withdrew the initial NTA, terminated proceedings or reclassified him under any expedited or border-crossing provision.

Federal Respondents argue that a noncitizen who was apprehended any time after entering the country illegally, is entitled to no more due process than the statute gives him, *citing Dep't of Homeland Sec. v. Thuraissigiam,* 591 U.S. 103, (2020). ECF Doc. 5, p. 7. In *Thuraissigiam,* the Supreme Court rejected a noncitizen's due process claim, explaining that people detained at or near the border are treated as "applicants for admission" and are afforded "only those rights regarding admission that Congress has provided by statute." 591 U.S. at 140. Although *Thuraissigiam* certainly limited the scope of due process claims available to "applicants for admission," the decision's sweeping statements must be read in context. *See id.*

In addition, the noncitizen in *Thuraissigiam* was detained under *8 U.S.C. § 1225*, and an asylum officer determined that he did not sufficiently establish a credible fear, so he was placed in expedited removal proceedings. *Id.* at 140. He attempted to challenge this negative credible

fear determination through a writ of habeas corpus, in which he requested a "new opportunity to apply for asylum and other applicable forms of relief." *Id.* at 114-15.

This description reveals two key points of distinction between *Thuraissigiam* and Mr. Kusi's case. First, *Thuraissigiam* challenged the denial of his asylum claim, whereas Mr. Kusi challenges his detention. Nothing in Thuraissigiam suggests that Mr. Kusi lacks such a due process right. The second key point is that Mr. Thuraissigiam was stopped by the Border Patrol "within twenty-five yards of the border," immediately detained and released. *Thuraissigiam,* 591 U.S. at 114. Mr. Kusi was detained approximately a week after entering the country but unlike Thuraissigiam, he was released and provided a Notice to Appear in Chicago for with his wife for the I-130 interview at USCIS. ECF Doc. 1, p. 32-33. Further still, Federal Respondents wholly fail to explain the "wheres and whys" for ICE's decision to take "Petitioner back into custody" at the USCIS interview. *See* ECF Doc. 5, p. 2 ("II. Relevant Facts and Procedural History").

Perhaps the most salient problem in Federal Respondents' Response is their attempt to create a record to reclassify Mr. Kusi as "seeking admission … at the port of entry." ECF Doc. 5, p. 11.

First, Federal Respondents falsely claim that *"Petitioner's NTA shows that he was initially arrested the same day of when he unlawfully entered the United States without inspection in 2022."* ECF Doc. 2, p. 8. Federal Respondents' then double-down: "*Petitioner here was apprehended the same day he unlawfully entered the United States* ... ." ECF No. 5, p. 9.

Then again, trusting that if a falsehood is repeated enough, it becomes true, Federal Respondents claim:

> *Indeed, on the same day he unlawfully entered the United States,* a DHS officer apprehended him, processed him, and

> in the exercise of discretion, served him with an NTA charging him as inadmissible to the United States as an alien who had not been admitted or paroled.

ECF Doc. 5, p. 11 (emphasis supplied).

Really? Is the federal government's response a "boilerplate" so encompassing that key DHS documents are ignored and "facts" invented?

Foremost, DHS's Notice to Appear states that Mr. Kusi entered on **November 1, 2022**. ECF Doc. 1, p. 35. The **November 1** date is specifically identified directly under the Federal Respondents' yellow Exhibit B sticker, where it is typed that Mr. Kusi entered at or near "**Calexico, California**" on "**11/01/2022, 0600**." ECF Doc. 5-2, p. 1.

Next, Federal Respondents' Notice to Appear states that, on **November 7, 2022**, *six days after his entry*, ICE and Mr. Kusi executed receipt of the Notice to Appear. ECF No. 1, p. 35-36. Also on **November 7**, Mr. Kusi had his "credible fear" interview. ECF Doc. 5-2, p. 1.

Still more, "*on **November** 7 at 3:02 AM*" after ICE encountered Mr. Kusi "*in the El Centro Sector's area of responsibility*," ICE attempted to contact a member of Mr. Kusi's family to verify Mr. Kusi's address and telephone number in the United States. ECF Doc. 5-2, p. 2. Finally, Federal Respondents' Exhibit B states "KUSI was served with Forms I-200, I-862, I-286 and the List of Free Legal Service Providers" on **November 7, 2022**. ECF No. 5-5, p. 3.

That Mr. Kusi was "encountered" by DHS on **November 1** is not supported by Federal Respondents' own documents. Mr. Kusi entered the United States on **November 1** and was encountered by ICE on **November 7**. Federal Respondents' attempt to reclassify Mr. Kusi as "an arriving alien … seeking admission" with nonexistent facts corroborates decisions of multiple U.S. district court decisions that the BIA's decision in *Matter of Yajure Hurtado* is a flawed,

unconstitutional overreach by the federal government. Mr. Kusi should be immediately released or a bond hearing ordered by this Court.

In sum, Federal Respondents' reliance on *Thuraissigiam* is misplaced because its holding does not prohibit Mr. Kusi from pursuing his due process claim for two reasons: First, he challenges detention, not his deportability. And second, Mr. Kusi was detained in September 2025 after residing in the United States for years and denied a bond hearing in violation of due process, the INA and APA.

2. *Matter of M-S-* confirms that Section 1226 governs custody once DHS initiates Section 240 proceedings

The Attorney General's decision in *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019), is directly on point and forecloses DHS's argument. *Matter of M-S-* holds that once DHS has placed a noncitizen into Section 240 removal proceedings, the agency's detention authority is governed by Section 1226(a), not Section 1225(b). *See Id.* at 510–12. *Matter of M-S-* makes clear that the initiation of Section 240 proceedings is the statutory pivot point:

> … proceedings under section 240 of the Act [are] full removal proceedings."

Id. at 510. This principle applies with overwhelming force here. Federal Respondents cannot now retroactively disavow Section 240 and successfully claim that the detention statute applying to border inspections governs instead.

To say differently, once DHS exercised its prosecutorial discretion to place Mr. Kusi in Section 240 proceedings, it was bound by Section 1226 for custody purposes. *Id.*; *Jennings*, 583 U.S. at 288–90.

IV. JURISDICTION EXISTS UNDER § 2241

Federal Respondents' objections to jurisdiction are virtually identical to those made in all of their Responses to all other petitions challenging *Matter of Yajure Hurtado*: "Where an alien, *like this Petitioner,* challenges the decision to detain *her* in the first place or to seek a removal order against *her*, or if an alien challenges any part of the process by which *her* removability will be determined the court lack jurisdiction to review the challenge." ECF Doc. 5, p. 16. Their customary jurisdiction objections include Sections 1252(e)(3), 1252(g), and 1252(b)(9) of Title 8. None bars this Court from adjudicating Mr. Kusi's claim.

1. Section 1252(e)(3) does not bar jurisdiction.

Congress limited Section 1252(e)'s application to "an order to exclude an alien in accordance with Section 235(b)(1) [of the INA]." Federal Respondents did not commence Section 235 proceedings against Mr. Kusi. Further, the "writ of habeas corpus" provisions, Section 1252(e))2), limits application to a "petitioner [who] was ordered removed under such section." *Id.* Section 1252(e)(3) does not bar this Court's jurisdiction.

2. Section 1252(g) does not apply.

Section 1252(g) prohibits federal district courts from considering "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

The Supreme Court has "not interpret[ed] this language to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, [the Court has] read the language to refer to just those three specific actions themselves." *Jennings*, 583 U.S. at 294 *(citing Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471. 482-83.* (1999)). Thus, Section 1252(g) applies only "to protect from judicial intervention the Attorney

General's long-established discretion to decide whether and when to prosecute or adjudicate removal proceedings or to execute removal orders." *Duarte v. Mavorkas*, 27 F.4th 1044, 1055 (5th Cir. 2022) (*quoting Alvidres-Reves v. Reno*, 180 F.3d 199, 201 (5th Cir. 1999)).

The statute "does not bar courts from reviewing an alien detention order, because such an order, while intimately related to efforts to deport, is not itself a decision to execute removal orders and thus does not implicate [Section 1252(g)]." *Cardoso v. Reno.* 216 F.3d 512, 516-17 (5th Cir. 2020) (citation omitted); *accord Kong v. United States.* 62 F.4th 608, 617-18 (1st Cir. 2023) collecting cases).

Mr. Kusi is not challenging Federal Respondents' decision to execute a final removal order (there is none). Nor is Mr. Kusi challenging Federal Respondents' decision to commence or adjudicate his removal proceedings. Mr. Kusi challenges his on-going detention and enforcing his constitutional right to due process in the context of the removal proceedings – not the legitimacy of the removal proceedings or any removal order. Such claims are not barred by Section 1252(g).

3. Section 1252(b)(9) does strip jurisdiction.

Section 1252(b)(9) is another narrowly applicable provision providing:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from* any action taken or proceeding brought to remove an alien from the United States under this subchap-ter [including *§§ 1225* and *1226*1 shall be available only in judicial review of a final order under this section.

Jennings, 583 U.S. at 292 (citing 8 U.S.C. 1252(b)(9)) (emphasis added).

In *Jennings*, the Supreme Cout declined to apply an expansive interpretation of "arising from" and held that Section 1252(b)(9) did not present a bar to reviewing the immigration habeas petitioners' challenge to mandatory detention. *Id.* at 293. The Supreme Court found an expansive

interpretation of "arising from" would make "claims of prolonged detention effectively unreviewable." *Id.*

In rejecting the premise that Section 1252(b)(9) does not present a bar because "detention is an 'action taken . . . to remove' an alien," *see id. at 318* (Thomas, J, concurring), the plurality explained that, "[t]he question is not whether *detention* is an action taken to remove an alien but whether *the legal questions* in this case arise from such an action," *Id.* at 295 n.3. The plurality opinion held that the legal questions of whether mandatory detention without a bond hearing was proper were "too remote from [removal actions] to fall within the scope of Section 1252(b)(9). *Id.*

In 2019, a plurality of the Supreme Court again found that Section 1252(b)(9) did not strip it of jurisdiction to hear a group of immigrants' challenges to their detention under Section 1226(c). *See Nielsen v. Preap*, 586 U.S. 392, 402 (2019). Even more recently, a majority of the Supreme Court characterized Jennings as holding that Section 1252(b)(9) '"does not present a jurisdictional bar' where those bringing suit 'are not asking for review of an order of removal,' 'the decision ... to seek removal,' or 'the process by which ... removability will be determined." *Dept. of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 19 (2020). The *Regents* opinion omitted *Jennings'* reference to the possibility that detainees' challenges to "the decision to detain them in the first place" may also be barred by Section 1252(b)(9).

Federal Respondents' arguments are also foreclosed by post-*Jennings* Fifth Circuit decisions. In 2022, that court stated, "where review of any agency determination involves neither a determination as to the validity of [a noncitizen's] deportation orders or the review of any question of law or fact arising from their deportation proceedings, section 1252(a)(5) and (b)(9) should not operate as a bar to the district court's review." *Duarte v. Mayorkas*, 27 F.4th 1044, 1056

(5th Cir. 2022). This petition addresses questions of law from "custody proceedings" in continued detention. ECF Doc. 1, p. 51 (identified as "Custody Redetermination Proceedings").

4. Section 1252(a)(5) does not apply.

Federal Respondents do not specifically cite Section 1252(a)(5) to bar jurisdiction. However, "because jurisdiction is always first," *La. v. U.S. Dept. of Energy*, 90 F.4th 461, 466 (5th Cir. 2024), Petitioner addresses this narrowly applicable provision which "specifies that the only means of obtaining judicial review of a final order of removal, deportation, or exclusion is by filing a petition with a federal court of appeals." *Duarte v. Mayorkas*. 27 F.4th at 1051.

Section 1252(a)(5) is a "zipper clause," *id.* at 1056 (*quoting Duron v. Johnson*, 898 F.3d 644. 647 (5th Cir. 2018)), which "funnel[s] judicial review of final deportation orders ... into a single mechanism." *Id.* Thus, where there is no final removal order and a habeas petitioner's "arrest and detention claims are independent of any future removal order," Section 1252(a)(5) does not prevent the district court from hearing such claims. *Medina v. U.S. Dep't Homeland Security*, No. 17-CV-00218, 2017 WL 2954719, at *15 (W.D. Wash. Mar. 14, 2017); accord *Jennings*, 583 U.S. at 320, (Thomas, J., concurring) (describing Section 1252(a)(5)'s narrow applicability to support a broader reading of a separate jurisdiction-channeling provision, Section 1252(b)(9)).

Here, as stated above, there is no removal order to execute. With no final order of removal, Section 1252(a)(5) poses no jurisdictional bar.

5. Section 1226(e) does not bar jurisdiction.

Section 1226(e) precludes an alien from "challenging a discretionary judgment by the Attorney General or a decision that the Attorney General has made regarding detention or release." *Jennings*, 583 U.S. at 295. Section 1226(e) does not preclude "challenges to the statutory framework that permits the alien's detention without bail." *Id.* In other words, the Court retains

jurisdiction to review a non-citizen's detention insofar as that detention presents constitutional issues such as those raised in a habeas petition. *Oyelude v. Chertoff*, 125 F. Ap-p'x 543, 546 (5th Cir. 2005). Mr. Kusi's claim is that his procedural due process rights are violated based on the Federal Respondent's denial of a bond hearing under *Matter of Hurtado*.

In sum, because Mr. Kusi challenges the decision to subject him to mandatory detention without a bond hearing, this Court has jurisdiction to hear his constitutional claim.

V. DUE PROCESS REQUIRES REINSTATMENT OF THE BOND

Federal Respondents have detained Petitioner since September 26, 2025 (ECF No. 1, pp. 32, 46. The Immigration Judge denied a bond hearing based solely on *Matter of Hurtado*. The Government claims detention is not prolonged because removal proceedings are ongoing, but detention without a bond hearing exceeds constitutional bounds, particularly when:

- Petitioner has pending relief from removal;
- Petitioner is not a flight risk;
- Petitioner is not a threat to public safety; and
- DHS can proceed with removal proceedings without Petitioner's detention.

Under *Zadvydas*, *Demore*, and post-J*ennings* district court decisions across the Fifth Circuit, such detention requires immediate release or an individualized bond hearing.

VI. REMEDY

The sole remedy in habeas is release or a constitutionally adequate bond hearing.

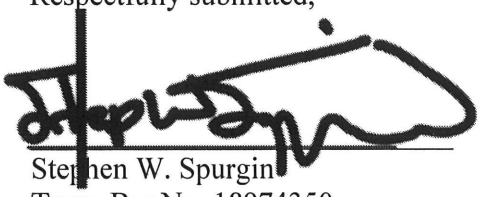
VII. CONCLUSION

FOR THESE REASONS and in the Petition, the Court has jurisdiction, Petitioner Roland F. Kusi is not properly detained under 8 U.S.C. § 1225(b)(2)(A), Federal Respondents violated the Immigration and Nationality Act, the Administrative Procedure Act, and the Due Process Clause

requiring the Court to enter an Order providing for Petitioner's immediate release from custody, or in the alternative, an individualized bond hearing,

Date: November 24, 2025

Respectfully submitted,



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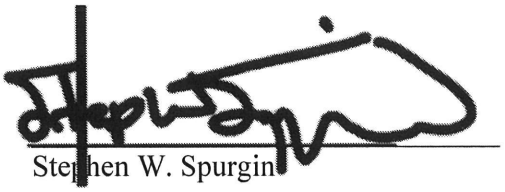
VIII. CERTIFICATE OF SERVICE

I, Stephen W. Spurgin, attorney for Petitioner, affirm that a true and correct copy of the Petitioner's Reply to Federal Respondents' Response to Writ of Habeas Corpus was served upon the Federal Respondents via the Court's ECF portal on this 24rd day of November 2025.



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