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Detention under INA § 235(b): The Statutory Scheme and Strategies for Release

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THE LEGAL AID SOCIETY

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Introduction

Immigration authorities have long invoked § 235(b) of the Immigration and Nationality Act (INA) and its predecessor statutes to justify the detention of noncitizens entering the United States.[1] The number of noncitizens detained under INA § 235(b), rather than the general detention provision, INA § 236(a), has increased exponentially in recent years.[2] The reach of § 235(b) has extended even further under the second Trump administration, as the government seeks to subject more people to expedited removal and detention without a bond hearing.

This advisory is intended for legal advocates who represent clients who are, or could be, detained under INA § 235(b). It provides an overview of § 235's inspection and detention provisions and explains how these provisions differ from detention under § 236.[3] It then provides guidance on how to seek release before the Department of Homeland Security (DHS), Executive Office for Immigration Review (EOIR), and the federal courts.

The increased frequency of detention under § 235(b) is due to three trends. First, recent years have seen record levels of contacts between newly arrived noncitizens and immigration officials at or near the U.S.-Mexico border.[4] Second, in 2018, 2019, and 2025, Supreme Court and agency decisions dramatically expanded the scope of § 235(b). As a result, the statute can now reach thousands of individuals each year who previously would have been subject to § 236(a)'s distinct detention and

1 Immigration and Nationality Act § 235(b) [hereinafter INA], entitled "Inspection of applicants for admission," is codified at 8 U.S.C. § 1225(b).

2 *See* Office of Homeland Security Statistics, Immigration Enforcement and Legal Processes Monthly Tables (Select Download Data, Immigration Enforcement and Legal Processes Monthly Tables--November 2024 table, Nationwide Credible Fear Screenings Completed by Result) https://ohss.dhs.gov/topics/immigration/immigration-enforcement/immigration-enforcement-and-legal-processes-monthly (Jan. 16, 2025) (showing over 400% increase in individuals receiving fear screenings under § 235(b) from 2014 to 2024); *see also* American Immigration Council, *A Primer on Expedited Removal*, 3 (Feb. 2025), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_primer_on_expedited_removal_0225.pdf.

3 INA § 235(b) also covers a small number of lawful permanent residents (LPRs) who are stopped at ports of entry and deemed inadmissible because of certain criminal convictions or suspected criminal activity. *See* INA § 101(a)(13)(C). Specific strategies for this group are outside the scope of this advisory.

4 For example, DHS has reported that between Border Patrol encounters and CBP encounters at ports of entry, there were more than 2 million enforcement encounters at the U.S.-Mexico border per year in fiscal years 2022, 2023, and 2024—some of the highest annual numbers on record. *See* U.S. Customs and Border Protection, Nationwide Encounters, https://www.cbp.gov/newsroom/stats/nationwide-encounters (July 16, 2025). This increase is a product of changing migration patterns and border enforcement practices. *See, e.g.,* Juliana Kim, *The U.S. set a new record for apprehensions at the southern border*, NPR (Oct. 24, 2022), https://www.npr.org/2022/10/24/1130841306/new-record-in-border-patrol-apprehensions (explaining that the number of individuals attempting to enter the United States unlawfully was higher in fiscal year 2000 than in fiscal year 2022, but that border patrol officers apprehended more individuals in 2022 due to changes in border enforcement practices).

release procedures.[5] And third, DHS' discretionary decisions have contributed to the sharp increase in § 235(b) detentions.

This trend is likely to continue. In January 2025, DHS expanded the scope of expedited removal to the fullest extent authorized by Congress, effective immediately.[6] In July 2025, DHS began taking the novel position that all "applicants for admission" are subject to § 235(b) detention, regardless of how long they have been in the country or where they are apprehended, a policy that drastically extends the reach of the statute.[7] The most recent published agency decision on the topic, from May 2025, is also a marked expansion of § 235(b)'s applicability relative to past practice. In that decision, *Matter of Q. Li*, the Board of Immigration Appeals (BIA) interprets § 235(b) to extend to individuals apprehended near the border without a warrant shortly after entering without inspection and placed in removal proceedings.[8]

A designation of § 235(b) detention can significantly restrict an individual's avenues for seeking release from immigration detention. Most notably, individuals detained under INA § 235(b)—unlike those detained under INA § 236(a)—do not have a statutory or regulatory right to a bond hearing before an immigration judge. Nor are they eligible for an administrative bond from DHS under INA § 236(a).

For these reasons, many courts, government officials, and advocates refer to § 235(b) detention as "mandatory." However, the "mandatory" designation is a misnomer.[9] Even when an individual is detained under § 235(b), DHS officials retain statutory authority to release the individual on parole under INA § 212(d)(5). Moreover, DHS has long maintained that it has discretion to choose whether an individual is detained under § 235(b) or § 236(a) in the first place.

5 *Jennings v. Rodriguez*, 583 U.S. 281 (2018); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019); *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025).

6 DHS, Designating [Noncitizens] for Expedited Removal, 90 Fed. Reg. 8139 (Jan. 24, 2025).

7 *See ICE Memo: Interim Guidance Regarding Detention Authority for Applications for Admission*, AILA (July 8, 2025), https://shorturl.at/XF71Y.

8 *Q. Li*, 29 I&N Dec. at 66. In addition, the Laken Riley Act includes provisions that purport to authorize State attorneys general to sue the federal government to prevent the release of noncitizens. *See* Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3, 3–6 (2025). States can purportedly sue for (a) failing to detain those subject to detention under INA § 235(b)(3), (b) failing to make case-by-case parole determinations before releasing under INA § 212(d)(5)(C), and (c) releasing noncitizens on bond or parole under INA § 236(f) in a manner that harms a State. *Id.*

9 Presumptive detention under INA § 235(b) should be distinguished from mandatory detention under § 236(c), which prohibits the release of individuals who are removable on certain criminal or national security grounds, except in very narrow circumstances related to witness protection.

Part 1: What Is the Scope of INA § 235?

INA § 235 provides for the inspection of noncitizens seeking admission to the United States,[10] and directs immigration authorities to undertake certain procedures if a noncitizen is deemed inadmissible.[11] The statute also authorizes the detention of noncitizens pending that inspection process and through related immigration proceedings.[12]

I. What are INA § 235's procedures for inspection and related proceedings?

INA § 235(a)(3) provides that all noncitizens "who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers."[13] During such inspection, the immigration official may require the noncitizen to provide information about their intentions, as well as information related to grounds of inadmissibility.[14] Individuals who are admitted will generally be issued a Form I-94 arrival/departure record.[15] Individuals who receive a grant of parole should also receive a Form I-94, but this document will bear a "parole" stamp that makes clear that it does not reflect a formal admission.[16]

An immigration officer may determine that the noncitizen is not entitled to admission. If an immigration officer determines that an individual has a valid, non-fraudulent entry document but is inadmissible for some other reason, then INA § 235(b)(2) directs the immigration officer to detain the individual for full removal proceedings under INA § 240.[17]

10 INA § 235(a)(3).

11 INA §§ 235(b)(1), (2).

12 INA §§ 235(b)(1)(B)(ii), (b)(1)(B)(iii)(IV), (b)(2)(A).

13 INA § 235(a)(3). INA § 235(a)(1) defines "applicant for admission" as a noncitizen "present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including [a noncitizen] who is brought to the United States after having been interdicted in international or United States waters). . . ." In turn, INA § 101(a)(13) defines "admission" to refer to "the lawful entry of [a noncitizen] into the United States after inspection and authorization by an immigration officer," excluding those paroled under § 212(d)(5), certain "alien crewmen" and lawful permanent residents returning to the United States except in limited circumstances.

14 INA § 235(a)(5); 8 C.F.R. § 235.1(f)(1).

15 8 C.F.R. § 235.1(h)(1).

16 8 C.F.R. § 235.1(h)(2); *see also* INA § 212(d)(5)(A) (stating that a grant of parole "shall not be regarded as an admission of the [noncitizen]").

17 *See* INA § 235(b)(2)(A).

If an immigration officer determines that the noncitizen is inadmissible because they lack a valid entry document, or because their entry document was procured through fraud or willful misrepresentation, and certain other criteria are met, then the immigration official may place the noncitizen in "expedited removal" proceedings under § 235(b)(1).[18]

In expedited removal proceedings, an individual may be ordered removed by a DHS official without ever seeing an immigration judge.[19] However, DHS officials are required to ask an individual if they fear persecution or torture in the country to which they would be deported.[20] If the individual responds in the affirmative, the officer may not execute the removal order and instead must refer the individual for an interview with an asylum officer.[21] If an asylum officer determines that an applicant has adequately demonstrated a basis for seeking protection, then the applicant must be afforded an opportunity to apply for asylum.[22] Typically, an individual who has a positive asylum

18 *See* INA § 235(b)(1)(A)(i); INA §§ 212(a)(7), (a)(6)(C).

19 The statute and regulations provide a process for verifying claims of citizenship, permanent residence, and asylee or refugee status. INA § 235(b)(2)(C); 8 C.F.R. § 235.3(b)(5).

20 The Biden administration attempted to change this requirement in 2024. Historically, U.S. immigration officials were required to affirmatively ask individuals in expedited removal proceedings whether they feared persecution or torture in the country to which they would be deported. *See* American Immigration Council, *Analysis of the President's 212(f) Proclamation & Interim Final Rule Restricting Asylum*, 5 (June 2024), https://www.americanimmigrationcouncil.org/sites/default/files/research/an_american_immigration_council_analysis_of_the_presidents_212f_proclamation_and_interim_final_rule_restricting_asylum.pdf [hereinafter *AIC June 2024 Fact Sheet*]. In June 2024, however, the administration issued an interim final rule that removed this requirement. *See* Securing the Border, 89 Fed. Reg. 48710 (June 7, 2024) (to be codified at 8 C.F.R. pts. 208, 235, 1208). Under that rule, individuals seeking protection had to affirmatively ask for asylum or otherwise "manifest" a fear of return. 8 C.F.R. § 235.15(b)(4). After advocacy groups filed a lawsuit challenging the Securing the Border (STB) rule, the D.C. District Court found that the "manifestation of fear" requirement was arbitrary and capricious and determined that the rule and related guidance must be "vacated and remanded to the issuing agencies under the APA." *Las Americas Immigrant Advoc. Ctr. v. DHS*, 2025 WL 1403811, at *17, 21 (D.D.C. May 9, 2025).

21 INA § 235(b)(1)(A)(ii), (b)(1)(B); 8 C.F.R. § 235.3(b)(4). Historically, some detained asylum-seekers experienced significant delays in their credible fear proceedings. Under a January 5, 2024 settlement agreement in *Padilla v. ICE*, DHS agreed to promptly refer detained asylum seekers for credible fear interviews. *See* Settlement Agreement, *Padilla v. ICE,* No. 2:18-cv-00928-MJP (W.D. Wash. Oct. 18, 2023). For more information about this lawsuit and settlement, see Northwest Immigrant Rights Project et al., *Padilla v. ICE and Delays in Credible Fear Interviews* (Mar. 20, 2024), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/padilla_practice_alert_-_032224.pdf.

22 INA § 235(b)(1)(B)(v). Prior to 2023, an applicant was required to satisfy the "credible fear" standard, defined as demonstrating a "significant possibility" that the applicant qualifies for asylum. *Id.* Under the Circumvention of Lawful Pathways (CLP) rule enacted in May 2023 and the 2024 STB rule, individuals who crossed the border between ports of entry were ineligible for asylum and subjected to either a "reasonable possibility" or a "reasonable probability" standard, both of which are more demanding than the "significant possibility" standard. *See AIC June 2024 Fact Sheet*, *supra* note 20, at 6–7; Victoria Neilson, *Changes to Asylum Eligibility Under the Biden Administration*, National Immigration Project (Oct. 1, 2024), https://nipnlg.org/sites/default/files/2024-09/Biden_asylum-changes-chart.pdf. Neither "reasonable possibility" nor "reasonable probability" is the operative screening standard for most people *currently* placed in expedited removal proceedings. *See* Defendants' Statement (ECF No. 210), *E. Bay Sanctuary Covenant v. Trump*, No. 4:18-cv-06810 (N.D. Cal. filed May 20, 2025) (noting CLP expired in May 2025 and was not extended); *Las Americas*, 2025 WL 1403811 at *14–15

screening is taken out of the expedited removal system altogether and placed into standard removal proceedings under INA § 240.[23] Under certain circumstances, U.S. Citizenship and Immigration Services (USCIS) may retain jurisdiction over the case to consider the noncitizen's asylum claim on an expedited schedule.[24]

II. Who can be placed in expedited removal proceedings?[25]

A. Statutory and Regulatory Framework

An individual may only be placed in expedited removal proceedings if:

- DHS determines that they are inadmissible under
  - § 212(a)(6)(C) (fraud or misrepresentation in procuring entry document or false claim to citizenship) ***or***
  - § 212(a)(7) (lack of valid entry document);

  and
- The noncitizen either
  - "is arriving in the United States" ***or***
  - is within the group(s) of non-"arriving" noncitizens affirmatively designated by the Attorney General as subject to expedited removal, which is statutorily limited to the following individuals:
    - those who have not been admitted or paroled into the United States ***and***
    - cannot show that they have been continuously present for the two years preceding the relevant determination of inadmissibility.[26]

(vacating portion of STB that made most recent entrants ineligible for asylum and therefore subject to the more stringent "reasonable probability" screening). However, Trump's January 2025 § 212(f) proclamation purports to do away with asylum screenings altogether for people who crossed the border on or after January 20, 2025, and leaves only a slim possibility of accessing CAT relief. *See* Proclamation No. 10888, 90 Fed. Reg 8333 (Jan. 29, 2025). Litigation on the legality of this proclamation is pending. *See RAICES v. Noem*, 2025 WL 1825431 (D.D.C. July 2, 2025), *stayed in part pending appeal*, No. 25-5243 (D.C. Cir. Aug. 1, 2025).

23 8 C.F.R. § 208.30(f).

24 *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (Mar. 29, 2022) (to be codified at 8 C.F.R. pts. 208, 212, 235, 1003, 1208, 1235, 1240).

25 For a full discussion of expedited removal, see AIC, *A Primer on Expedited Removal*, *supra* note 2; National Immigration Litigation Alliance, *Everything Expedited Removal* (Feb. 7, 2025), https://immigrationlitigation.org/wp-content/uploads/2025/04/25.02.28-ER-FINALx.pdf.

26 INA §§ 235(b)(1)(A)(i), (b)(1)(A)(iii). The regulations set forth procedural requirements that an immigration officer must follow in making the "determination of inadmissibility" and *before* executing

Thus, by statute, non-arriving noncitizens *cannot* be subjected to expedited removal if they have been admitted or paroled into the United States or if they can establish continuous presence in the United States for two years before being deemed inadmissible under INA §§ 212(a)(6)(C) or 212(a)(7).[27] While there is no explicit temporal restriction for "arriving" noncitizens in the statute, there are good arguments that, as a matter of statutory interpretation, this first category only covers people who are *currently* in the process of arriving at a port of entry in the United States.[28]

In 2004, the Secretary of Homeland Security issued a designation allowing officials to apply expedited removal procedures with regard to noncitizens who are apprehended within 100 miles of the Canadian or Mexican border and who entered the United States fewer than 14 days prior to apprehension.[29] In 2019, the first Trump administration expanded this designation to all individuals falling within the scope of the statute, though the Biden Administration later rescinded that change.[30] In January 2025, the second Trump administration restored the scope of expedited removal to the "fullest extent authorized by Congress," effective immediately.[31]

an expedited removal order, including creating a record on Form I-867AB, advising the noncitizen of the charges against them, providing an opportunity to respond before issuing and serving the expedited order on the individual, and obtaining supervisory review. 8 C.F.R. §§ 235.3(b)(2)(i), (b)(7).

27 *See* INA § 235(b)(1).

28 INA § 235(b)(1)(A)(i). *See* Plaintiff's Motion at 19–20, (ECF No. 22-1), *CHIRLA v. Noem*, No. 25-cv-872-JMC, (D.D.C. filed June 11, 2025) (citing use of present progressive tense and statutory structure), https://litigationtracker.justiceactioncenter.org/cases/chirla-v-noem-district-court/memorandum-support-motion-stay-pdf; *see also Matter of M-D-C-V-*, 28 I&N Dec. 18, 23 (BIA 2020) (interpreting "arriving" as used in 8 U.S.C. § 235(b)(2)(C)).

29 Designating [Noncitizens] for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004).

30 Designating [Noncitizens] for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019); Rescission of the Notice of July 23, 2019, Designating [Noncitizens] for Expedited Removal, 87 Fed. Reg. 16022 (Mar. 21, 2022).

31 Designating [Noncitizens] for Expedited Removal, 90 Fed. Reg 8139 (Jan. 24, 2025).

January 2025 Expedited Removal Expansion

The January 2025 notice designates two specific categories of noncitizens subject to its terms,[32] in addition to the categories already covered by the 2004 designation.[33] The result is that the following groups of noncitizens are now potentially subject to expedited removal, as per § 235(b)(1)(A):

- Any noncitizen who "is arriving" at a port of entry and is determined to be inadmissible for fraud or misrepresentation or lacking proper entry documents
- Any noncitizen who was never admitted or paroled, is encountered anywhere in the United States, and cannot prove that they have been physically present in the United States for the two years preceding the immigration officer's determination that they are inadmissible for fraud or misrepresentation or lack of proper entry documents.

On August 29, 2025, a D.C. federal court stayed the January 2025 expedited removal expansion notice, finding that existing expedited removal procedures violate the due process rights of noncitizens arrested in the interior.[34] Further litigation before the D.C. Circuit is anticipated.

Even if an individual is potentially subject to expedited removal by statute, immigration officials are not required to apply the expedited removal procedures. Immigration officials retain discretion to place the individual in full removal proceedings before the immigration court.[35] Historically, officials have exercised this discretion for various reasons, including to keep family units intact, address humanitarian concerns, and preserve limited detention and asylum screening resources.

32 *Id.* at 8140 (noting two groups who are newly subject to expedited removal: (1) noncitizens "who did not arrive by sea, who are **apprehended anywhere in the United States** more than 100 air miles from a U.S. international land border, and who have been **continuously present in the United States for less than two years**," and (2) noncitizens "who did not arrive by sea, who are **apprehended within 100 air miles from a U.S. international land border**, and who have been **continuously present in the United States for at least 14 days but for less than two years**") (emphasis added).

33 Designating [Noncitizens] for Expedited Removal, *supra* note 29.

34 *Make the Road New York v. Noem*, 2025 WL 2494908 (D.D.C. Aug. 29, 2025).

35 *See Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011); *Matter of J-A-B- & I-J-V-A,* 27 I&N Dec. 168 (BIA 2017); *Matter of M-S-*, 27 I&N Dec. at 518 n. 7; *Matter of Cabrera-Fernandez*, 28 I&N Dec. 747, 748 (BIA 2023). *But see Florida v. United States*, 660 F. Supp. 3d 1239, 1275–76 (N.D. Fla. 2023) (holding that § 236(a) "does not apply to applicants for admission apprehended at the Southwest Border" and therefore DHS does not have discretion to choose between § 236(a) and § 235 detention authorities for such noncitizens).

B. Current Practice

1. People Paroled at a Port of Entry, but Placed in Expedited Removal Proceedings at a Later Date

On January 23, 2025, Acting DHS Secretary Benjamine Huffman issued a memo entitled "Guidance Regarding How to Exercise Enforcement Discretion,"[36] (Enforcement Discretion Memo) which directs DHS to consider placing additional noncitizens who are already in the United States into expedited removal in light of the January 2025 expansion. The Enforcement Discretion Memo directs DHS to affirmatively evaluate if individuals' parole should be terminated. Officers are directed to consider applying expedited removal to people whose parole DHS terminates and to people whose § 240 removal proceedings DHS moves to terminate, as well as to any other person who is "amenable to expedited removal but to whom expedited removal has not been applied."[37] In February, Immigration and Customs Enforcement (ICE) issued a directive (ICE ER Directive) ordering officers to consider for expedited removal all noncitizens previously released by Customs and Border Protection (CBP) who have not affirmatively applied for asylum, including paroled "arriving [noncitizens]."[38]

ER After Dismissal of § 240 Proceedings: In May 2025, ICE began moving to dismiss pending § 240 proceedings in immigration courts around the country in an attempt to place more noncitizens in expedited removal proceedings. When immigration judges grant those motions,[39] ICE has issued noncitizens expedited removal orders, even where they have reserved appeal of the IJ's dismissal and thus § 240 proceedings are still legally pending. In some cases, DHS has conducted Credible Fear Interviews (CFIs) for such noncitizens despite the pendency of removal proceedings. Because this campaign of dismissals frequently has been accompanied by ICE aggressively arresting noncitizens attending their immigration court hearings, many practitioners have filed habeas petitions challenging the legality of their clients' detention pursuant to these practices with some success.[40] In July 2025, advocates also filed a systemic challenge to ICE's new policies regarding courthouse arrests and dismissals of § 240 proceedings for placement in expedited removal.[41]

36 *See* DHS, Memorandum on Guidance Regarding How to Exercise Enforcement Discretion (Jan. 23, 2025), https://www.dhs.gov/sites/default/files/2025-01/25_0123_er-and-parole-guidance.pdf.

37 *Id.* at 2.

38 *See* Feb. 18, 2025 ICE Email Directive on Expedited Removal and Nondetained Docket, https://immpolicytracking.org/policies/ice-directs-ero-officers-to-consider-expedited-removal-for-large-categories-of-noncitizens/#/tab-policy-overview.

39 For resources on opposing such motions to dismiss for the purposes of placement in expedited removal, see National Immigration Project, *Practice Alert: Protecting Noncitizens from Expedited Removal and Immigration Court Arrests* (May 30, 2025), https://nipnlg.org/sites/default/files/2025-05/alert-protecting-noncitizens-er.pdf.

40 *See infra* Part 2.II "Spotlight,"; *see, e.g.*, Petition, *Mata Velasquez v. Kurzdorfer*, No. 25-CV-493, (W.D.N.Y. filed June 6, 2025), https://www.nyclu.org/uploads/2025/06/FILED-PETITION-6-6.pdf.

41 *See* Complaint, *Immigrant Advocates Response Collaborative v. DOJ*, (ECF No. 1), No. 1:25-cv-02279 (D.D.C. filed July 16, 2025), https://immigrantjustice.org/wp-content/uploads/2025/07/IARCvDOJ-Complaint_07-16-2025_filestamped.pdf [hereinafter *I-ARC Complaint*]; *see also* Complaint, *African Communities Together v. Lyons*, No. 1:25-cv-6366, (S.D.N.Y. Aug. 1, 2025) (challenging EOIR dismissal policy).

ER After Dismissal of Affirmative Asylum Applications: In May 2025, DHS delegated authority to issue orders of expedited removal to USCIS.[42] Beginning in June 2025, some noncitizens have reported receiving letters entitled "Notice of Dismissal" from USCIS' Asylum Vetting Center stating that their affirmative asylum applications are being dismissed because of alleged expedited removal orders. Some of these letters instruct the applicants to request a CFI, while others state that a CFI appointment notice is forthcoming. While some noncitizens receiving these letters may in fact have pre-existing expedited orders of removal, in other cases it seems possible that any Form I-860 Notice and Order of Expedited Removal was issued contemporaneously with the USCIS letter.

On August 1, 2025, a federal district court stayed both the Enforcement Discretion Memo and the ICE ER Directive, finding them contrary to the statute and arbitrary and capricious.[43] The court held that the policies are unsupported by § 235(b)(i)(A)(iii)(II), because that provision excludes noncitizens who were paroled into the United States, even if that parole is later terminated.[44] The court likewise found that the policies are unauthorized by § 235(b)(1)(A)(i), concluding that a noncitizen who has been inspected at the border and paroled into the country is no longer in the process of "arriving."[45]

2. People Apprehended Within Two Years After Entry Without Inspection, but Placed in Expedited Removal Proceedings After Two Years

The Trump administration is also reportedly applying expedited removal to people who entered without inspection (EWI) and were initially encountered by ICE or CBP or were issued a Notice to Appear within two years of entry, even if they were later released and have now spent more than two years in the United States. The administration takes the position that such an arrest or any charge of removability constitutes a "determination of inadmissibility" under INA § 235(b)(1)(A)(iii) and so long as that occurred within two years of entry, the person is forever eligible for expedited removal proceedings. However, placing a person in expedited removal more than two years after they entered without inspection likely violates the statute, as advocates have argued in litigation challenging this practice.[46] Such placements also likely violate the regulations, which

42 DHS, Delegation to Director, USCIS, to Order Expedited Removal and to Enforce Immigration Laws (May 2, 2025), https://drive.google.com/file/d/1U5b5XpiLIrV2dj2ISxHPB9B5Pgp0OvnP/view. *See also* Priscilla Alvarez, *Exclusive: New Trump Administration Plan Could End Asylum Claims and Speed Deportations for Hundreds of Thousands of Migrants*, CNN (June 25, 2025), https://www.cnn.com/2025/06/25/politics/migrants-asylum-claims-deportations.

43 *Coalition for Humane Immigrant Rights* (CHIRLA) *v. Noem,* 2025 WL 2192986 (D.D.C. Aug. 1, 2025), *administratively stayed in part*, No. 25-5289 (D.C. Cir. Aug. 18, 2025). Practitioners can stay abreast of the status of the case here https://litigationtracker.justiceactioncenter.org/cases/chirla-v-noem-district-court-expedited-removal-parole-recipients.

44 CHIRLA, 2025 WL 2192986, at *21–27.

45 *Id.* at *27–30.

46 A variety of arguments may be available regarding why such placements violate the expedited removal statute. The January 2025 designation expanding expedited removal specifies that it applies to people who "have been continuously present in the US for less than two years," so the government has not even attempted to formally expand expedited removal beyond that group. *See Designating [Noncitizens] for Expedited Removal*, *supra* note 31. Such ER placements also likely violate § 235(b)(1) because there was never a "determination" of inadmissibility in the first two years of presence. Neither an arrest nor a charge on an NTA constitute a "determination" of inadmissibility—the former is not an adjudication of

impose specific procedural requirements on the "determination of inadmissibility" referenced in the statute.[47] As such, an arrest or encounter by ICE or CBP or a Notice to Appear within two years of entry, should not trigger eligibility for placement in expedited removal more than two years after entry. Nonetheless, DHS may succeed in these illegal placements because the INA severely restricts judicial review of individual expedited removal orders.[48]

3. People First Apprehended More Than Two Years After Entry Without Inspection

There have also been anecdotal reports of DHS initiating expedited removal proceedings for noncitizens who entered without inspection more than two years ago and never previously had contact with any DHS officer or subagency. When legal challenges have been brought against such placements, the government has in some cases eventually conceded that such individuals are not eligible for expedited removal. However, DHS may take the position that expedited removal is available unless and until the noncitizen provides proof of two years of physical presence, in which case advocates may want to be prepared to provide such evidence and to argue that the lack of any meaningful ability to gather and provide such evidence is a due process violation.[49]

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inadmissibility at all, while the latter is akin to an allegation, not a conclusion. *See I-ARC Complaint*, *supra* note 41, ¶¶97–99.

Application of expedited removal in the interior, rather than at the border, is also in tension with caselaw directing that even if a person who entered without inspection can be understood to have been applying for admission at that time, they do not "remain[] in a perpetual state of applying for admission." *United States v. Gambino-Ruiz*, 91 F.4th 981, 989 (9th Cir. 2024) (citing *Torres v. Barr*, 976 F.3d 918 (9th Cir. 2020) (en banc)). Under this line of reasoning, INA § 235 has no application in the interior. Section 235(b) also sets forth a statutory "inspection" scheme that couples inspection with certain results (including expedited removal) *of those inspections*. The purpose of § 235(b)(1) and (2) is to explain what will happen as a result of inspection; where DHS opted not to place a person in expedited removal at the time of inspection, the statute does not authorize DHS to substitute in a new processing decision (i.e., expedited removal) years later. This reading is consistent with the legislative history of § 235; in creating the expedited removal scheme, Congress was targeting the "thousands of [noncitizens who] arrive in the U.S. at airports each year without valid documents and attempt to illegally enter the U.S.," not individuals who have already been physically present in the country for an extended period of time. H.R. Rep. No. 104-469, pt. 1, at 157–58 (1996).

47 *See* 8 C.F.R. § 235.3(b)(2); INA 235(b)(1)(A)(iii)(II); *I-ARC Complaint*, *supra* note 41, ¶¶93–95.

48 *See* INA §§ 242(a), (e); *Cabrera v. U.S. DHS.*, 2025 WL 1009120 (7th Cir. Apr. 4, 2025) (affirming dismissal of petition challenging expedited removal order despite the petitioner's claim of over two years' physical presence). *But see Co Tupul v. Noem*, 2025 WL 2426787 (D. Ariz. Aug. 4, 2025) (rejecting in temporary restraining order government's argument that INA § 242(a) stripped the court of jurisdiction to review challenge to placement in expedited removal of a person not statutorily amenable to expedited removal).

49 *See, e.g.*, *Co Tupul*, 2025 WL 2426787 (temporarily enjoining expedited removal where petitioner had resided in the country for almost 30 years, ICE officer had informed petitioner's counsel of "new policy" of placing noncitizens in expedited removal upon their "first contact" with ICE, ICE refused to terminate ER proceedings despite later-submitted evidence of physical presence, and habeas court concluded "the evidence creates a serious question whether Petitioner is eligible for expedited removal proceedings given her decades long presence in the United States"); Joint Stipulation of Dismissal Without Prejudice, (ECF No. 9), *Co Tupul*, No. 25-cv-2748 (D. Ariz. Aug. 13, 2025) (noting ICE's agreement to place Ms. Co Tupul in § 240 proceedings and that expedited removal required encounter by immigration officer within two years of unlawful entry); *Orellana Juarez v. Moniz*, 2025 WL 1698600, at *1 (D. Mass. June 11, 2025) (explaining that the petitioner had entered almost three years before ICE arrested him at a traffic stop

III. What's the difference between an "arriving" noncitizen and a non-arriving noncitizen under § 235(b)?

The INA and its implementing regulations have long distinguished "arriving [noncitizens]" who present themselves at a port of entry from noncitizens who are apprehended within the United States after entering without inspection.[50] Department of Justice (DOJ) regulations continue to draw this distinction, defining "arriving [noncitizen]" as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or [a noncitizen] seeking transit through the United States at a port-of-entry, or [a noncitizen] interdicted in international or United States waters and brought into the United States by any means . . ."[51] This division historically held enormous significance in terms of the statutory and regulatory procedures that applied and the constitutional rights recognized for each group.[52]

However, the Supreme Court and recent BIA caselaw has made the distinction less relevant for purposes of determining detention authority and the ability to secure release under INA § 235. Most notably, in *Matter of Q. Li*, the BIA held that an individual who enters without inspection but is apprehended without an arrest warrant 100 yards from the border while still in the process of entering the United States, on the day they crossed the border, "arrives in the United States"

and issued expedited removal order, after which petitioner retained counsel who provided evidence of his presence, and only then did ICE end the ER proceedings and initiate § 240 proceedings); *Domingo-Ros v. Archambeault*, 2025 WL 1425558, at *3 (S.D. Cal. May 18, 2025) (temporarily enjoining removal of noncitizens placed in expedited removal after petitioners argued they had been present for over two years, but arrest and placement in ER had deprived them of the ability to gather and present evidence of their continued presence, with court concluding that record raised "serious questions" regarding "whether the expedited removal process was improvidently employed"); Joint Motion to Dismiss (ECF No. 13), *Domingo-Ros*, No. 25-cv-1208 (S.D. Cal. May 22, 2025) (noting DHS' agreement to place petitioners in § 240 proceedings) *cf. Dvortsin ex rel. El Gamal v. Noem*, 2025 WL 1751968, at *2 & n.7 (D. Colo. June 12, 2025) (explaining that where noncitizens had lived in the country for over two years "Respondents could not legally place them" in expedited removal proceedings and noting government's concession that ER was unavailable); *El Gamal v. Noem*, 2025 WL 1857593, at *2 (W.D. Tex. July 2, 2025) (noting that government "admitted in their briefing" that "the INA does not permit the use of expedited removal proceedings" because petitioners had been physically present for more than two years).

50 *See M-D-C-V-*, 28 I&N Dec. at 24 (discussing the traditional understanding that "arriving [noncitizen]" refers to those who "appear at a port of entry").

51 8 C.F.R. § 1.2; 8 C.F.R. § 1001.1(q). "[A]rriving [noncitizen]" is a specific term of art that is distinct from the statutory phrase "arrives in the United States." *Compare* INA § 235(a)(1) (referring to a noncitizen who "**arrives in the United States** (whether or not at a designated port of arrival . . .)" in the definition of "applicant for admission" in § 235(a)(1)) *with* INA § 235(b)(1)(A)(i) (referring to a noncitizen who "**is arriving in the United States**" when explaining which groups may be placed in expedited removal in § 235(b)(1)(A)(i)) *and* 8 C.F.R. § 235.3(b)(1)(i)–(ii) (defining "**arriving [noncitizens]**" by reference to 8 C.F.R. § 1.2, as distinct from "**[noncitizens] who arrive in**" the United States away from a port of entry) *and* 235.15(b)(2)(i)(A) (referring to the same distinction) (emphases added). "Arriving [noncitizens]" are thus a subset of "applicants for admission."

52 *See* Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. Rev. 565, 581–600 (2021). Indeed, a prior version of the INA treated these groups very differently, with arriving noncitizens being placed in exclusion proceedings, while EWI noncitizens were placed in deportation proceedings. *See, e.g.*, 8 C.F.R. § 1240.30 (setting forth procedures for exclusion proceedings commenced prior to April 1, 1997, under former INA § 236); *id.* § 1240.40 (setting forth procedures for deportation proceedings commenced prior to April 1, 1997).

under 8 U.S.C. § 235(a)(1), citing *DHS v. Thuraissigiam*.[53] Such a person may therefore be detained without bond for the duration of inspection and related proceedings, under the logic of *Matter of Q. Li*, pursuant to § 235(b)(2), even though they are not deemed an "arriving [noncitizen]" by regulation.[54]

IV. How do INA § 235(b) and its implementing regulations authorize detention during inspection and related proceedings?

INA § 235(b) has been interpreted to authorize, without access to a bond hearing, the detention of noncitizens seeking admission throughout the inspection process and subsequent removal proceedings (expedited or otherwise). This section details the detention-related provisions.

A. *INA § 235(b)(1): Detention Arising from Expedited Removal Proceedings*

Two distinct statutory provisions authorize the detention of individuals who are subject to the expedited removal procedures under § 235(b)(1):

- *First*, **INA § 235(b)(1)(B)(ii)** provides that individuals in expedited removal who establish a credible fear of persecution "shall be detained for further consideration of the application for asylum."
- *Second,* in a sub-clause titled "mandatory detention," **INA § 235(b)(1)(B)(iii)(IV)** states that individuals in expedited removal/credible fear proceedings "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."[55]

In 2005 in ***Matter of X-K-***, the Board interpreted the statute and the contemporaneous regulations as allowing bond hearings for non-arriving noncitizens who were initially detained under INA § 235(b)(1)(B)(ii), and then were transferred to full section 240 proceedings following a positive credible fear determination. The Board opined that the INA itself was silent as to the availability of bond hearings, and that the regulations and legislative history suggested that bond hearings should be available.[56]

53 *Q. Li*, 29 I&N Dec. at 67–68. However, the BIA did not decide whether the noncitizen in that case was an "arriving [noncitizen]" as defined by 8 C.F.R. § 1001.1(q). *Id.* at 68 n. 2.

54 *See* INA § 235(b)(2)(A).

55 Various regulatory provisions relate to detention of both arriving and non-arriving individuals in expedited removal. *See, e.g.*, 8 C.F.R. § 235.3(b)(2)(iii) (providing that any noncitizen "whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal," absent a grant of parole); *id.* § 235.2(b)(4)(ii) ("Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the [noncitizen] shall be detained" (absent a grant of parole)); *id.* § 235(b)(5)(i) (directing detention during IJ review of a person issued an expedited removal where a claim of LPR, USC, refugee, or asylee status has been made but not verified).

56 *See Matter of X-K-*, 23 I&N Dec. 731, 734 (BIA 2005).

Several years later, in ***Jennings v. Rodriguez,*** a class of arriving noncitizens argued that INA § 235(b)(1)(B)(ii) is limited to individuals in expedited removal and credible fear proceedings, and that § 235(b)(1) detention authority expires when an individual establishes a credible fear of persecution and is thereafter placed in full INA § 240 removal proceedings. The Supreme Court rejected this statutory argument, interpreting the requirement of detention "for further consideration of the application for asylum" as mandating detention until immigration authorities had finished considering the application for asylum—that is, until the removal proceeding was complete.[57] The Court noted that it was illogical to suggest a switch from § 235(b) detention to § 236(a) detention, given that the latter statute "authorizes detention only 'on a warrant issued' by the Attorney General."[58]

In 2019, then-Attorney General Barr issued ***Matter of M-S-***, holding the INA does not authorize bond hearings for individuals who enter the United States without inspection, are placed in expedited removal proceedings, establish a credible fear for persecution or torture, and are then referred for full removal hearings.[59] The AG reasoned that the INA does not permit the statute of detention to automatically switch from § 235(b) to § 236(a) upon transfer to full removal proceedings. And echoing the Supreme Court's decision in *Jennings*, the Attorney General noted that the statute's text makes clear that § 236(a) is triggered by arrest on a warrant issued by DHS, and for individuals already in immigration custody, it would make little sense to require ICE to issue an arrest warrant to continue detention.[60]

B. INA § 235(b)(2): Detention of Applicants for Admission Without Expedited Removal

With respect to "applicants for admission" who are "seeking admission," inspected, and referred directly to immigration court for removal proceedings, INA § 235(b)(2)(A) states that they "shall be detained for a proceeding under section 240."[61] In *Jennings*, the Supreme Court held that this provision—like § 235(b)(1)(B)(ii)—refers to the entire duration of removal proceedings. An individual detained upon inspection, then placed in removal proceedings under INA § 235(b)(2), therefore remains subject to no-bond detention until removal proceedings conclude. Recently, however, the BIA and DHS have applied this detention authority to noncitizens detained or re-detained long after coming into the country.

57 *Jennings v. Rodriguez*, 583 U.S. 281, 297–303 (2018); *see id.* at 302 (holding that § 235(b)'s detention provisions apply "throughout the completion of applicable proceedings and not just until the moment those proceedings begin").

58 *Id.* at 303.

59 *M-S-*, 27 I&N Dec. at 509.

60 *Id.* at 515. The Attorney General also reaffirmed that DHS retains prosecutorial discretion to take individuals out of the expedited removal process at any point prior to completion of the credible fear process. *Id.* at 518 n.7 (citing *E-R-M- & L-R-M-*, 25 I&N Dec. 520).

61 INA § 235(b)(2)(A); *see also* 8 C.F.R. § 235.2(b)(1)(ii), (c).

1. Regulations Specifically Authorize No-Bond Detention for "Arriving [Noncitizens]"

In addition to the general statutory detention authority in INA § 235(b)(2) that "applicants for admission" who are "seeking admission," inspected, and referred to removal proceedings "shall be detained for a proceeding under section 240," longstanding regulations specifically authorize no-bond detention of a subset of applicants for admission: "arriving [noncitizens]." Under the regulations, arriving noncitizens placed in § 240 proceedings or referred for an asylum merits interview "shall be detained in accordance with [INA § 235(b)]."[62] Regulations governing the immigration courts also provide that immigration judges "may not redetermine conditions of custody imposed by [DHS] with respect to . . . [a]rriving [noncitizens] in removal proceedings[.]"[63] These regulations pre-date *Jennings* and the recent spate of BIA precedent addressing detention and bond authority; prior to those decisions, "arriving [noncitizens]" were generally the only category of "applicants for admission" in § 240 proceedings who were considered ineligible for bond hearings due to the circumstances in which they came into the United States.

2. Statutory Authority for Detention at the Border and Later Re-Detention: *Matter of Cabrera-Fernandez and Matter of Q. Li*

The BIA recently held that INA § 235(b)(2) detention authority continues even where DHS releases someone on parole and re-detains them years later after parole is terminated.[64]

Board precedent on the question of which statute applies for recent entrants is somewhat inconsistent. In ***Matter of Cabrera-Fernandez***, the BIA reaffirmed that an applicant for admission who is apprehended shortly after entering without inspection and placed in § 240 removal proceedings may be released on conditional parole under INA § 236(a)(2)(B).[65] The Board considered the statutory basis of detention and release for noncitizens who had been apprehended by DHS "less than a mile" from the U.S.-Mexico border "about 40 minutes" after they had crossed between ports of entry without authorization.[66] DHS had detained them for a few days, placed them in full removal proceedings and charged them with inadmissibility under § 212(a)(6)(A)(i), then released them with paperwork stating they were released on their own recognizance.[67] The Board rejected the argument that just because they were eligible for § 235(b)(1)'s expedited removal and "mandatory detention" provisions upon entry, the noncitizens must have been released via § 212(d)(5)(A) parole under the logic of *Jennings*. Instead, the BIA noted that DHS retained discretion to place a respondent in expedited or full removal proceedings, and there was "no basis" for arguing the noncitizens' release was pursuant to § 212(d)(5) merely by operation of law.[68]

62 8 C.F.R. § 235.3(c).

63 8 C.F.R. § 1003.19(h)(2).

64 *Q. Li*, 29 I&N Dec. at 70.

65 *Cabrera-Fernandez*, 28 I&N Dec. at 748–49.

66 *Id.* at 747.

67 *Id.* at 747–49.

68 *Id.* at 748–49.

The BIA did not address whether "applicants for admission" like Mr. Cabrera-Fernandez are initially detained pursuant to § 236(a) or § 235(b). However, in light of the statement in *Jennings* that all noncitizens detained under § 235(b) may *only* be released via § 212(d)(5)(A),[69] it is arguable that noncitizens who are detained shortly after entering without inspection, placed in § 240 proceedings, and then released on conditional parole under § 236(a)(2)(B) must have been initially held pursuant to § 236(a).[70] This has important implications for arguments about what detention authority governs when DHS re-arrests previously released noncitizens.

In ***Matter of Q. Li***, the BIA addressed which detention provision applies to a noncitizen who entered the country in similar circumstances as Mr. Cabrera-Fernandez but who was released from detention with paperwork specifying the release constituted § 212(d)(5)(A) parole.[71] Two years later, ICE re-detained Ms. Li at a check-in and issued her a Notice to Appear (NTA) charging her with the same ground of inadmissibility and a notice of custody determination.[72] The Board rejected her argument that subsequent to her rearrest, she was detained under § 236(a) because she was "never placed in expedited removal proceedings and was instead placed directly in full removal proceedings."[73] Instead, it held that "an applicant for admission who is arrested and detained without a warrant while in the process of arriving in the United States, whether or not at a port of entry, and subsequently placed in removal proceedings is detained under section 235(b) [], and is ineligible for any subsequent release on bond under section 236(a)."[74] The BIA found that someone held under § 235(b)(2)(A) who is released on § 212(d)(5) parole and then re-detained after termination of that parole is again held under §235(b)(2)(A) until removal proceedings are completed.[75]

In contrast to *Matter of Cabrera-Fernandez*, which held that noncitizens who EWI and are apprehended near the border can be released pursuant to § 236(a)(2) (implying that their initial detention was also pursuant to § 236(a)),[76] *Matter of Q. Li* could be read to hold that all noncitizens arrested without a warrant shortly after crossing the border are held pursuant to § 235(b).[77] That conclusion, however, does not flow from the statutory text. It also contradicts the government's position that it has discretion to detain anyone in the United States pursuant to § 236.[78]

69 *Jennings*, 583 U.S. at 300.

70 *See also Q. Li*, 29 I&N Dec. at 69 (citing *Jennings*, 583 U.S. at 300).

71 *Id.* at 67.

72 The decision does not specify whether or not DHS originally issued Ms. Li an NTA, or what DHS' Notice of Custody Determination issued upon her re-arrest indicated was the operative detention statute. *Id.*

73 *Id.* at 70.

74 *Id.* at 69.

75 *Id.* at 70.

76 *Cabrera-Fernandez*, 28 I&N Dec. at 749.

77 *Qi Li*, 29 I&N Dec. at 70.

78 *See infra* Part 1.IV.B. (discussing *Q.* Li); 1.VI (discussing DHS' discretion).

3. Detention of People who Entered Without Inspection and Are First Arrested in the Interior

In recent years, a growing number of immigration judges have also taken the position that § 235(b)(2) must be applied to all individuals who entered without inspection, even if they were apprehended for the first time in the interior years after their entry. In July 2025, DHS issued a memo adopting this theory and ICE attorneys have begun arguing that immigration judges lack jurisdiction to grant bond to individuals who entered without inspection.[79] Under this interpretation, the noncitizen respondent is subject to § 235(b)(2)(A) because they are deemed to be an "applicant for admission" under INA § 235(a)(1). Notably, however, on August 4, 2025, the Attorney General designated for publication a BIA decision holding that a man who entered without inspection was detained under § 236.[80]

There are several reasons why DHS' expansive interpretation misreads the statute. As the Supreme Court recognized in *Jennings*, § 235(b) is concerned "primarily [with those] seeking entry," and is generally imposed "*at the Nation's borders and ports of entry*, where the Government must determine whether [a noncitizen] seeking to enter the country is admissible."[81] Throughout its text, the statute refers to "inspections"—a term not defined in the INA but which typically connotes an examination upon or soon after physical entry.[82] Many statutory provisions, various regulations and agency precedent discuss "inspection" in the context of admission processes at ports of entry, further supporting the conclusion that § 235 has a limited temporal and geographic scope.[83]

Consistent with this focus on the moment of physical entry, § 235(b)(1) is limited to presently "arriving" noncitizens and those apprehended within two years of entry, and § 235(b)(2) is limited to those in the process of "seeking admission." Similarly, the implementing regulations at 8 C.F.R.

79 *See ICE Memo*, *supra* note 7; Maria Sacchetti & Carol D. Leonnig, *ICE Declares Millions of Undocumented Immigrants Ineligible for Bond Hearings*, Wash. Post (July 15, 2025), https://www.washingtonpost.com/immigration/2025/07/14/ice-trump-undocumented-immigrants-bond-hearings/. Class action litigation against ICE's July 8, 2025 memo is currently pending in the Central District of California. *See Maldonado Bautista, et al. v. Noem*, No. 5:25-cv-01873-SSS-BFM (C.D. Cal.). The lawsuit includes a proposed nationwide class of "[a]ll noncitizens in the United States without lawful status who (1) have entered or will enter the United States without inspection; (2) were not or will not be apprehended upon arrival; and (3) are not or will not be subject to detention under [INA § 236(c), § 235(b)(1), or § 241] at the time [DHS] makes an initial custody determination," and seeks class wide declaratory relief and vacatur of DHS' policy under the APA. *See* Class Action Complaint and Amended Petition for Writ of Habeas Corpus, *Maldonado Bautista v. Noem*, No. 5:25-cv-01873-SSS-BFM (C.D. Cal. July 28, 2025). *See* https://www.nwirp.org/our-work/impact-litigation/ (providing *Maldonado Bautista* papers).

80 *Matter of Akhmedov,* 29 I&N Dec. 166 (BIA 2025).

81 *Jennings*, 583 U.S. at 297, 287.

82 *See* INA § 235 (titled "Inspection by immigration officers; expedited removal of inadmissible arriving [noncitizens]; referral for hearing"); INA §§ 235(b)(1)–(2) (referring to "inspections" in their titles); INA § 235(d)(1) (authorizing immigration officials to search certain conveyances in order to conduct "inspections" where noncitizens "are being brought into the United States").

83 *See, e.g.,* INA §§ 217(h)(2)(B)(i), 235A; 8 U.S.C. § 1752a; 8 C.F.R. § 235.1; *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010). For a full discussion of how the term "inspection" generally relates to determinations of admissibility at the time of entry, *see* Brief for American Immigration Lawyers Association and Capital Area Immigrants' Rights Coalition as Amici Curiae Supporting Plaintiffs' Motion for Preliminary Injunction, *Farmworker Ass'n of Fl. v. DeSantis*, 23-cv-226655-RKA, 716 F.Supp.3d 1312 (S.D. Fl. filed Aug. 25, 2023).

§ 1.2 address noncitizens who are presently "coming or attempting to come into the United States." The statutory and regulatory text's use of the present and present progressive tenses excludes noncitizens apprehended in the interior, because they are no longer in the process of arriving in or seeking admission to the United States.[84]

Additionally, the INA's statutory structure makes clear that § 236 also reaches individuals who have not been admitted. Section 236(c) exempts specific categories of noncitizens from the default eligibility to seek release on bond in § 236(a), including noncitizens subject to certain grounds of inadmissibility. Congress recently added new mandatory detention grounds to § 236(c) that apply only to noncitizens who have not been admitted, expressly including those who are inadmissible under § 212(a)(6)(A), or (7)--that is, persons who entered without being admitted.[85] If § 236(a) did not apply to inadmissible noncitizens, then the carve out in § 236(c) that refers to inadmissibility and Congress' most recent amendments would be surplusage.

The statutory history also supports a limited reading of § 235(b)'s reach. When Congress amended § 235(b)'s predecessor statute—which authorized detention only of arriving noncitizens—to include individuals who had not been admitted, legislators expressed concerns about recent arrivals to the United States who lacked the documents to remain in the country. There was no suggestion in the legislative history that Congress intended to subject all people present in the United States after an unlawful entry to mandatory detention and thereby transform immigration detention and sweep millions of noncitizens into § 235(b).[86]

District courts in various circuits have recently agreed, holding that INA § 235(b)(2) should be read to apply only to noncitizens who are apprehended while seeking to enter the country, and that noncitizens already residing in the United States, including those who are charged with inadmissibility, continue to fall under the discretionary detention scheme in INA § 236. The courts relied on, among other things, the decision in *Jennings* and Congress' recent expansion of mandatory detention under INA § 236(c)—amendments that would be rendered superfluous if all "applicants for admission" were subject to detention under § 235(b) and not § 236.[87]

84 *See Martinez v. Hyde,* 2025 WL 2084238, at *6 (D. Mass. July 24, 2025) (citing the use of present and present progressive tense to support conclusion that INA § 235(b)(2) does not apply to individuals apprehended in the interior); *accord Lopez Benitez v. Francis*, 2025 WL 2371588, at *6–7 (S.D.N.Y. Aug. 13, 2025). *See also United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."); *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019) (construing "is arriving" in INA § 235(b)(1)(A)(i) and observing that "[t]he use of the present progressive, like use of the present participle, denotes an ongoing process").

85 INA § 236(c)(1)(E), *as amended by* Laken Riley Act, Pub. L. 119-1, 139 Stat. 3 (2025).

86 *See* H.R. Rep. No. 104-469, pt. 1, at 157–58, 228–29 (1996); H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.). For additional discussion of these points, see Briefs for Plaintiffs, *Rodriguez v. Bostock*, No. 3:25-CV-05240-TMC, 779 F. Supp. 3d 1239 (W.D. Wash. 2025), https://www.nwirp.org/our-work/impact-litigation/ (providing *Rodriguez v. Bostock* briefs).

87 *Rodriguez*, 779 F. Supp. 3d at 1256–59 (granting preliminary injunction prohibiting IJs from denying bond to individuals apprehended in the interior based on INA § 235(b)(2)). *See also Gomes v. Hyde*, 2025 WL 1869299 at *6-7 (D. Mass. July 7, 2025) (relying on statutory structure and Laken Riley Act amendments to § 236 to find that recent entrant re-detained on a warrant was not subject to § 235(b)(2)); *Martinez*, 2025 WL 2084238 at *6–8; *Lopez Benitez*, 2025 WL 2371588 at *7; *Rocha Rosado v. Figueroa*, 2025 WL 2337099, at *8-10 (D. Ariz. Aug. 11, 2025); *Aguilar Maldonado v. Olson*, 2025 WL 2374411, at *11–13 (D. Minn. Aug. 15, 2025); *accord Castillo Lachapel v. Joyce*, 2025 WL 1685576, at *2 (S.D.N.Y.

V. How does detention under § 235(b) differ from detention under § 236(a)?

Individuals who are apprehended within the United States and placed in removal proceedings are generally detained under INA § 236(a). That provision states that "[o]n a warrant issued by the Attorney General," a noncitizen "may be arrested and detained pending a decision on whether the [noncitizen] is to be removed from the United States." DHS may continue to detain the individual under § 236(a)(1) after the issuance of a warrant or release them under § 236(a)(2).

Although the statute refers to arrest with a warrant, an immigration official can also arrest a noncitizen without a warrant if they have reason to believe that the noncitizen is subject to removal and likely to abscond before a warrant can be obtained; however, immigration authorities must still issue a warrant post-arrest, generally within 48 hours.[88] The BIA in *Matter of Q. Li* indicated that the post-arrest issuance of a warrant "cannot convert the statutory authority" for detention from § 235(b) to § 236(a).[89] However, INA § 287(a)(2) authorizes warrantless arrests of noncitizens already "in the United States," in addition to those "entering or attempting to enter." Consequently, under the statute, the lack of a warrant prior to a noncitizen's arrest by DHS, without more, is not dispositive of whether § 235(b) or § 236(a) governs the subsequent detention.

Section 236(a)'s release provision grants immigration authorities discretion to release a noncitizen on bond or conditional parole pending proceedings.[90] Under longstanding practice and implementing regulations, individuals detained by ICE under § 236(a) may seek a custody redetermination before an immigration judge. At that bond hearing, both sides may submit written evidence, testimony, and argument, and either side may appeal an adverse decision to the BIA.[91]

Although INA § 235(b) states that an individual "shall" be detained throughout proceedings, which is read to preclude release on bond, the INA also establishes a mechanism for release: parole under § 212(d)(5). All noncitizens who are applicants for admission are eligible for parole under the statute.[92] However, in contrast to *§ 236(a)* bond procedures that include the chance for a hearing before an IJ, the parole process available to individuals detained under § 235(b) consists merely of a custody review conducted by ICE. As discussed below, *see* Part 2.I.A, the parole process generally includes no hearing before a neutral decision maker, no formal record, and no possibility for appeal.[93]

June 16, 2025) (parties agreed that a person who had entered without inspection and was arrested in the interior was detained under § 236(a)).

88 *See* INA § 287(a)(2); 8 C.F.R. § 287.3(a).

89 *Q. Li*, 29 I&N Dec. at 69 n.4 (citing *Jennings*, 583 U.S. at 302).

90 *See* INA § 236(a)(2).

91 *See generally* 8 C.F.R. § 1236.1(d); Exec. Off. of Immigr. Rev., Immigration Court Practice Manual, ch. 9.3.

92 *See* INA § 212(d)(5)(A); *Jennings*, 583 U.S. at 288.

93 *See generally* 8 C.F.R. § 212.5.

VI. When does DHS have discretion to choose the type of removal proceeding or detention authority?

Immigration officials have long taken the position that immigration officials have discretion *not* to apply the detention and expedited removal procedures set forth in § 235(b).

A. § 240 Proceedings under § 235(b)(2) vs. ER Proceedings under § 235(b)(1)

In 2011, the BIA issued ***Matter of E-R-M- & L-R-M-***, which held that DHS retains broad discretion as to who it elects to place in expedited removal proceedings under § 235(b)(1) versus full removal proceedings pursuant to § 235(b)(2), even with respect to arriving noncitizens.[94] Although § 235(b) employs the word "shall," the BIA reasoned that the statute nevertheless must be construed consistently with longstanding principles of prosecutorial discretion.[95] Analogizing to federal criminal proceedings, the Board noted that "Congress has defined most crimes by providing that whoever engages in certain conduct 'shall' be imprisoned or otherwise punished." The Board explained that this language "has never been construed to require a Federal prosecutor to bring charges against every person believed to have violated the statute, or to mandate that where, as here, when multiple charges are possible, one or the other or all must be pursued."[96] It therefore held that DHS retains discretion to refer arriving noncitizens to § 240 removal proceedings, even if those individuals would fall within the scope of § 235(a)(1)(A)(i)'s expedited removal provision. As acknowledged in *E-R-M- & L-R-M-*, this logic requires finding that DHS has discretion to put *all* noncitizens who could be subject to expedited removal, including those who are *not* arriving, directly into § 240 proceedings.[97]

B. § 236(a) Detention vs. § 235(b) Detention

The DOJ under the Biden administration took the position that individuals encountered within the United States soon after crossing the border can be properly classified as subject to either § 235(b) or § 236 detention.[98] This is because "[t]he INA affords DHS multiple options for processing applicants

94 *E-R-M- & L-R-M-*, 25 I&N Dec. 520; *see also Innovation Law Lab v. McAleenan*, 924 F.3d 503, 508 (9th Cir. 2019) ("Congress' creation of expedited removal did not impliedly preclude the use of § 1229a removal proceedings for those who could otherwise have been placed in the more streamlined expedited removal process."); *Mata Velasquez*, 2025 WL 1953796 at *9 ("Because DHS chose to place [Petitioner] in section 240 proceedings instead of pursuing expedited removal in the first instance—even though it was not required to do that—the government vested [Petitioner] with the rights that Congress guaranteed non-citizens in those proceedings.").

95 *E-R-M- & L-R-M-*, 25 I&N Dec. at 522–23.

96 *Id.* at 522.

97 *Id.* at 523–24 ("we find that the statutory scheme itself supports our reading that the DHS has discretion to put [noncitizens] in [§] 240 removal proceedings even though they may also be subject to expedited removal under [§] 235(b)(1)(A)(i)").

98 *See* Brief for Petitioners at 5–7, 35, (No. 21-954), *Biden v. Texas*, 597 U.S. 785 (2022), 2022 WL 815341; Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 23–25, 29, (ECF No. 88-1), *Florida v. United States*, 660 F. Supp. 3d 1239 (N.D. Fla. filed Oct. 3, 2022).

for admission."[99] As the DOJ explained, DHS may detain and process such inadmissible individuals under either § 235(b)(1) or (2); in either situation, DHS may release them only on under § 212(d)(5). But DHS may also arrest individuals anywhere within the United States—including noncitizens encountered "shortly after" crossing land borders—under § 236(a), and may continue to detain them pending removal proceedings or release them on bond or conditional parole under § 236(a).[100]

At least in defending against litigation, the government has thus maintained that for individuals who have not been admitted and who are apprehended near the border, DHS has discretion to select which statute of detention applies; and if DHS decides to release the individual, it may do so either under § 212(d)(5) parole or § 236(a)(2) conditional parole.[101] In light of DHS' new interpretation about the reach of § 235(b)(2)—i.e., that it applies to all "applicants for admission" regardless of their location or length of time in the country—whether the government will continue to make these arguments about its discretion remains to be seen. Similarly, although the Board's reasoning in *Matter of Cabrera-Fernandez* is sparse, it is consistent with DHS' prior position on the scope of its own discretion.[102] Under this logic and the government's longstanding practice, applicants for admission detained at the border soon after entering without inspection can be and are frequently detained under § 236(a).

VII. How does INA § 235(b) detention differ from INA § 241(a) detention?

INA § 235(b), which generally covers detention pending a determination as to whether an individual will be ordered removed (like INA § 236), is distinct from INA § 241(a), which governs post-final order detention. Both § 235(b) and § 241(a) allow for release by DHS but the specific requirements and procedures differ.[103]

Notably, individuals with final removal orders (including those with reinstated orders under § 241(a)(5)) detained beyond the 90-day removal period under § 241(a)(2) may be released under supervision.[104] The statute does not provide for the right to a bond hearing, but they are entitled to seek release from detention after six-months if there is not a "significant likelihood of removal in the reasonably foreseeable future."[105]

99 Brief for Petitioners, *supra* note 99, at 5.

100 *See id.*

101 *See* Memorandum of Law in Support of Defendants' Motion for Summary Judgment, *supra* note 99, at 23–25, 29, 31–32; Brief for Petitioners, *supra* note 99; Respondents' Brief at 30–40, *Labrada-Hechavarria v. U.S. Attorney General* (11th Cir. appeal filed Nov. 3, 2023) (No. 23-13664).

102 *Cabrera-Fernandez*, 28 I&N Dec. at 749. *See also Matter of Roque-Izada*, 29 I&N Dec. 106, 108 (BIA 2025) (finding lack of "arriving [noncitizen]" classification on NTA to be indicative of whether noncitizen was legally an "arriving [noncitizen]").

103 *Compare* INA § 212(d)(5) *and* 8 C.F.R. § 212.5, *with* INA § 241(a)(3) *and* 8 C.F.R. § 241.4.

104 § 241(a)(3).

105 *Zadvydas v. Davis*, 533 U.S. 678, 698–701 (2001).

The government may argue that individuals with final expedited orders of removal, including those who received negative credible fear determinations, who have not yet been removed, are detained pursuant to § 235(b)(1)(B)(iii)(IV), not § 241, and therefore are not entitled to *Zadvydas* relief. Practitioners may consider arguing this is incorrect as a matter of statutory interpretation.[106]

For example, practitioners may argue that INA § 241 relates broadly to detention and removal of noncitizens ordered removed under *any* removal statute. Section 241 includes procedures that on their face are applicable to people with expedited removal orders issued under § 235(b)(1),[107] and therefore the option of post-removal period release under § 241(a) should be available even for people with expedited removal orders.

106 At least one district court has concluded that § 241(a), and thus the holding from *Zadvydas*, applies to such detention. *See Ortiz v. Barr*, 2021 WL 6280186, at *4 (S.D. Fla. Feb. 1, 2021), *report and recommendation adopted*, 2022 WL 44632, at *4 (S.D. Fla. Jan. 5, 2022) (rejecting the government's argument that petitioner was detained under § 235(b), based on Supreme Court's statement in *Jennings*, 583 U.S. at 297, that § 235(b)(1) and (2) mandate detention until proceedings have concluded, but "[o]nce those proceedings end, detention under § [235(b)] must end as well"). *But see, e.g.*, *Singh v. Gillis*, 2021 WL 1214787 (S.D. Miss. Mar. 3, 2021) (finding § 241 and *Zadvydas* inapplicable to petitioner with final expedited removal order), *report and recommendation adopted*, 2021 WL 1207724 (S.D. Miss. Mar. 30, 2021).

107 *See, e.g.*, INA § 241(a)(1)(A) (providing that when a noncitizen is "ordered removed"—without specifying the removal statute—they shall be removed within the 90-day "removal period"); § 241(a)(2), (3), (6) (governing detention during and after the "removal period"); § 241(c)(1) (governing removal of noncitizens arriving at POEs, explicitly including those "ordered removed . . . without a hearing under" § 235(b)(1)); § 241(e) (governing payment of expenses for removal, and explicitly covering those "ordered removed . . . without a hearing under § 235(a)(1)," with a footnote noting that the reference to § 235(a)(1) was likely a drafting error and "probably should be [§ 235](b)(1)").

Part 2: Getting Out of Detention

Getting a client out of detention may require advocacy both at the agency and federal court level. For many noncitizens, the path to seek release will begin with a request for parole from ICE. If there is an argument that a noncitizen should legally be considered detained pursuant to INA § 236(a) and not § 235(b), then seeking bond from the immigration judge with jurisdiction over their removal proceedings may also be an option.[108] Where neither DHS nor EOIR agree to release, or where there are particularly urgent circumstances, litigation in federal district court via a habeas petition may present another opportunity to get a client out of detention.

I. Seek release from detention at the agency level

A. Parole from ERO or CBP

Requests for release via parole are generally sent to a noncitizen's s deportation officer in ICE's Enforcement and Removal Operations division.

1. Recent Trump Administrations policies restricting parole

As of August 2025, President Trump and DHS issued a host of executive orders and agency memos that mention and dramatically narrow the use of the parole authority at INA § 212(d)(5). While the exact contours of any new parole policy have not been publicly shared, in litigation, the government has submitted documents stating that "ERO field offices no longer have the option to discretionarily release [noncitizens]."[109] Practitioners also report receiving emails from ERO in response to parole requests stating that DHS is not granting noncitizens' release on recognizance or parole. And ICE's statistics show that despite rising numbers of people in immigration custody, the agency has only paroled a few dozen people from detention each month since February 2025,[110] likely in part due to DHS' implementation of these orders.

Two executive orders issued on January 20, 2025, explicitly mention parole.

108 *See* 8 C.F.R. § 1003.19(c) (detailing where requests for bond redetermination can be made).

109 Second Amended Class Action Complaint at ¶ 31, *D.N.N. v. Baker*, No. 25-cv-1613 (D. Md. filed July 11, 2025) (challenging use of holding cells in ICE's Baltimore Field Office for extended detention).

110 *See Detention Management*, ICE, https://www.ice.gov/detain/detention-management (last visited July 9, 2025) (providing 2025 year-to-date detention statistics in downloadable spreadsheet).

i. "Protecting the American People Against Invasion"

This executive order directs DHS, the Attorney General, and the State Department to ensure that the parole authority "is exercised on only a case-by-case basis in accordance with the plain language of the statute, and in all circumstances only when an individual [noncitizen] demonstrates urgent humanitarian reasons or a significant public benefit derived from their particular continued presence in the United States arising from such parole."[111] While the order also directs government agencies to rescind policies of the prior administration that "led to the increased or continued presence" of undocumented noncitizens in the country, it does not name for rescission any specific agency directives related to parole.[112]

ii. "Securing Our Borders"

This order directs DHS to stop using the CBP One app as a way to parole otherwise inadmissible noncitizens into the country and to terminate all "categorical parole programs" including those for Cubans, Haitians, Nicaraguans, and Venezuelans.[113] However, the order also requires DHS to align "all future parole determinations" at the southern border to be consistent with the policies expressed in the order. These policies include detaining "to the maximum extent authorized by law" all noncitizens suspected of violating federal law until they are removed.[114]

2. Factors for Release on Parole

Parole, including when it functions to release people from detention, is a discretionary benefit. The INA authorizes DHS to grant parole temporarily "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[115] The implementing regulation[116] identifies certain groups of individuals whose parole from custody would "generally be justified":

- Individuals with "serious medical conditions in which continued detention would not be appropriate;"
- Pregnant individuals;
- Minors;
- Individuals who "will be witnesses in proceedings" in the United States (including administrative or legislative proceedings);
- A catchall category of individuals "whose continued detention is not in the public interest."

111 Exec. Order No. 14159, 90 Fed. Reg. 8443, 8446 (Jan. 20, 2025).

112 *Id.*

113 Exec. Order No. 14165, 90 Fed. Reg. 8467, 8467–68 (Jan. 20, 2025).

114 *Id.*

115 INA § 212(d)(5)(A). For an overview of parole, see American Immigration Council, *The Use of Parole Under Immigration Law* (Apr. 2024), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_use_of_parole_under_immigration_law_2024.pdf.

116 8 C.F.R. § 212.5(b).

DHS has historically paroled many noncitizens from detention even where they do not fall into one of the first four categories, presumably under the general "public interest" category or based on individualized analyses about the urgent humanitarian reasons or significant public benefit that would result from releasing an individual. As such, any noncitizen eligible for release on parole[117] may consider submitting a request for parole that highlights any sympathetic individualized circumstances and risks from continued detention in their case.

Noncitizens seeking parole from custody must also establish they are neither a "security risk," i.e. danger to the community, nor a risk of flight.[118] A successful parole request will generally include the following:

- Documents that establish the noncitizen's identity and explain why they merit parole and release from detention.
- Specific information about a "sponsor" in the United States, i.e. someone who is willing to receive the person seeking parole and provide them with assistance.
- Where release would benefit someone in the United States with immigration status (or a U.S. citizen), it is very helpful to highlight this.
- Additionally, if a noncitizen has prior negative immigration history in the United States, prior or current allegations regarding fraud, or contact with any criminal legal system, it is important to provide any possible mitigating evidence or arguments.

There are many guides that detail how to effectively present a parole request to DHS.[119]

3. DHS Policies Favoring Release on Parole

Practitioners may consider raising additional specific arguments for release based on existing agency guidance relevant to their client's circumstances. Citing such DHS policies as a basis for release on parole may strengthen the request, and may also serve to exhaust the claim in the event that federal litigation becomes necessary.

As of August 2025, there are at least three situation-specific agency directives that establish a presumption in favor of release on parole for eligible noncitizens.[120] While current agency practice does not appear to comply with these directives, DHS has not formally announced their rescission.

117 Any noncitizen "applying for admission" may be paroled. INA § 212(d)(5)(A).

118 8 C.F.R. § 212.5(c), (d).

119 *See, e.g.*, Immigration Justice Campaign, *Writing and Submitting Parole or Release Requests*, https://immigrationjustice.us/get-trained/parole/writing-and-submitting-parole-request/ (last visited Aug. 15, 2025); Florence Immigrant and Refugee Rights Project, *How to Request Humanitarian Parole* (Sept. 2022), https://firrp.org/wp-content/uploads/2022/09/hp-final.pdf.

120 Note that there are many DHS and ICE policies that are not widely known that may be helpful to a noncitizen's case. For example, FOIA requests and litigation by Al Otro Lado have led to the disclosure of many hundreds of ICE policies, both internal and related to the treatment of noncitizens in its custody. *See* https://docs.google.com/spreadsheets/d/1uUSctCAMGEikY3FRsMjWrMca7TKN8twR8ChHaR4n7lY/edit?gid=0#gid=0.

However, practitioners should closely monitor DHS announcements regarding the continuing validity of these policies, as the agency may attempt to rescind these and other directives without notice. Even where DHS does purport to rescind such directives, it may be worth preserving an argument for release based on the policy, in the event that the agency reverses course or a federal court finds a directive to be improperly rescinded under the Administrative Procedure Act (APA).[121]

Where DHS does not appear to have complied with the relevant guidance in a client's case, consider arguing that failure to provide the required process means that DHS should release them, or, alternatively and at minimum, undertake the additional necessary steps in their case. Examples include:

i. ICE Directive No. 11002.1: Parole of Arriving [Noncitizens] Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009) (2009 Parole Directive)[122]:

- This agency guidance is relevant for arriving noncitizens who have passed credible fear interviews. It provides that "when an arriving [noncitizen] found to have a credible fear establishes to the satisfaction of [ICE] his or her identity and that he or she presents neither a flight risk nor danger to the community, [ICE] should, absent additional factors . . . parole the [noncitizen] on the basis that his or her continued detention is not in the public interest." 2009 Parole Directive, § 6.2.

- The 2009 Parole Directive also sets forth specific procedures that ERO is supposed to follow after an arriving noncitizen in ICE custody is determined to have a credible fear. ICE is required to automatically provide the noncitizen with a form (Parole Advisal and Scheduling Notification) that informs them ICE will interview them regarding potential parole from custody and sets forth the interview date and deadline for submitting evidence in support of parole. *Id.* § 6.1. Decision-making about parole is supposed to be individualized and memorialized on a specific worksheet. *Id.* § 6.2. The directive also requires ICE to provide written notice of the parole decision within seven days (absent "reasonable justification for delay"), with explanation of any denial and advice that the noncitizen may request a redetermination based on changed circumstances or additional relevant evidence. *Id.* § 6.5, 6.6. Lastly, the policy provides for supervisory review of any parole determination. *Id.* § 6.7.

121 One recently rescinded ICE Directive required the Field Office Director to conduct a custody review whenever a detained person's child was in child welfare or guardianship proceedings, taking into account the effect of continued detention on the likelihood of reunification or maintenance of guardianship status and other related factors. *See* ICE, Directive 11064.3, Interests of Noncitizen Parents and Legal Guardians of Minor Children or Incapacitated Adults, at § 5.4 (July 14, 2022, rescinded July 2, 2025), https://www.ice.gov/doclib/foia/policy/11064.3_InterestsNoncitizenParents.pdf. The replacement policy removes this custody review requirement. *See* ICE, Directive 11064.4, Detention and Removal of [Noncitizen] Parents and Legal Guardians of Minor Children (July 2, 2025), https://www.ice.gov/doclib/foia/policy/11064.4.pdf. Practitioners may consider preserving an argument that the prior policy should apply in the event it comes back into force in the future, or to support an argument that its rescission was unlawful.

122 ICE, Directive 11002.1, Parole of Arriving [Noncitizens] Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2003). In July 2025, a district court relied on this directive, suggesting it is still operative. *See Y-Z-L-H- v. Bostock*, 2025 WL 1898025, at *12-13 (D. Or. July 9, 2025).

ii. Memorandum, Michael Garcia, Detention Policy Where an Immigration Judge has Granted Asylum and ICE has Appealed (Feb. 9, 2004) (later numbered ICE Directive No. 16004.1)[123]

- This ICE memo provides guidance on releasing people in removal proceedings with non-final grants of "protection" relief and requires review of decisions to continue detention in these circumstances by the Field Office Director.
- The policy states that where an immigration judge has granted asylum "or other protection relief, such as withholding of removal or protection under the Convention Against Torture," and ICE has appealed that grant to the BIA, "it is ICE policy to favor release . . . absent exceptional concerns such as national security issues or danger to the community." The policy emphasizes that "arriving [noncitizens] should be considered for parole."
- Additionally, the policy requires that "[i]n all cases, the Field Office Director must approve a decision to keep [a noncitizen] granted protection relief in custody pending appeal, in consultation with the Chief Counsel. This review cannot be delegated beyond the Field Office Director or anyone acting in that capacity."
- Various high-level ICE officials have affirmed in recent years that this policy remains in effect. In March 2012, the Executive Associate Director of ERO Gary Mead wrote to remind ICE officials that the February 2004 memorandum remained "in effect and should be followed."[124] Associate Director Mead confirmed that the policy "applies at all times following a grant of protection, including during any appellate proceedings and throughout the removal period," and that the Field Office Director "must approve" any decision to continue detaining such respondents. In June 2021, Acting Director of ICE Tae Johnson issued another reminder to all ICE employees about the continuing validity of the "longstanding policy" detailed in the February 2004 memorandum.[125]

iii. ICE Directive No. 11032.4: Identification and Monitoring of Pregnant, Postpartum, or Nursing Individuals (July 1, 2021)[126]

- This ICE policy specifies the procedures and requirements for ICE to initially detain and continue the detention of anyone who is known to be pregnant, postpartum (within a year of giving birth), or nursing (the act of breastfeeding a child regardless of time since childbirth).

123 ICE, Memorandum on Detention Policy Where an Immigration Judge Has Granted Asylum and ICE Has Appealed (Feb. 20, 2004), https://www.ice.gov/doclib/foia/policy/memoDetPolicyAsylumICE_Appealed_02.20.2004.pdf.

124 U.S. Dep't of Just., Immigr. & Nat. Serv., Memorandum on Detention and Release During the Removal Period of Aliens Granted Withholding or Deferral of Removal, 3 (Apr. 21, 2000), https://nipnlg.org/sites/default/files/2024-07/all_ice_policies_on_post-relief_release.pdf.

125 June 7, 2021, ICE Email Directive, REMINDER, Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal, or Convention Against Torture Protection, and DHS has Appealed, https://nipnlg.org/sites/default/files/2024-07/all_ice_policies_on_post-relief_release.pdf. In August 2025, a district court relied on a recent government brief that cited to this directive, suggesting it is still operative. *See Caceres v. Joyce*, 2025 WL 2223032, at *2 (S.D.N.Y. Aug. 5, 2025).

126 ICE, Directive 11032.4, Identification and Monitoring of Pregnant, Postpartum, or Nursing Individuals (July 1, 2021) https://www.ice.gov/doclib/detention/11032.4_IdentificationMonitoringPregnantPostpartumNursingIndividuals.pdf.

- It details responsibilities of various components of ICE and states that "FODs will ensure, unless release is prohibited by law or exceptional circumstances exist" that such individuals "are generally released from detention." *Id.* § 5.1.
- In August 2025, a district court rejected a government argument that the Executive Order "Protecting the American People Against Invasion" had revoked this ICE directive.[127]

4. Limitations of Parole

All forms of parole under INA § 212(d)(5) are temporary, including release from custody. The statute provides that "when the purposes of such parole shall, in the opinion of the Attorney General, have been served the [noncitizen] shall forthwith return or be returned to the custody from which he was paroled."[128] The regulation sets forth information on termination of parole.[129] Termination "restores" the noncitizen to the status they had "at the time of parole."[130] Parole terminates automatically when a noncitizen leaves the country, or upon expiration of the authorized period.[131] However, DHS can also terminate parole by providing individualized written notice to the parolee. There are no requirements for what rationale or reasoning the written notice must provide regarding termination. The regulation also specifies that service of a "charging document," or Notice to Appear placing the person in removal proceedings, constitutes "written notice of termination of parole, unless otherwise specified."[132] However, it is not the case that all paroled individuals apprehended at or near the border and issued an NTA have had their parole terminated, because DHS may have issued the NTA before or simultaneously with release on parole. Parolees can technically seek re-parole or an extension of their parole period.

In contrast to a bond hearing before an immigration judge, the parole process consists merely of a custody review conducted by a DHS officer.[133] The parole process does not include a hearing before a neutral decision maker, and unless particular DHS policies apply, does not require the agency to create or serve any documentation or provide for a right to an appeal of a negative determination.[134]

127 *Aguilar Maldonado*, 2025 WL 237441, at *15.

128 INA § 212(d)(5)(A).

129 8 C.F.R. § 212.5(e).

130 8 C.F.R. § 212.5(e)(2)(i); *see also Matter of Q. Li*, 29 I&N Dec. at 70 (noncitizen detained under § 235(b) who is released on parole "whose grant of parole is subsequently terminated, is returned to custody under [§] 235(b) pending the completion of removal proceedings").

131 8 C.F.R. §212.5(e)(1). The Fifth Circuit has read the parole regulation to mean that "DHS is obliged to either re-parole [] or commence removal proceedings" against a noncitizen whose parole automatically terminates at the expiration of its authorized period. *Bouchikhi v. Holder*, 676 F.3d 173, 179 (5th Cir. 2012). However, the court held that requirement "does not affect when the parole terminates." *Id.*

132 8 C.F.R. § 212.5(e)(2)(i).

133 *See* 8 C.F.R § 212.5(a).

134 As a matter of practice, ICE often does provide a form notice response to parole requests, often with checkboxes and no individualized analysis.

B. Request Bond from IJ: Argue INA § 235(b) Does Not Apply

If DHS asserts that an individual is held pursuant to INA § 235(b) and thus ineligible for bond, there may be arguments advocates can make to the Immigration Judge or BIA about why that statutory classification is incorrect. These arguments should be presented in a motion requesting a bond redetermination from the Immigration Court.

1. IJs Have Jurisdiction to Determine Their Own Jurisdiction[135]

Where DHS alleges someone is held under § 235(b) and is therefore ineligible for release on bond, the IJ or DHS may take the position that an IJ lacks jurisdiction to even determine whether the noncitizen is eligible to seek bond. However, the question of whether someone is correctly classified as ineligible for bond is a legal question over which EOIR has jurisdiction, and is distinct from whether they merit bond. Several legal authorities support this distinction and demonstrate that DHS' allegations that a person is not eligible for bond are not dispositive.[136]

For example, where DHS argues that someone is an "arriving [noncitizen]" and is thus ineligible for bond,[137] BIA caselaw has long directed that IJs have jurisdiction to analyze whether the person was properly deemed "arriving" in the first place.[138] Similarly, in the wake of *Matter of Q. Li*, practitioners report that immigration courts across the country have routinely considered the question of whether that decision forecloses or leaves open jurisdiction for bond in any individual case.

135 *See Matter of Bulnes*, 25 I&N Dec. 57, 59 (BIA 2009) ("An Immigration Judge has the authority to consider and decide whether he has jurisdiction over a matter presented to him. In other words, an Immigration Judge has jurisdiction to determine his jurisdiction.").

136 *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999) (holding that IJs and the BIA are not bound by DHS' assertion that a person is in a mandatory detention category that would deprive EOIR of jurisdiction to redetermine bond); Immigration Court Practice Manual, ch. § 9.3(b) ("an Immigration Judge has jurisdiction to rule on whether he or she has jurisdiction to conduct a bond hearing"); BIA Practice Manual, ch. § 7.2(b)(3), ("The Board has jurisdiction to rule on whether an Immigration Judge has jurisdiction to make a bond determination.").

137 *See* 8 C.F.R. § 1003.19(h)(2)(i)(B) (an IJ "may not redetermine conditions of custody imposed by the Service with respect to . . . [a]rriving [noncitizens] in removal proceedings").

138 *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998) (BIA conducted a legal analysis of whether a respondent was properly deemed "arriving" before determining whether the IJ had authority to grant bond); National Immigration Project, *A Guide to Obtaining Release from Immigration Detention* 23 n.78 (May 28, 2024) https://nipnlg.org/sites/default/files/2024-05/2024_Guide-Obtaining-Release-Imm-Detention.pdf (collecting unpublished BIA decisions recognizing IJ's authority to make legal determination about whether respondent qualifies as "arriving" for purposes of bond determination).

2. The Record Demonstrates Detention Is Pursuant to § 236(a), Not § 235(b)

It can be difficult to determine whether an individual is actually detained under § 235(b) or § 236(a). However, the evidence may demonstrate that ICE detained them under § 236(a), not § 235(b), and therefore they are entitled to a bond hearing in immigration court. A careful examination of the record is particularly important where a client was released at or near the border and later rearrested by ICE. In such cases, paperwork from both the release and the rearrest may be relevant.[139]

Document	INA 235(b) or INA 236(a)?
Form I-94 with "PAROLED" stamp, given upon release from custody	If ICE redetains following written notice (such as later-issued NTA or another type of notice of parole revocation), likely establishes detention pursuant to § 235(b)
Form I-200 Warrant for Arrest, dated prior to or shortly after client's detention	Can support claim that detention is pursuant to § 236(a)
Form I-286 Notice of Custody Determination	Can support claim that detention is pursuant to § 236(a), as it is only referenced by 8 C.F.R. § 236.1, which implements INA § 236
Completed Form I-860 Notice and Order of Expedited Removal	Likely establishes detention pursuant to § 235(b)
Missing or incomplete Form I-860	Could indicate that DHS initiated but did not complete credible fear process, *Matter of M-S-* does not apply, and detention may be pursuant to § 236(a)
Form I-213	May contain useful information about initial encounter with immigration officials, subsequent releases, and re-arrests; may also be helpful if silent or ambiguous regarding DHS argument that detention is under § 235(b)
Form I-270 Record of Determination/Credible Fear Worksheet	If completed with determination by asylum officer, likely indicates detention pursuant to § 235(b)

139 Many of these documents can be obtained through FOIA requests to CBP, ICE and USCIS. *See* American Immigration Council, *FOIA and Immigration Agencies* (April 26, 2023), https://www.americanimmigrationcouncil.org/practice_advisory/freedom-information-act-and-immigration-agencies.

i. EWI first apprehended near the border (distinguish *Matter of Q. Li*)

For noncitizens who entered without inspection and were apprehended somewhere in the vicinity of the border, DHS will likely argue, or the IJ may assume, that the IJ lacks jurisdiction to redetermine bond under *Matter of Q. Li*. Practitioners can argue *Matter of Q. Li* is distinguishable.

First, *Matter of Q. Li* addresses a person who was encountered just after, *i.e.*, on the same day as—crossing the border—at most 100 yards north of it.[140] The decision hinges on this fact to conclude that Ms. Li is someone "who arrives in the United States" under § 235.[141] Relatedly, *Matter of Q. Li* announces that Ms. Li must have initially been detained under § 235(b) because she was arrested based on DHS' statutory warrantless arrest authority found in the first part of INA § 287(a)(2), which authorizes an immigration officer "to arrest any [noncitizen] who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of [noncitizens]."[142] If a noncitizen was not arrested just shortly after crossing the border without inspection (when arguably still in the process of "entering or attempting to enter,") then they were arrested *after* "entry," and therefore the warrantless arrest power specified in *Matter of Q. Li*, which the BIA links to § 235(b) detention, would not have been available.[143]

Second, where redetention is at issue, *Matter of Q. Li* is limited to cases where a person was previously released on humanitarian parole under INA § 212(d)(5), and does not extend to cases where a person was released on recognizance.[144] Practitioners report that after *Matter of Q. Li*, many IJs have found jurisdiction to redetermine bond when the record demonstrates a person was released on recognizance (deemed "conditional parole" under INA § 236(a)(2)(B)) at the border, rather than paroled under § 212(d)(5). Under *Matter of Cabrera-Fernandez*, this argument is available even where the record demonstrates that a noncitizen was arrested shortly after crossing the border.[145]

140 *Q. Li*, 29 I&N Dec. at 67. The decision is ambiguous as to Ms. Li's exact location; in one place it states she was "less than 100 yards" from the border. *Id.* at 70.

141 *Id.* at 68 (citing *Thuraissigiam*, 591 U.S. at 140 (discussing a person who "tries to enter the country illegally" and is "detained shortly after unlawful entry" and therefore has not "effected an entry") and *M-D-C-V-*, 28 I&N Dec. at 23 (discussing a person apprehended just inside the southern border on the same day they crossed into the United States)); *see also id.* at 69 ("[W]e hold that an applicant for admission who is arrested and detained **without a warrant while arriving** in the United States, whether or not at a port of entry, and subsequently placed in removal proceedings is detained under section 235(b)[.]" (emphasis added).

142 *Id.* at 70 n.5 (quoting INA § 287(a)(2)).

143 Although not mentioned in *Q. Li*, INA § 287(a)(2) separately authorizes warrantless arrests "if [the arresting officer] has reason to believe that the [noncitizen] so arrested is in the United States in violation of any [law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of noncitizens] and is likely to escape before a warrant can be obtained for his arrest." This warrantless authority applies nationwide, to noncitizens with any type of immigration status, including authorizing arrest for detention under § 236(a). Thus, despite the suggestion in *Matter of Q. Li* that a warrantless arrest is itself a marker of § 235(b) detention, *see* 29 I&N Dec. at 69 n.4, arrest without a warrant, when the person arrested was not in the process of illegal entry in the arresting officer's "presence or view," is not alone evidence of § 235(b) detention as opposed to § 236(a) detention.

144 *Q. Li*, 29 I&N Dec. at 69–70.

145 *See Cabrera-Fernandez*, 28 I&N Dec. at 747–49 (concluding that for people encountered "less than a mile"

Third, practitioners may argue that paperwork showing a person was paroled under INA § 212(d)(5) alone does not mean a case is on all fours with *Matter of Q. Li*. The BIA found the recency and proximity of Ms. Li's border crossing to be essential. More specifically, under DHS' past practice, parole under INA § 212(d)(5) was granted in certain cases to noncitizens apprehended in the interior. Thus, parole paperwork, without more, does not definitively establish that a person was previously detained pursuant to INA § 235(b) and is therefore ineligible for bond, as noncitizens who have not been admitted may also be detained under INA § 236.[146]

ii. EWI first apprehended in the interior

If a noncitizen was first arrested in the interior of the country, as opposed to immediately after crossing the border, consider making all available arguments that *Matter of Q. Li* is distinguishable, as detailed above. In addition, consider arguing generally that INA § 235(b) is inapplicable because it only reaches individuals who are in the process of entering or who have just entered the United States. There are several arguments available about why INA § 236(a) must be the governing statute for people who entered without inspection and are first encountered in the interior. *See* Part 1.IV.B.3, *supra*.

Historically, the government has not attempted to classify such individuals as subject to no-bond detention under INA § 235(b)(2), even if they are technically applicants for admission. However, as noted above, DHS now takes the position that such individuals are ineligible for bond, and certain IJs have accepted that argument.

iii. Arriving versus non-arriving

It is also important to talk to a client about the circumstances of their arrival, to determine whether they are properly classified as "arriving" or "non-arriving," *see* Part 1.III, *supra*, given that a designation as "arriving" means bond will be unavailable, *see* Part 1.IV.B.1, *supra*. It is not always easy to distinguish between official ports of entry and frequently-used but unofficial entry points. Immigration advocates near the U.S.-Mexico border report that it is not uncommon for groups of migrants to congregate near a gap in a border wall, where CBP officials almost immediately stop, inspect, and detain individuals upon entering. Under these circumstances, an individual may reasonably believe that they entered the United States through an official port of entry, whereas in fact they entered without inspection.[147]

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from the border, "about 40 minutes after" they entered without inspection, INA § 236(a)(2)(B) "provide[d] DHS with an alternative statutory mechanism for releasing" them, and therefore the paperwork showing they had been released on recognizance could not be legally construed as equivalent to parole under § 212(d)(5)).

146 This argument may be particularly important if DHS or the IJ emphasizes the argument in the concurrence in *Matter of Q. Li*, which states that "[t]he grant of immigration parole to the respondent confirms her status as an arriving [noncitizen]." 29 I&N Dec. at 71 (concurrence).

147 For illustrative photos and additional helpful questions to ask clients to distinguish between an entry without inspection and presenting at a POE, *see* Taylor Levy, Taylor Levy Law, "Seeking Asylum at the U.S. Mexico Border" (Feb. 27, 2025) slides 14-32, https://tinyurl.com/borderslides (last visited Aug. 14, 2025).

3. The Record Is Ambiguous, and DHS Has Not Met Its Burden

Practitioners may also consider arguing that DHS bears the burden of establishing that an individual is subject to INA § 235(b). Where DHS has asserted that a noncitizen is detained under § 235(b) but provided no supporting evidence, or where some evidence is in the record but it does not definitively establish § 235(b) detention, practitioners can argue that DHS has failed to meet its burden of proof and that the Immigration Judge should not instead require the noncitizen to try to prove they are detained pursuant to § 236. Highlighting DHS' lack of evidence could be especially helpful to support an argument that *Matter of Q. Li* is distinguishable, *see* Part 2.I.B.2.i., *supra*, or that a person was improperly designated as "arriving," *see* Part 2.I.B.2.iii, *supra*.

Notably, the regulations are silent as to which party must bear the burden to establish the statute of detention. However, under principles of common law, DHS should do so because it has the best (and in some cases, only) access to the relevant proof. The agency has a record of documents showing how an individual was processed by CBP and/or ICE, and therefore should carry the burden of proof.[148] Even in the context of mandatory detention under § 236(c), where a noncitizen might have better access to their own criminal records, DHS bears the initial burden of explaining why there is reason to believe that § 236(c) applies.[149]

4. Consider Other Implications of Bond Arguments

While arguing that a noncitizen is not detained pursuant to INA § 235(b) may establish the IJ's jurisdiction over their bond proceedings, such arguments may also impact their eligibility for affirmative benefits. As such, it is important to confirm that making these arguments in requests for custody redeterminations will not impact a noncitizen's substantive removal case.

For example, practitioners may want to argue that a noncitizen has been paroled from custody pursuant to § 212(d)(5) in order to have a "parole" that renders them eligible for adjustment of status.[150] Under *Matter of Q. Li*, inadmissible applicants for admission who were arrested without a warrant near the border are subject to § 235(b);[151] practitioners have argued that under *Jennings* such individuals can *only* be released via § 212(d)(5) and as a result, they must have been granted § 212(d)(5) parole by operation of law, thereby assuring their eligibility for adjustment. This question is pending before at least one circuit court of appeals as of August 2025.[152]

148 *See U.S. v. One Parcel of Property Located at 194 Quaker Farms Road, Oxford, Conn.*, 85 F.3d 985, 990 (2d Cir. 1996) (explaining that burden of proof commonly lies with the party that "has superior access to evidence on a particular issue" (citing John W. Strong et al., *McCormick on Evidence* § 337, at 570 94th ed.(1992)); *accord Campbell v. U.S.*, 365 U.S. 85, 96 (1961) ("[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary").

149 *See Joseph*, 22 I&N Dec. at 804.

150 *See* INA § 245(a); 8 C.F.R. § 245.2(a)(2)(ii); *cf. Cabrera-Fernandez*, 28 I&N Dec. at 747-48.

151 *See Q. Li,* 29 I&N Dec. at 69-70; *but see Roque-Izada,* 29 I&N Dec. at 107-09 (finding that recent border crosser released from custody had not established he was granted § 212(d)(5) parole); *Cabrera-Fernandez*, 28 I&N Dec. at 749-50 (noncitizens released on their own recognizance shortly after crossing were conditionally paroled and thus ineligible for adjustment).

152 *See Labrada-Hechavarria v. U.S. Att'y Gen.*, No. 23-13664 (11th Cir.); *Castillo-Casanova v. U.S. Att'y*

* * *

While this advisory only addresses legal arguments about bond eligibility, there are many helpful resources on how to effectively present evidence and argument regarding lack of danger and flight risk in support of bond.[153]

II. File a Habeas Petition in District Court

If parole requests to DHS and motions for bond redetermination to the IJ are not successful, it may be possible to challenge the legality of a noncitizen's ongoing detention pursuant to INA § 235(b) via a habeas petition in federal district court. Federal courts may order release, or more commonly, other procedural relief such as a bond hearing, in a habeas proceeding under 28 U.S.C. § 2241.[154]

A. *Possible Legal Claims*

1. INA Claims

If there are viable arguments that a noncitizen is not subject to any of the detention provisions in § 235(b),[155] litigators may consider seeking a declaratory judgment stating the proper statutory basis for the detention and pursuing the relief available for people detained under that statute. Under the Supreme Court's recent decision in *Loper Bright v. Raimondo*, a federal habeas court should independently interpret the meaning and scope of statutes like § 235(b) using the traditional tools of statutory construction.[156]

For example, if DHS has argued that a noncitizen is subject to § 235(b)(2) under *Matter of Q. Li*, or that § 235(b)(2) applies because they are deemed to be an applicant for admission despite having entered the country many years ago, and there are grounds for arguing that they are actually detained pursuant to INA § 236(a), a claim that their detention without a bond hearing violates the statute may be appropriate.[157] A petition should state the legal and factual basis for why § 236(a) is

Gen., No. 24-10645 (11th Cir.).

153 *See, e.g.*, National Immigration Project, *A Guide to Obtaining Release from Immigration Detention*, *supra* note 140; Immigration Justice Campaign, *Bond*, https://immigrationjustice.us/get-trained/bond/.

154 This Advisory is not a comprehensive guide to immigration habeas practice. For a discussion of procedural considerations and other substantive challenges, as well as a template petition and application for order to show cause, *see* National Immigration Litigation Alliance, *Habeas Corpus Petitions* (Jan. 15, 2025), https://immigrationlitigation.org/new-practice-advisory-habeas-corpus-petitions/. For a collection of caselaw, *see* Amica Center for Immigrant Rights, *Index of Immigration Habeas Law*, June 2024, https://amicacenter.org/app/uploads/2024/06/Immigration-Habeas-Law-Index-June-2024.pdf.

155 Such arguments could include a claim that it was improper as a matter of fact or law for a noncitizen client to be subjected to expedited removal. *See* Parts 1.II, 1.IV.A, *supra*. The viability of such claims, particularly in light of the INA's provisions limiting judicial review of expedited removal orders and policies implementing expedited removal, *see* INA § 242(a)(2)(A), (e), is beyond the scope of this advisory. Practitioners should conduct jurisdiction-specific research to inform any such claims.

156 603 U.S. 369, 385, 401 (2024); *see also Rodriguez v. Bostock*, 2025 WL 1193850, at *12.

157 *See, e.g.*, *Gomes*, 2025 WL 1869299 at *6-8 (agreeing with petitioner that he was not subject to § 235(b)(2)

the proper statute governing detention and include any supporting evidence. *See* Part 1.VI.B, 1.V (distinguishing §§ 235(b) and 236(a) detention), Part 2.I.B (discussing why § 235(b) may not apply), *supra.*

The district court may then order a bond hearing before the immigration court. Litigators could also consider a constitutional claim, as many courts have held that for bond hearings under § 236(a) to provide sufficient due process, in certain circumstances *DHS* must bear the burden of justifying continued detention and must do so by an elevated standard proof. However, there is a circuit split on this issue so practitioners should research the law in the circuit where the petition will be filed.[158]

If INA § 241 authorizes detention, then a statutory claim seeking release due to prolonged detention under *Zadvydas* or other fact-specific claims may be available.[159]

2. APA Claims

Under the Administrative Procedure Act, an individual "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. Relief under the APA may take the form of "writs of prohibitory or mandatory injunction or habeas corpus." 5 U.S.C. § 703.[160] Courts can "compel agency action unlawfully withheld or unreasonably delayed," §706(1), or "hold unlawful and set aside agency action" on a number of grounds, § 706(2). Habeas petitioners have successfully brought claims arguing that DHS'

despite *Q. Li* and ordering that he receive a bond hearing at which DHS must justify ongoing detention by clear and convincing evidence); *Rodriguez v. Bostock*, 2025 WL 1193850 at *12-16 (finding that statutory text, canons of construction, legislative history and longstanding agency practice support petitioner's argument that § 236(a), not § 235(b), governs his detention); *Romero v. Hyde*, 2025 WL 2403827 (D. Mass. Aug. 19, 2025) (similar, and collecting cases).

158 *See Hernandez-Lara v. Lyons,* 10 F.4th 19, 39, 45-46 (1st Cir. 2021) (holding that procedural due process requires government to bear the burden of proof at all bond hearings under § 236(a)); *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020) (holding that burden-shifted bond hearing is appropriate once § 236(a) detention is prolonged and requiring DHS to justify continued detention by clear and convincing evidence); *see also, e.g.*, *L.G. v. Choate*, 744 F. Supp. 3d 1172(D. Colo. 2024) (due process requires DHS to bear burden to justify petitioner's detention under § 236(a) by clear and convincing evidence); *Hulke v. Schmidt*, 572 F. Supp. 3d 593 (E.D. Wis. 2021) (same); *Roberto M. D. v. Garland*, 2021 WL 7161831 (D. Minn. Dec. 29, 2021); *but see Miranda v. Garland*, 34 F.4th 338 (4th Cir. 2022) (rejecting burden-shifting argument for § 236(a) bond hearings); *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022) (same but not foreclosing "all as-applied challenges to" § 236(a)'s procedures); *Borbot v. Warden Hudson Cnty. Corr. Facility*, 906 F.3d 274, 276-77 (3d Cir. 2018) (holding that where petitioner did not challenge constitutional adequacy of initial § 236(a) bond hearing or demonstrate unreasonably prolonged detention, he was not entitled to new hearing with shifted burden based on due process challenge to duration of his detention).

159 For example, if a noncitizen is being detained after a final grant of withholding of removal or protection under the Convention Against Torture, there may be a due process or *Accardi* claim available. *See, e.g.*, National Immigration Project, *Practice Advisory: Seeking Release of Clients Detained in Virginia Who Have Won Fear-Based Relief Under* Rodriguez Guerra v. Perry *(E.D. Va.) Settlement* (July 29, 2024) https://www.acluva.org/sites/default/files/field_documents/2024_july_29_rodriguez_guerra_settlement_practice_advisory73_1.pdf.

160 The relevant federal habeas statute also grants federal courts the authority to grant a writ of habeas corpus where an individual is "in custody in violation of the . . . laws . . . of the United States," including the APA and the INA. 28 U.S.C. § 2241(c)(3).

actions, as related to their immigration custody, violate the APA. While a variety of APA claims may be available depending on specific circumstances,[161] below are claims that could be raised in the § 235(b) context.

i. Failure to adjudicate or blanket denials of parole applications

In light of ICE's apparent nation-wide policy to not parole anyone from immigration custody as of mid-2025, *see* Part 2.I.A.1, *supra*, practitioners could consider raising a claim that ICE's failure to adjudicate a pending parole application violates the INA and APA.

In any individual case, ICE's failure to decide a pending request for parole under INA § 212(d)(5) could constitute "agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1). To establish a § 706(1) claim, a plaintiff must establish that ICE is "legally required" to adjudicate a properly submitted parole request.[162] Courts have found that DHS has a "non-discretionary duty to act on and process" parole applications, at least in the context of USCIS requests.[163] That finding overcomes the jurisdictional bar at INA § 242(a)(2)(B)(ii), which restricts judicial review of certain discretionary "decision[s] or action[s]" by DHS.[164] However, such a claim is likely reviewable only as insofar as it challenges the failure to render any decision at all, not ICE's decision to deny a particular request.

Additionally, if ICE's practice evolves into issuing blanket *denials* of all parole requests, a § 706(2) claim may also be available based on a policy of failing to comply with INA § 212(d)(5)(A). Several courts have recently recognized that the statute requires individualized determinations, even in the context of parole revocation.[165] A § 706(2) claim in this context could allege: 1) that ICE's policy of denying all parole applications violates the INA's requirement of a case-by-case analysis, 2) because of that unlawful policy, the individual parole applicant has not received statutorily-required review and thus remains unlawfully detained, and 3) the policy should therefore be set aside.[166]

161 *See, e.g. Gayle v. Meade*, 2020 WL 2086482, at *6 (S.D. Fla. Apr. 30, 2020) (finding *Accardi* violation of habeas petitioners' rights due to ICE's failure to comply with PBNDS' requirements to follow CDC guidelines during COVID-19 pandemic).

162 *See, e.g.*, *Roe v. Mayorkas*, 2023 WL 3466327, at *17 & n.11 (D. Mass. May 12, 2023) (denying motion to dismiss § 706(1) claim regarding unreasonably slow adjudication of Afghan humanitarian parole requests).

163 *Lamarche v. Mayorkas*, 691 F. Supp. 3d 274, 279 (D. Mass. 2023); *see also Roe*, 2023 WL 3466327 at *9, 17 n.11 (relying on *Biden v. Texas*, 597 U.S. 785, 806-07 (2022) for proposition that DHS' exercise of discretion under § 212(d)(5) "must be reasonable"). These cases involved the same statute, INA § 212(d)(5)(A), that governs requests for parole from ICE custody.

164 *See Lamarche*, 691 F. Supp. 3d at 277-78 ("the weight of authority indicates that discretion does not authorize the unreasonable delay or wholesale suspension" of parole adjudications).

165 *See Y-Z-L-H-*, 2025 WL 1898025, at *6 (noting "mandatory procedures" that must be followed in granting parole); *Mata Velasquez*, 2025 WL 1953796, at *10-11 ("Several courts have found that just as a grant of parole requires an individualized review, revocation of parole requires a case-by-base assessment to comply with the statute."); *see also Castellon v. Kaiser*, 2025 WL 2373425, at *5-6 (E.D. Cal. Aug. 14, 2025) (collecting cases).

166 *See* 5 U.S.C. § 706(2)(A), (C), (D); Class Complaint at 24-25, *Damus v. Nielsen*, No. 18-cv-578 (D.D.C. Mar. 15, 2018), https://cgrs.uclawsf.edu/legal-document/class-complaint-injunctive-and-declaratory-relief.

Challenges to "the legality of policies and processes governing discretionary decisions" have been found to be judicially reviewable and not subject to § 242(a)(2)(B)(ii)'s jurisdictional bar.[167] Here, even in the absence of a formal written policy, petitioners can point to ICE's own data showing virtually no parole grants and any other evidence tending to show ICE has a policy of denying all release requests.[168] Notably, for a policy to constitute a "final agency action," it "need not be in writing to be [] judicially reviewable."[169]

Importantly, apart from possible vacatur of a broader policy, the potential relief to an individual litigant through these APA claims would likely be limited to requiring ICE to provide an individualized parole decision. That decision could very well be a denial. As such, it may be advisable to bring these claims only where other challenges resulting in more effective remedies are also available.

ii. Violation of *Accardi* doctrine where ICE fails to comply with binding agency policy

Pursuant to a long-standing legal principle known as the *Accardi* doctrine, individuals may challenge immigration agencies' actions based on their failure to comply with procedural regulations and internal agency rules and procedures if they impact the rights of individuals.[170] Note that while most courts and academics have described the *Accardi* doctrine to be based in administrative law principles, some have articulated *Accardi* claims as having a basis in due process.[171]

As described above, *see* Part 2.I.A.1, there are a number of ICE policies relating to the release of people detained under § 235(b). During the first Trump administration, several courts granted relief on claims that ICE's failure to comply with the 2009 Parole Directive constituted a violation of the *Accardi* doctrine, both on an individual and class-wide basis.

For example, in *Abdi v. Duke*, the district court found that the Parole Directive was binding on ICE under *Accardi* despite language in the policy itself disclaiming any binding effect, citing the government's statements before the Supreme Court in a different case that the directive remained

167 *Doe v. Noem*, 2025 WL 1099602, at *12 (D. Mass. Apr. 14, 2025) (collecting cases and finding jurisdiction to review challenge to policy terminating parole for parole program recipients); *see also Damus v. Nielsen*, 313 F. Supp. 3d 317, 327-28 (D.D.C. 2018).

168 *See* Part 2.I.A, *supra*.

169 *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015).

170 *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individual are affected, it is incumbent upon agencies to follow their own procedures."); *see also, e.g.*, *Kurapati v. U.S. Bureau of Citizenship & Immigr. Servs.*, 775 F.3d 1255, 1262 (11th Cir. 2014) ("Even when a decision is committed to agency discretion, a court may consider allegations that an agency failed to follow its own binding regulations.") (citation omitted); *Mata Velasquez*, 2025 WL 1953796 at *9-11 (finding that DHS' summary revocation of parole violated petitioner's right to case-specific determination under § 212(d)(5) and its implementing regulations).

171 *See, e.g.*, *Brown v. Holder*, 763 F.3d 1141, 1148 (9th Cir. 2014) (explaining *Accardi* claim flows from administrative rather than constitutional law, and rejecting claim where regulations and procedures at issue did not create substantive rights); *but see, e.g.*, *Francois v. Garland*, 120 F.4th 459, 464-65 (5th Cir. 2024) (holding, under *Accardi*, that the BIA violated a petitioner's due process rights because it violated its own regulations); *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991) ("The *Accardi* doctrine is premised on fundamental notions of fair play underlying the concept of due process.").

"in full force and effect."[172] The *Abdi* petitioners alleged that ICE had a widespread practice of disregarding the Parole Directive and denying parole to asylum seekers who had passed their CFIs.[173] The court granted a preliminary injunction based on the petitioners' contention that ICE "failed to comply with the procedures set forth in the ICE Directive when making discretionary decisions concerning parole."[174] Because the petitioners merely sought "compliance with certain minimum procedural safeguards when parole decisions are made," and not with the "ultimate parole decision,"[175] the court-ordered relief required ICE to strictly adhere to all the procedural requirements of the 2009 Parole Directive in making parole decisions for class members.[176]

Federal judges in the District of Columbia granted similar relief in various other cases.[177] Practitioners have brought these *Accardi* claims via habeas petitions, as well as civil complaints.[178]

The remedy for these kinds of claims is generally limited—namely a "better" parole decision-making process that merely conforms with ICE's own policy (for as long as it remains in effect), but that still lacks neutral review.[179] However, raising them can result in additional process and the opportunity to shine a light on the egregious impact of continued detention on individuals subject to § 235(b).

172 *Abdi v. Duke*, 280 F. Supp. 3d 373, 389 (W.D.N.Y. 2017), *vacated in part on other grounds sub nom. Abdi v. McAleenan*, 405 F. Supp. 3d 467 (W.D.N.Y. 2019).

173 *Abdi*, 280 F. Supp. 3d at 380-81.

174 *Id.* at 389, 409-11.

175 *Id.* at 385. Because parole decisions are discretionary and thus not reviewable by courts pursuant to INA § 242(a)(2)(B)(ii), petitioners had to challenge "the procedures employed by Respondents in administering the parole process," *not* the actual "decision to grant or deny parole." *Id.* at 383; *see also Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 136 (D.D.C. 2018) (finding jurisdictional bar did not preclude review where plaintiffs were "not seeking review of their individual parole determinations" but of defendants' deterrence policy).

176 *Abdi,* 280 F. Supp. 3d at 410-11.

177 *See Aracely, R.*, 319 F. Supp. 3d at 153-54, 157; *Damus*, 313 F. Supp. 3d at 330, 339-43 (impacted class was "arriving asylum-seekers" found to have a credible fear and denied parole by one of five ICE field offices); *Mons v. McAleenan*, 2019 WL 4225322, at *8-12 (D.D.C. Sept. 5, 2019) (same for asylum seekers detained by the New Orleans ICE Field Office).

178 *See, e.g.*, *Abdi*, 280 F. Supp. 3d at 381 (habeas and civil complaint); *Aracely, R.*, 319 F. Supp. 3d at 124 (civil complaint only).

179 However, in egregious circumstances, a court may be willing to order direct release following a failure to comply with applicable parole guidance. *Cf. Jimenez v. Cronen*, 317 F. Supp. 3d 626, 656-57 (D. Mass. 2018) (ordering district court hearing to conduct post-order custody review applying the standards in 8 C.F.R. § 241.4 rather than ordering ICE to conduct such review where "ICE has repeatedly demonstrated an inability to perform lawfully and to decide fairly whether detention is justified").

3. Constitutional Claims[180]

The Fifth Amendment's Due Process Clause applies to all "persons" within the United States, including noncitizens detained under § 235(b). The Fifth Amendment requires both:

- **Substantive Due Process:** a reasonable relation between an individual's detention and the government's purported interests in that detention. The government's interests in civil immigration detention are limited to addressing flight risk and danger to the community.[181] In other words, is a client's detention arbitrary, or is it a reasonable measure to prevent flight and/or danger?
- **Procedural Due Process:** adequate procedures to ensure that an individual's detention bears the necessary reasonable relation to its stated purpose. The hallmark of procedural due process is a procedurally-adequate hearing before a neutral arbiter.

Because the substantive and procedural due process violations experienced by a person detained under § 235(b) are intertwined—the government may not have an adequate reason to detain the client and has never been required to demonstrate one—a habeas petition may assert both arguments. They may be separated into two different due process claims or included within one due process claim.

i. Procedural Due Process

A **procedural due process claim** challenges detention under § 235(b) without individualized review of the necessity of detention. The Fifth Amendment's Due Process Clause requires "adequate procedural protections" to ensure that the government's asserted justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint."[182] In almost every civil confinement context, the Supreme Court has found that the hallmark of procedural due process is an individualized custody hearing before a neutral adjudicator.[183] The Second Circuit recently affirmed that these civil commitment precedents apply with equal force to immigration detention.[184]

Based on this precedent, a habeas petitioner could argue that even minimally adequate procedural protections are not included in the statutory and regulatory scheme authorizing detention under § 235(b). As described above, the sole statutory mechanism available for release—parole—consists of a wholly discretionary, unappealable decision after a custody review (not a hearing) by a low-level ICE officer. Thus, advocates may consider arguing that the parole process does not satisfy

180 This section is focused on constitutional challenges to detention under § 235(b), not to placement in expedited removal. While there may be constitutional challenges available in some cases, a full discussion of challenges to placement in ER is beyond the scope of this advisory.

181 In the context of post-final order detention, the Supreme Court indicated that the justification of preventing flight loses salience where "removal seems a remote possibility." *Zadvydas*, 533 U.S. at 690.

182 *Zadvydas*, 533 U.S. at 690 (citation omitted).

183 *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 81, 86 (1992) (citing *United States v. Salerno*, 481 U.S. 747-51 (1987)); *Addington v. Texas*, 441 U.S. 418, 433 (1979); *Zadvydas*, 533 U.S. at 690-92 (collecting cases).

184 *Velasco Lopez*, 978 F.3d at 856 ("The Government's claim that these precedents are inapplicable in an immigration context is unpersuasive."); *but see Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024).

basic procedural due process, as it does not include a hearing or individualized review by a neutral arbiter. A habeas petition asserting a procedural due process claim to § 235(b) detention would seek such review, likely in the form of a constitutionally-adequate bond hearing before an immigration judge, or a bail hearing in district court, *see infra* Part 2.II.B.

The history and posture of a person's immigration proceedings, along with the relevant subsection of § 235(b) that authorizes detention, may affect the nature of the procedural due process claim available. Most commonly, advocates argue that additional procedures to determine the validity of detention are required when one or more of the following circumstances applies:[185]

- Detention under any subsection of § 235(b) without individualized review has become unreasonably prolonged, spanning many months or even years, and the unreasonably prolonged nature of the detention triggers a need for additional process[186]
- Detention without individualized review is otherwise unconstitutional in light of the circumstances of the case, such as:
  - A person who was placed in expedited removal has established a credible or reasonable fear of persecution, is pursuing asylum in § 240 removal proceedings, and is detained pursuant to § 235(b)(1)(B)(ii)[187]
  - A person who was paroled into the United States years earlier and is subsequently re-detained pending removal proceedings[188]
  - A person who entered without inspection and encountered CBP shortly after crossing the border was placed in removal proceedings and released on their own recognizance, and is re-detained much later absent meaningfully changed circumstances[189]

185 This list of potential claims includes more common types of claims and is not exhaustive.

186 While many district courts entertain such claims, a minority of courts has rejected them, and relevant circuit court caselaw is scant. *See infra* Part 2.II.A.3.iv, collecting prolonged § 235(b) detention cases by circuit. *See also Jennings*, 583 U.S. at 312 (declining to review in the first instance an as-applied due process challenge to detention of "arriving" noncitizens without a bond hearing in excess of six months under § 235(b)).

187 *See Padilla v. U.S. ICE*, 704 F. Supp. 3d 1163, 1172-74 (W.D. Wash. 2023) (denying motion to dismiss procedural and substantive due process claims of class of noncitizens with positive credible fear determinations seeking expeditious bond hearings), *argued*, No. 24-2801 (9th Cir. May 21, 2025).

188 *See, e.g.*, *Rodrigues De Oliveira v. Joyce*, 2025 WL 1826118, at *6 (D. Me. July 2, 2025) (bond hearing warranted where petitioner was detained nine years after parole into the United States at a POE, and IJ had found no jurisdiction for bond redetermination based on 8 C.F.R. § 1003.19(h)(1)(i)(B)).

189 In such cases, detention should properly be understood as authorized, if at all, by INA § 236, not § 235. *See supra* Parts 1.IV.B.2, 2.I.B.2. However, in some cases DHS has taken the position that § 235 may authorize such detention. *Compare, e.g.*, *Valdez v. Joyce*, 2025 WL 1707737 (S.D.N.Y. June 18, 2025) (ordering immediate release after finding due process violation where noncitizen was attending immigration court hearings and DHS attempted to dismiss removal proceedings for placement in expedited removal and provided no notice or process prior to re-detention, but noting that the parties agreed that § 236(a) was the relevant detention authority) *with, e.g.*, *Castellon*, 2025 WL 2373425 (similar, but DHS took the position that § 235, and not § 236(a), was the relevant detention authority).

Courts evaluating these procedural due process claims often look to one of two available legal standards. In cases of prolonged detention, some look to a **multi-factor test** to determine if detention without review by a neutral arbiter has become "unreasonable," triggering a right to a bond hearing—similar to tests used to evaluate the same question with regard to prolonged detention under INA § 236(c). Courts tend to place the most importance on the length of detention to date; other factors considered include reasons for delay by either party, likelihood that detention will continue and for how long, whether the conditions of confinement are meaningfully different from criminal punishment, and the likelihood that removal proceedings will result in a final order of removal.[190] Consult local caselaw for the appropriate multi-factor test.

Some courts instead consult the Supreme Court's decision in ***Mathews v. Eldridge***, setting out the three factors a court should use to determine what additional process, if any, is required to satisfy procedural due process:

1. "the private interest that will be affected by the official action;"
2. "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and
3. "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[191]

The first *Mathews* factor will always weigh in a petitioner's favor, particularly when detention is or likely to become prolonged, because the interest in being free from detention is "the most elemental of liberty interests."[192]

As for the second *Mathews* factor, the risk of erroneous deprivation is high, given that the parole process bears none of the essential hallmarks of due process. The parole process is less procedurally robust than the regulatory post-order custody review process available to people detained under INA § 241, yet some courts have found that even those regulations similarly "do not afford adequate procedural safeguards."[193] Individuals who present no risk of flight or danger are routinely detained for long periods under § 235(b), and there are often errors in the factual bases the government uses to deny parole requests. The government also has alternatives available to ameliorate risk of flight

190 *See, e.g.*, *A.L. v. Oddo*, 761 F. Supp. 3d 822, 826 (W.D. Pa. 2025) (applying the multi-factor test from *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203 (3d Cir. 2020)); *Leke v. Hott*, 521 F. Supp. 3d 597, 603 (E.D. Va. 2021) (not explicitly adopting a specific test, but placing great weight on the length of detention—24 months—and fact that there was "no clear end in sight to Petitioner's detention"); *Arechiga v. Archambeault*, 2023 WL 5207589, at *4 (D. Nev. Aug. 11, 2023) (applying multi-factor test from *Banda v. McAleenan*, 385 F. Supp. 3d 1099 (W.D. Wash. 2019)).

191 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

192 *Hong v. Mayorkas*, 2022 WL 1078627, at *4 (W.D. Wash Apr. 11, 2022) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004)).

193 *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011), *abrogated on other grounds as recognized in Rodriguez Diaz*, 53 F.4th at 1201; *Cabrera Galdamez v. Mayorkas*, 2023 WL 1777310, at *6-7 (S.D.N.Y. Feb. 6, 2023) (discussing procedural shortcomings of post-order custody reviews conducted by ICE); *but see Castaneda v. Perry*, 95 F.4th 750, 761 (4th Cir. 2024) (finding one bond hearing and post-order custody reviews "ample process").

that do not involve detention, are effective at ensuring appearance, and are much cheaper, such as case management.[194]

Finally, because immigration courts routinely conduct bond hearings, and they impose a "minimal fiscal and administrative burden,"[195] any government interest under the third *Mathews* factor does not outweigh the first two factors, which weigh strongly in petitioners' favor.

A petitioner arguing for relief under either test will need to articulate the procedural protections that they claim would be constitutionally adequate. Consider seeking a **constitutionally-adequate bond hearing**, and specifying that:

- The hearing must be set within a week (or other limited period of time);
- The government must bear the **burden of proof** to show by **clear and convincing evidence** that continued detention is necessary to ameliorate risk of flight or danger;[196]
- The immigration judge must consider ability to pay a bond and the availability of release with conditions as an alternative sufficient to protect any government interest in preventing flight risk or danger;[197]
- A transcript or recording of hearing should be produced.

The two types of tests—a multi-factor analysis and *Mathews*—answer different questions. The *Mathews* test "resolve[s] the question of 'whether the administrative procedures provided . . . are constitutionally sufficient,' . . . balanc[ing] the benefits or burdens of 'additional or substitute procedural safeguards.'"[198] Meanwhile, the multi-factor tests developed out of § 236(c) prolonged

194 *See* Amicus Brief of American Immigration Council et al. at 22-28, *Hodge v. Brophy*, No. 23-7988 (2nd Cir. Apr. 24, 2024), *available at* https://www.americanimmigrationcouncil.org/amicus-brief/amicus-brief-to-the-second-circuit-arguing-for-individualized-custody-determination-after-prolonged-mandatory-detention/.

195 *Hong*, 2022 WL 1078627, at *5.

196 *See Black v. Decker*, 103 F.4th 133, 155-58 (2d Cir. 2024) (in context of prolonged detention under INA § 236(c), liberty interest requires DHS to bear burden of proof and meet clear and convincing standard); *Hernandez-Lara*, 10 F.4th at 28-35, 41 (in § 236(a) context, finding *Mathews* analysis requires placing burden of proof on DHS to establish danger by clear and convincing evidence to minimize risk of error and flight risk by preponderance of the evidence); *Velasco Lopez,* 978 F.3d at 855-56 (in context of § 236(a), placing burden of proof on DHS and noting that the Supreme Court "has reaffirmed the [] standard for various types of civil detention"); *German Santos*, 965 F.3d at 213-14 (in context of prolonged § 236(c) detention, concluding after *Mathews* analysis that DHS must justify continued detention by clear and convincing evidence); *A.L.*, 761 F. Supp. 3d at 826 (applying *German Santos* to § 235(b) prolonged detention of arriving noncitizen); *but see Rodriguez Diaz v. Garland,* 53 F.4th 1189, 1211 (9th Cir. 2022) (in § 236(a) context, stating "We are aware of no Supreme Court case placing the burden on the government to justify the continued detention of [a noncitizen], much less through an elevated "clear and convincing" showing."); *Miranda*, 34 F.4th at 361-63 (DHS need not bear burden of proof in INA § 236(a) bond hearings).

197 *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976, 990–94 (9th Cir. 2017) (concluding that due process requires IJs in § 1226(a) bond hearings to consider ability to pay and alternative conditions of release); *Black*, 103 F.4th at 158-59 (same, in § 236(c) habeas-ordered bond hearings).

198 *Banda*, 385 F. Supp. 3d at 1106 (quoting *Mathews*, 424 U.S. at 334-35); *but see Hong*, 2022 WL 1078627,

detention caselaw and are largely geared toward addressing the reasonableness of detention that has already stretched on for some time. Nevertheless, courts have based orders for a bond hearing on both tests, and circuit caselaw on immigration detention generally should be consulted to determine whether arguments should be made under one or both tests.

ii. Substantive Due Process

A **substantive due process claim** may also be available to challenge detention that is not reasonably related to a legitimate government interest. An advocate might consider challenging the fact of detention, the length of detention, or the conditions of detention on this basis,[199] arguing that the government has failed to adequately articulate why the individual in question should continue to be detained.

Such a claim would assert that a generalized reference to the statutory scheme, requiring detention absent a discretionary grant of parole, is not a reasonable basis for the specific detention of the individual in question, and instead, detention must be reasonably related to preventing flight or danger.[200] Courts considering this claim frequently subsume the analysis into a procedural due process claim by concluding that continued detention cannot be reasonably related to its only legitimate purpose—protecting against flight risk or danger—if there has been no individualized determination by a neutral decisionmaker that the person's detention is necessary to protect against either concern.[201]

Substantive due process claims during COVID-19 pandemic

A number of habeas courts have ordered the release of petitioners from ICE custody based on claims regarding conditions of confinement that violate individuals' substantive due process rights. Petitioners were most successful in making these claims during the early months of the COVID-19 pandemic. Practitioners often litigated these requests for release in motions for a temporary

at *4 (finding *Mathews* to be inadequate in habeas proceeding because "due process requires a different level of protection for cases involving 'significant deprivation of liberty' compared to cases involving 'mere loss of money'") (quoting *Santosky v. Kramer,* 455 U.S. 745, 755-56 (1982)).

199 Conditions of confinement may also give rise to other types of constitutional claims, and in some jurisdictions may be more viably challenged outside of habeas, review of which is beyond the scope of this advisory. For more information, *see* Eunice Cho, ACLU National Prison Project, *Litigating Immigration Detention Conditions: An Introductory Guide*, (Mar. 2024), https://incarcerationlaw.com/documents/CLE/Immigration%20Detention/2024-3-12%20ACLU%20NPP--Litigating%20Immigration%20Detention%20Conditions%20Practice%20Guide.pdf.

200 *See Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 474–75 (3d Cir. 2015), *abrogated on other ground by Jennings*, 583 U.S. at 303-04 (addressing the due process limitations on detention without individualized review in the context of INA § 236(c), and explaining: "[D]ue process requires us to recognize that, at a certain point—which may differ case by case—the burden to [a noncitizen's] liberty outweighs a mere presumption that the [noncitizen] will flee and/or is dangerous. At this tipping point, the Government can no longer defend the detention against claims that it is arbitrary or capricious by presuming flight and dangerousness: more is needed to justify the detention as necessary to achieve the goals of the statute.").

201 *See Padilla*, 704 F. Supp. 3d at 1172-73.

restraining order or preliminary injunction due to the urgent threats to individuals' health because of pre-existing medical vulnerabilities and facility-specific conditions.[202] Courts have viewed such releases as interim measures that can preserve petitioners' ability to fully pursue habeas relief.

Several courts considering these substantive due process claims ordered the release of individuals subject to § 235(b).[203] Claims regarding punitive conditions of confinement, particularly those relating to deliberate indifference to medical needs, should not be constrained by a petitioner's statute of detention.[204]

iii. Spotlight: Fighting Back Against Courthouse Arrests & Re-detention for Placement in Expedited Removal

DHS' aggressive and unprecedented campaign to arrest noncitizens attending their immigration court hearings, often coupled with attempted placement in expedited removal proceedings, *see* Part 1.II.B, *supra*, has spurred a spate of habeas petitions challenging these re-detentions. Practitioners have made a variety of statutory and constitutional arguments in these petitions and accompanying motions for temporary restraining orders/preliminary injunctions.[205] Below is a brief discussion of a selection of the claims that have been raised and ensuing court orders. Advocates are encouraged to review sample filings, many of which have been shared publicly and have in-depth discussion of the various legal arguments.[206]

202 Much of the caselaw relates to people subject to mandatory detention under INA § 236(c). *See, e.g. Asmed B. v. Decker*, 460 F. Supp. 3d 519 (D.N.J. 2020) (rejecting argument that petitioner subject to § 236(c) could not be released by habeas court where he argued punitive conditions of confinement and deliberate indifference to medical needs and granting preliminary injunction); *Basank v. Decker*, 449 F. Supp. 3d 205 (S.D.N.Y. 2020) (granting TRO); *Coreas v. Bounds*, 458 F. Supp. 3d 352 (D. Md. 2020) (granting preliminary injunction); *Essien v. Barr*, 457 F. Supp. 3d 1008 (D. Colo. 2020) (granting preliminary injunction); *Prieto Refunjol v. Adducci*, 461 F. Supp. 3d 675 (S.D. Ohio 2020) (granting preliminary injury ordering release of some petitioners detained under various detention statutes, but not others, based on level of medical risk); *Vazquez Barrera v. Wolf*, 455 F. Supp. 3d 330 (S.D. Tex. 2020) (similar); *Thakker v. Doll*, 451 F. Supp. 3d 358 (M.D. Pa. 2020) (granting TRO); *see also Ochoa v. Kolitwenzew*, 464 F. Supp. 3d 972 (C.D. Ill. 2020) (granting petition on emergency basis). *But see, e.g., A.S.M. v. Warden, Stewart Cnty. Det. Ctr.*, 467 F. Supp. 3d 1341 (M.D. Ga. 2020 (denying preliminary injunction based in part on minority view that release through a writ of habeas corpus is not available for "unconstitutional conditions of confinement claims").

203 *See, e.g.*, *Ruderman v. Kolitwenzew*, 459 F. Supp. 3d 1121, 1132-33, 1135-39 (C.D. Ill. 2020); *Yeury J. S. v. Decker*, 2020 WL 14050650, at *6-10 & n.4 (D.N.J. May 11, 2020) (returning LPR).

204 *See Yeury J. S.*, 2020 WL 14050650, at *6 n.4 ("Petitioner points out that his challenge is to the conditions of his confinement and not to the government's authority to detain him. Here, I find the fact that Petitioner is subject to detention under § 1225(b) does not negate his argument that the conditions of his confinement may be unconstitutional.").

205 The requests for urgent relief have also been filed in some cases as orders to show cause or motions for bail hearings in the habeas court.

206 *See, e.g.*, NYCLU, *Velazquez v. Kurzdorfer* (June 13, 2025), https://www.nyclu.org/court-cases/velazquez-v-kurzdorfer; ACLU Pennsylvania, *Lopez Contreras v. Oddo*, (May 29, 2025), https://www.aclupa.org/cases/lopez-contreras-v-oddo/; Innovation Law Lab, *OJM v. Bostock*, https://innovationlawlab.org/cases/ojm-v-bostock/ (last updated July 14, 2025); Innovation Law Lab, *YZLH v Bostock*, https://innovationlawlab.org/cases/yzlh-v-bostock/ (last updated July 9, 2025).

Due Process Claims

Many of the people ICE has arrested at immigration court hearings have been living at liberty in the United States for several months, if not years, after being released by CBP at the border. This includes noncitizens paroled in at POEs and those who entered between ports and encountered CBP shortly after crossing the border. The operative facts for due process claims based on the unreasonableness of re-detention raised in these habeas petitions are: 1) DHS necessarily made a determination that the petitioner was not a flight risk or danger when CBP initially released them at the border;[207] 2) in the intervening months, there have been no materially changed circumstances that would negatively impact that analysis;[208] instead, in most cases, petitioners have further mitigated flight risk by establishing ties to the United States and attending their court hearings; and 3) prior to arresting them, DHS failed to conduct an individualized determination of the need for detention in their cases or provide any opportunity to contest their re-detention in front of a neutral adjudicator.[209] Such facts give rise to a substantive due process claim, based on the government's lack of justification for detention; as well as a procedural due process claim, based on the petitioner's entitlement to adequate pre-deprivation process under a *Mathews* analysis.[210] Some courts have ruled favorably on such due process claims, finding that the petitioner's liberty interest was violated by ICE's re-detention without any procedural safeguards,[211] while others have rejected them.[212]

207 Courts have rejected DHS' litigation position that the initial release did not constitute a finding of lack of flight risk and danger. *See Singh v. Andrews,* 2025 WL 1918679, at *2 n.1 (E.D. Cal. July 11, 2025) (in releasing petitioner, "DHS necessarily determined under 8 C.F.R. § 1236.1(c)(8) that he was not a flight risk").

208 *See Valdez,* 2025 WL 1707737, at *3 n.6 (rejecting argument that change in enforcement priorities constituted change in circumstances, noting "[t]he law requires a change in relevant facts, not just a change in attitude").

209 *See, e.g.*, Petitioner's Memorandum of Law in Support of his Motion For Preliminary Injunction, (ECF No. 23), *Mata Velasquez*, 2025 WL 953796 (W.D.N.Y. filed June 12, 2025), https://www.nyclu.org/uploads/2025/06/PI-MOL.pdf; Motion for Preliminary Injunction, (ECF No. 6-1), No. 25-cv-716, *N.M.Z. v. Rodriguez* (W.D. Tex. filed June 24, 2025), https://www.scribd.com/document/884039872/6-Preliminary-Injunction-Redacted-2-1.

210 *See id.*; *see also supra* Part 2.II.A.3.i (discussing *Mathews* test).

211 *See, e.g.*, *Singh*, 2025 WL 1918679, at *2, 10 (finding immediate release warranted where ICE arrested noncitizen who entered United States in January 2024, was RORed by CBP and attended immigration court hearing); *Valdez*, 2025 WL 1707737, at *4 (where petitioner entered in April 2024 and was re-arrested at hearing, "[ICE's] ongoing detention of Petitioner with no process at all, much less prior notice, no showing of changed circumstances, or an opportunity to respond, violates his due process rights"); *Lopez Benitez*, 2025 WL 2371588 at *11-13, 15 (finding due process violation and ordering immediate release of petitioner re-detained at immigration court without prior individualized custody determination); *accord Pinchi v. Noem*, 2025 WL 2084921, at *3-7 (N.D. Cal. July 24, 2025); *Pablo Sequen v. Kaiser*, 2025 WL 2203419, at *2-3 (N.D. Cal. Aug. 1, 2025).

212 *See Chaviano v. Bondi,* 2025 WL 1744349, at *8 (S.D. Fla. June 23, 2025), *appeal docketed*, No. 25-12153 (11th Cir. June 24, 2025); *Lopez Contreras v. Oddo*, 2025 WL 2104428, at *5-6 (W.D. Pa. July 28, 2025) (where petitioner was redetained while in § 240 proceedings, placed in ER, passed CFI and returned to § 240 proceedings, finding no likelihood of success on procedural and substantive due process claims because DHS complied with statute and regulations regarding CFIs and detention of inadmissible arriving [noncitizens], detention was not prolonged and was required by § 235(b)(1)).

District courts have found other due process violations based on the improper procedures DHS has used in dismissing people's § 240 proceedings, revoking their grants of parole, and improperly subjecting them to expedited removal and re-detention.[213] These claims often involve finding a violation of the INA and the APA as well.[214] Notably, a number of courts granting these courthouse arrest habeas petitions have ordered immediate release and prohibited DHS from re-detaining the petitioner unless it establishes re-detention is justified based on flight risk or dangerousness.[215]

Jurisdictional Issues

Not all petitioners have prevailed, as the government has successfully raised a host of jurisdictional bars that preclude district courts' review. At least one court has found both constitutional and statutory claims arising from a courthouse re-detention and improper placement in expedited removal to be jurisdictionally barred.[216] The relevant jurisdiction-stripping provisions in individual petitions are INA §§ 242(a)(2)(A) and (e), which bar review of expedited removal orders except for very limited questions.

iv. Government Arguments Contesting Due Process Claims in INA § 235(b) Context

In contesting the due process claims described above, there are several key cases that the government frequently raises. Below is a description of two of those cases and some arguments that practitioners may consider making preemptively or in replying to the government's opposition.

DHS v. Thuraissigiam, 591 U.S. 103 (2020)

In *Thuraissigiam*, the Supreme Court held that the habeas petitioner lacked a constitutional right to judicial review of a negative credible fear determination. The Court found that in the context of a recently arrived noncitizen, detained immediately after crossing the border, INA § 242(e)(2)'s preclusion of judicial review of expedited removal orders under § 235(b)(1) did not violate the Suspension Clause or the Due Process Clause. The government has used the case to argue that noncitizens subject to detention under § 235(b) only have a right to the procedural protections provided for by the INA, and thus any due process claim for additional process must fail. However, several aspects of the decision are worth emphasizing in arguing that *Thuraissigiam* does not control, or even relate to, habeas claims contesting detention under § 235(b).

213 *See Mata Velasquez*, 2025 WL 1953796 at *11-17 (finding detention violated due process where petitioner's parole was revoked without adequate procedures).

214 *See Y-Z-L-H*, 2025 WL 1898025 at *12-13 (finding APA violation for terminating parole without taking required procedural steps); *Mata Velasquez*, 2025 WL 1953796 at *11 (finding parole revocation violated statutory and regulatory rights).

215 *See, e.g.*, *Singh*, 2025 WL 1918679 at *10; *O-J-M- v. Bostock*, 2025 WL 1943008, at *1 (D. Or. July 14, 2025) (finding petitioner's "substantial interest in her liberty has been erroneously deprived by the Government without procedural due process through the series of Government actions" and ordering release).

216 *Chaviano*, 2025 WL 1744349 at *4-7 (finding no jurisdiction to review claims regarding ineligibility for expedited removal and detention and finding no violation of Suspension Clause).

First, neither the claims, holding, or reasoning in *Thuraissigiam* had to do with a challenge to custody. In fact, this was a point emphasized repeatedly by the majority. 591 U.S. at 107, 117-19 ("Not only did respondent fail to seek release, he does not dispute that [his] confinement . . . is lawful."). Instead, the case is about the permissible procedures for granting or denying noncitizens with no ties to the country admission into the United States. The petitioner argued that the Constitution required judicial review of his claim that his expedited removal order was flawed and that he should be provided "a new opportunity to apply for asylum." *Id.* at 117 n.13. *Thuraissigiam* merely held that the government's plenary power over admission dictates that those at the threshold of initial entry, like the petitioner in that case, lack due process rights in admission decisions beyond the rights prescribed by Congress. 591 U.S. at 107, 138-40.[217] As several district courts have found, this narrow holding does not apply to detention challenges.[218] Congress' power to set procedures to admit or exclude noncitizens does not mean that Congress has the authority to arbitrarily or unreasonably deprive noncitizens of liberty by detaining them in violation of the Due Process Clause.[219]

Practitioners seeking to distinguish *Thuraissigiam* may therefore emphasize that not only the claim (unlawful detention), but also the relief sought, is entirely distinct: a constitutionally-adequate bond hearing or release from custody, not "administrative review of [an] asylum claim and ultimately [] authorization to stay in this country." *Thuraissigiam*, 591 U.S. at 107. The former falls squarely within the traditional purposes of the writ of habeas corpus. *Id.*[220]

Additionally, practitioners may consider arguing that *Thuraissigiam* should be cabined to the context of expedited removal of a person who was apprehended at the border immediately after crossing into the United States. It arguably does not apply to *any* claims, be they challenges to detention or otherwise, brought by noncitizens in other situations. *Thuraissigiam* stands for the narrow proposition that a noncitizen who has just crossed the border and has no ties to the United

217 This principle has long been articulated in Supreme Court jurisprudence. *See, e.g.*, *Landon v. Plasencia,* 459 U.S. 21, 32 (1982) (holding noncitizens "seeking initial admission . . . ha[ve] no constitutional rights regarding [their] application[s]"); *U.S. ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as a[] [noncitizen] denied entry is concerned."). What was arguably different about the petitioner's situation in *Thuraissigiam* was that he had not arrived at a port of entry but instead crossed the border and made it "25 yards into U.S. territory before he was caught." 591 U.S. at 139. The Supreme Court rejected this distinction because the government's plenary power regarding admission "would be meaningless if it became inoperative as soon as an arriving [noncitizen] set foot on U.S. soil." *Id.*

218 *See, e.g.*, *Singh*, 2025 WL 1918679, at *6; *A.L.*, 761 F. Supp. 3d at 825-26; *Padilla*, 704 F. Supp. 3d at 1171-72; *Arechiga*, 2023 WL 5207589 at *3; *Leke*, 521 F. Supp. 3d 597 at 604; *but see Mendoza-Linares v. Garland*, 2024 WL 3316306, at *2 (S.D. Cal. June 10, 2024) (holding *Thuraissigiam* defeated prolonged detention habeas); *Gonzales Garcia v. Rosen*, 513 F. Supp. 3d 329, 333 (W.D.N.Y. 2021) (same).

219 *See Zadvydas*, 533 U.S. at 695 ("[T]hat [plenary] power is subject to important constitutional limitations.").

220 *See also Castro v. U.S. DHS*, 835 F.3d 422, 449 & n.32 (3d Cir. 2016) (concluding that petitioners who, like Mr. Thuraissigiam, were apprehended immediately upon entry without inspection and did not contest that they were statutorily subject to expedited removal, could not "challenge issues relating to their application[s] for admission," *i.e.*, attack the validity of their credible fear determinations in habeas proceedings, but "doubt[ing] that Congress could authorize, or that the Executive could engage in, the indefinite, hearingless detention of a [noncitizen] simply because the [noncitizen] was apprehended shortly after clandestine entrance").

States cannot resort to habeas as a means of "gaining entry," and that due process is not violated where such individuals are subject to expedited removal in accordance with the procedures of the INA. 591 U.S. at 137-40. However, where petitioners designated as "applicants for admission" have "effected an entry" and gained ties and time in the country, the legal regime described in *Thuraissigiam* should not apply to them. 591 U.S. at 140.[221] For example, the Ninth Circuit has held that the "entry fiction is best seen . . . as a fairly narrow doctrine that primarily determines the procedures that the executive branch must follow before turning an immigrant away" because "[o]therwise, the doctrine would allow any number of abuses to be deemed constitutionally permissible merely by labelling certain 'persons' as non-persons."[222]

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953)

At issue in *Mezei* was a noncitizen's detention on Ellis Island after being denied entry and "permanently excluded" from the United States on national security grounds. 345 U.S. at 207. His order of exclusion was based on a determination that his "entry would be prejudicial to the public interest for security reasons," a finding made after he attempted to return to the country after 19 months in Hungary during the Cold War. *Id.* at 208. However, because no other country would accept him, he remained detained for 21 months before a district court granted him habeas relief in the form of conditional parole on bond. *Id.* at 209. The Supreme Court reversed in a decision that focused on the constitutionality of the admission procedures laid out in the Passport Act of 1918. In passing that law, Congress "expressly authorized the President" to exclude noncitizens without a hearing on the basis of potential harm to the national security of the United States. *Id.* at 210-11, 214-15.

The government often cites *Mezei* in support of its argument that arriving or recently entered noncitizens are only entitled to whatever process Congress provides for them. In other words, the government may argue that a noncitizen detained under § 235(b) only has the rights granted to them by statute, which provides for release only pursuant to discretionary parole under § 212(d)(5).[223] However, as many courts adjudicating due process claims for noncitizens have held, *Mezei* is inapplicable to habeas petitions that raise due process challenges to prolonged or otherwise unreasonable detention under § 235(b).[224]

Practitioners may consider arguing that *Mezei* should be cabined to its highly specific context. Importantly, while the habeas court had granted the petitioner release on bond, the Supreme

221 *See* 591 U.S. at 139-140 (discussing entry fiction applicable to noncitizens "who arrive at ports at entry" and extending it to petitioner because he was detained "shortly after his unlawful entry").

222 *Kwai Fun Wong v. United States*, 373 F.3d 952, 973 (9th Cir. 2004) (emphasis omitted), *abrogated on other grounds by Wilkie v. Robbins*, 551 U.S. 537 (2007); *see also Khouzam v. Att'y Gen.,* 549 F.3d 235, 256 (3d Cir. 2008) ("[W]e have repeatedly held that [noncitizens] detained immediately upon arrival...are entitled to due process of law . . . .").

223 *See, e.g.*, *Mbalivoto v. Holt*, 527 F. Supp. 3d 838, 845-46 (E.D. Va. 2020) (describing government's position).

224 *See, e.g.*, *Leke*, 521 F. Supp. 3d at 604; *Mbalivoto*, 527 F. Supp. 3d at 845-46; *Kydyrali v. Wolf*, 499 F. Supp. 3d 768, 772 (S.D. Cal. 2020); *Lett v. Decker*, 346 F. Supp. 3d 379, 385-86 (S.D.N.Y. 2018), *vacated as moot*, 2020 WL 13558956 (2d Cir. July 30, 2020); *but see, e.g.*, *Petgrave v. Aleman*, 529 F. Supp. 3d 665, 678-79 (S.D. Tex. 2021) (finding *Mezei* and *Thuraissigiam* precluded the due process claim of petitioner apprehended shortly after entering unlawfully).

Court's analysis was primarily focused on the constitutionality of certain exclusion procedures. *Mezei*, 345 U.S. at 210-12.[225] Moreover, the statute at issue in *Mezei* is distinguishable from INA § 235. The Passport Act specified that it applied "during periods of international tension and strife," and allowed the Executive to exclude arriving noncitizens "without a hearing when the exclusion is based on confidential information the disclosure of which may be prejudicial to the public interest." *Id.* at 210-11.

In contrast, habeas petitioners subject to § 235(b) raising due process claims regarding the length or reasonableness of their detention are held pursuant to a distinct statutory scheme and the vast majority of them present starkly different facts than those of *Mezei*. Notably, because § 235(b) is a pre-final order detention authority, such individuals have not yet had their applications for admission or inadmissibility definitively decided. Unlike the petitioner in *Mezei*, who had been permanently excluded prior to filing his habeas, petitioners subject to § 235(b) have a statutory right to further proceedings regarding whether they can lawfully remain in the country.

Additionally, courts have held that the national security context of *Mezei* renders it distinguishable.[226] There, the Attorney General had, *prior* to the habeas court's grant of bond, made an individualized determination that the petitioner posed too great of a security risk to temporarily admit.[227] Practitioners may consider emphasizing the lack of any individualized allegations in a noncitizen's case regarding their dangerousness, let alone a determination that they pose a threat to national security. Moreover, the procedural remedy of a constitutionally-adequate bond hearing would allow the government to present any such allegations, and an Immigration Judge to weigh any risks related to release.

Notwithstanding *Mezei,* and more recently *Thuraissigiam*, many courts have recognized that individuals who are in removal proceedings, litigating their claims through the statutory process, have due process rights against arbitrary detention—despite being subject to detention under § 235(b). While courts have held that the requirements of due process are flexible, the Supreme Court in *Zadvydas* rejected the government's argument that the plenary power doctrine—or Congress' authority over admission and removal of noncitizens—means that certain noncitizens have no due process right to challenge detention. 533 U.S. at 695. The Court noted that even the political branches' authority in that realm "is subject to important constitutional limitations." *Id.* The Court distinguished between challenges to Congress's plenary power and challenges to "an indefinite term of imprisonment within the United States." *Id.*

225 *Mbalivoto*, 527 F. Supp. 3d at 846 & n. 7 ("[A]s in *Thuraissigiam*, the Court was specifically considering the constitutionality of the statutory scheme used to determine Mezei's admissibility . . . and because Mezei had already been definitively determined to be barred from entering the United States on national security grounds, the Court did not consider directly the constitutionality of his indefinite detention").

226 *See, e.g.*, *Kydyrali*, 499 F Supp. 3d at 772 ("Unlike Mr. Mezei, Petitioner is not alleged to present national security concerns, has not been permanently excluded from the United States, and seeks a bond hearing prior to a conclusive decision on his application for admission."); *Djelassi v. ICE Field Off. Dir.*, 434 F. Supp. 3d 917, 921-22 (W.D. Wash. 2020); *Leke*, 521 F. Supp. 3d at 604 (distinguishing *Mezei* as it involved "potential disclosure of sensitive national security information, a factor not applicable" in pending habeas petition); *Lett*, 346 F. Supp. 3d at 386 ("[T]he *Mezei* court explicitly tailored its holding to the national security context . . . ."); *Gutierrez v. Dubois*, 2020 WL 3072242, at *8–9 (S.D.N.Y. June 10, 2020) (similar, and collecting cases).

227 *See Bermudez Paiz v. Decker*, 2018 WL 6928794, at *11 (S.D.N.Y. Dec. 27, 2018).

v. Select caselaw by jurisdiction: due process challenges to prolonged detention under § 235(b) (last updated August 2025)

Prolonged detention has been the most common basis for seeking habeas relief and consequently has generated the most precedent. This section includes a sampling of relevant caselaw but is not an exhaustive review.

First Circuit:

District courts have recognized as-applied due process challenges to prolonged detention under § 235.

See, e.g., *Benito Vasquez v. Moniz*, 2025 WL 1737216 (D. Mass. June 23, 2025) (explaining that even where § 235(b)(1) authorized detention, pre-removal detention that is "indefinite or unduly prolonged" would violate substantive due process, but finding no such violation where petitioner was detained for 12 days); *Pena v. Hyde*, 2025 WL 2108913 (D. Mass. July 28, 2025) (similar, for noncitizen purportedly detained under § 235(b)(2) for 17 days); *Oppong v. Hodgson*, 2017 WL 841276 (D. Mass. Mar. 3, 2017) (suggesting due process rights with regard to custody for arriving noncitizen paroled in and detained under § 235(b)(1) are the same as under § 236, but declining to decide the exact nature of the petitioner's constitutional rights where he had not yet been detained for six months).

Second Circuit:

District courts have recognized as-applied due process challenges to prolonged detention under § 235, with exceptions.

See, e.g., *Perez v. Decker*, 2018 WL 3991497 (S.D.N.Y. Aug. 20, 2018) (granting habeas petition and ordering constitutionally adequate bond hearing for arriving noncitizen held under § 235(b)(2)(A), finding 9 months prolonged detention violated due process; noting conclusion would be same even if petitioner were held under § 235(b)(1)(B)); *Lett v. Decker*, 346 F. Supp. 3d 379, 385-86 (S.D.N.Y. 2018) (similar, for arriving noncitizen held under § 235(b)(2) for 10 months), *vacated as moot*, 2020 WL 13558956 (2d Cir. July 30, 2020); *Rasel v. Barr*, 455 F. Supp. 3d 38, 45–49 (W.D.N.Y. 2020) (declining to decide whether INA § 235 or § 236 authorized detention, and applying multi-factor reasonableness test to conclude 21-month detention was unreasonable, giving rise to a need for additional procedural protections).

But see, e.g., *Rodriguez Figueroa v. Garland*, 535 F. Supp. 3d 122 (W.D.N.Y. 2021) (rejecting as-applied procedural due process challenge to over two-year § 235(b) detention brought by petitioner who was apprehended shortly after crossing the border); *Poonjani v. Shanahan*, 319 F. Supp. 3d 644 (S.D.N.Y. 2018) (similar, as to an arriving noncitizen).

Third Circuit:

District courts have recognized as-applied due process challenges to prolonged detention under § 235.

See, e.g., *Akhmadjanov v. Oddo*, 2025 WL 660663 (W.D. Pa. Feb. 28, 2025) (finding § 235(b) detention of arriving noncitizen unreasonable after 17 months and ordering bond hearing); *A.L.*, 761 F. Supp. 3d 822 (finding § 235(b) detention of arriving noncitizen unreasonable after 10 months and ordering bond hearing); *Frank B. v. Green*, 2020 WL 1673026 (D.N.J. Apr. 6, 2020) (finding § 235(b) detention unreasonable after 11 months, ordering bond hearing, and collecting cases); *Singh v. Sabol*, 2017 WL 1659029 (M.D. Pa. Apr. 6, 2017) (finding § 235(b)(1) detention of arriving noncitizen unreasonable after 17 months, recommending bond hearing); *cf. Castro v. U.S. DHS*, 835 F.3d 422, 449 n.32 (3d Cir. 2016) ("We doubt . . . that Congress could authorize, or that the Executive could engage in, the indefinite, hearingless detention of [a noncitizen] simply because the [noncitizen] was apprehended shortly after clandestine entrance.").

Fourth Circuit:

District courts have recognized as-applied due process challenges to prolonged detention under § 235.

See, e.g., *Abreu v. Crawford*, 2025 WL 51475 (E.D. Va. Jan. 8, 2025) (applying multi-factor reasonableness test to prolonged §235(b) detention of arriving noncitizen and finding 13-month detention unreasonable, ordering bond hearing); *Mbalivoto v. Holt*, 527 F. Supp. 3d 838 (E.D. Va. 2020) (similar, and finding 22-month detention unreasonable); *Leke v. Hott*, 521 F. Supp. 3d 597 (E.D. Va. 2021) (similar, and finding 24 months unreasonable).

Fifth Circuit:

District courts have recognized as-applied due process challenges to prolonged detention under § 235, with exceptions.

See, e.g., *da Silva v. Nielsen*, 2019 WL 13218461 (S.D. Tex. Mar. 29, 2019) (holding detention of an "arriving" noncitizen for over a year under § 235(b)(1) without bond hearing violated due process, ordering bond hearing); *N.Z.M. v. Wolf*, 2020 WL 2813557 (S.D. Tex. May 28, 2020) (similar, regarding detention lasting two years and three months, ordering immediate release).

But see, e.g., *Ford v. Ducote*, 2020 WL 8642257 (W.D. La. Nov. 2, 2020) (finding no due process violation for arriving noncitizen detained under § 235(b)(1) for over one year pending completion of removal proceedings, because detention "is not 'indefinite'"); *Tahtiyork v. U.S. DHS*, 2021 WL 389092 (W.D. La. Jan. 12, 2021) (following *Ford*), *report and recommendation adopted*, 2021 WL 372573 (Feb. 3, 2021); *Petgrave v. Aleman*, 529 F. Supp. 3d 665 (S.D. Tex. 2021) (similar, regarding a person detained under § 235(b)(1) upon apprehension shortly after crossing the border).

Sixth Circuit:

Caselaw is limited.

See Kasneci v. Director, Bureau of Immigr. & Customs Enf't, 2012 WL 3639112 (E.D. Mich. Aug. 23, 2012) (acknowledging a returning LPR detained under § 235(b)(2) may be entitled to a bond hearing if detention were to become prolonged but dismissing habeas petition where LPR detained only 27 days).[228]

Seventh Circuit:

District courts have recognized as-applied due process challenges to prolonged detention under § 235.

See, e.g., *Ruderman v. Kolitwenzew*, 459 F. Supp. 3d 1121 (C.D. Ill. 2020) (ordering bond hearing for arriving noncitizen who was initially paroled into the United States, then redetained for four years under § 235(b)(2), applying multi-factor reasonableness test); *cf. Vargas v. Beth*, 378 F. Supp. 3d 716 (E.D. Wis. 2019) (assuming § 236(c) authorized detention and finding 9.5 month detention unreasonable under multi-factor test, but noting possibility petitioner was detained under § 235(b) and suggesting result would be the same).

Eighth Circuit:

District courts have recognized as-applied due process challenges to prolonged detention under § 235.

See, e.g., *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853 (D. Minn. 2019) (applying multi-factor reasonableness test to returning LPR detained under § 235(b)(2) and ordering bond hearing after 19 months of detention); *Jenkins C. v. Barr*, 2020 WL 2559562 (D. Minn. May 4, 2020) (following *Jamal A.*, and recommending bond hearing for an arriving noncitizen detained under § 235(b)(2) for 26 months), *report and recommendation adopted*, 2020 WL 2557947 (May 20, 2020) ("The Government's argument is essentially that [a noncitizen] detained under § [235] can never complain about the length of his detention, whether it is the more than 27-month detention at issue here or one that lasts for decades. The Constitution demands more.").

But cf. Banyee v. Garland, 115 F.4th 928 (8th Cir. 2024), *rehearing denied*, 131 F.4th 823 (8th Cir. 2025) (abrogating the line of district court cases entertaining as-applied due process challenges to

228 In *Hamama v. Adducci*, 946 F.3d 875 (6th Cir. 2020), the Sixth Circuit vacated class-wide relief based on a *Zadvydas* analysis for people detained under § 235(b) for lack of jurisdiction under 8 U.S.C. § 1252(f)(1). The panel also noted, arguably in dicta, its disapproval of the district court's extension of *Zadvydas*'s reasoning to pre-removal-order detention. *Id.* at 879-80. Courts in the Sixth Circuit have continued to grant as-applied due process challenges to mandatory detention under § 236(c) even after *Hamama*, *e.g.*, *M.T.B. v. Byers*, 2024 WL 3881843 (E.D. Ky. Aug. 20, 2024), suggesting as-applied challenges under § 235(b) remain available as well.

prolonged detention under § 236(c), which had applied a multi-factor reasonableness test). *Banyee* did not address § 235 detention.[229]

Ninth Circuit:

District courts have recognized as-applied due process challenges to prolonged detention under § 235, with exceptions.

Banda v. McAleenan, 385 F. Supp. 3d 1099 (W.D. Wash. 2019) (finding that noncitizen's prolonged detention of over 18 months under § 235(b)(1) violated due process after applying multi-factor test to evaluate the constitutionality of detention, ordering bond hearing); *Djelassi v. ICE Field Office Director*, 434 F. Supp. 3d 917 (W.D. Wash 2020) (following *Banda*, ordering bond hearing for noncitizen detained under § 235(b)(1) for 1.5 years with likely one more year of detention pending petition for review); *Kydyrali v. Wolf*, 499 F. Supp. 3d 768 (S.D. Cal. 2020) (following *Banda*, ordering bond hearing for noncitizen detained under § 235(b)(1) for 20 months); *A.E. v. Andrews*, 2025 WL 1424382 (E.D. Cal. May 16, 2025) (applying *Mathews v. Eldridge* and ordering bond hearing for arriving noncitizen detained under § 235(b)(1) for 20 months); *Masood v. Barr*, 2020 WL 95633 (N.D. Cal. Jan. 8, 2020) (finding nine months of detention without individualized review under § 235(b)(1) was unreasonable, ordering bond hearing); *Arechiga v. Archambeault*, 2023 WL 5207589 (following *Banda*, ordering bond hearing for arriving noncitizen detained under § 235(b)(1) for 43 months).

But see, e.g., *Ibarra-Perez v. Howard*, 468 F. Supp. 3d 1156 (D. Ariz. 2020) (rejecting *Banda*, finding § 235 detention of arriving noncitizen until conclusion of removal proceedings did not violate due process); *Lopez v. U.S. DHS*, 2021 WL 2079840 (D. Ariz. Jan. 28, 2021) (same), *report and recommendation adopted*, 2021 WL 2075733 (D. Ariz. May 24, 2021).

Tenth Circuit:

Caselaw is limited.

Cf. M.S.P.C. v. U.S. CBP, 60 F. Supp. 3d 1156, 1171 (D.N.M. 2014) (denying motion for stay of removal but taking the position that "Congress can place the expedited removal decision entirely within the discretion of executive officers, with only the process that Congress sees fit to authorize," but that is "[u]nlike . . . the indefinite or prolonged detention context").

But see, e.g., *Gonzalez Aguilar v. Wolf*, 448 F. Supp. 3d 1202 (D.N.M. 2020) (finding no due process violation from prolonged detention of "arriving" petitioner who had been released, then subsequently redetained pursuant to § 235(b)(2)); *de la Rosa Espinoza v. Guadian*, 2020 WL 3452967 (D. Kan. June 24, 2020) (applying *Gonzalez Aguilar* to a person detained upon arrival at a POE to seek asylum); *Bataineh v. Lundgren*, 2020 WL 3572597 (D. Kan. July 1, 2020) (applying *de la Rosa* to a returning LPR detained at a POE).

229 Following *Banyee*, as of August 2025 no district courts in the Eighth Circuit have issued decisions considering any impact it may have on *Jamal A.* and its progeny. However, *Banyee*'s reasoning might be distinguishable, given the court's focus on *Demore v. Kim*'s holding that § 236(c)—a statute mandating no-bond detention of people with certain criminal records pending removal proceedings—is facially constitutional. In contrast, *§ 235(b)* is not limited to people with criminal records.

Eleventh Circuit:

Caselaw is limited.

Moore v. Nielsen, 2019 WL 2152582 (N.D. Ala. May 3, 2019) (applying multi-factor test and ordering bond hearing for returning LPR deemed "arriving," and citing approvingly cases affirming due process rights against prolonged detention for people detained under § 235(b) "regardless of their immigration status").

Cf. Barillas v. Field Office Director for the Ice Miami Office of Enf't & Removal Operations, 697 F. App'x 624, 625 (11th Cir. Aug. 30, 2017) (remanding dismissal of habeas petition to determine whether release on parole rendered petition moot, but noting that an "arriving" noncitizen might, despite that status, be "entitled to basic procedural protections when her liberty interest is denied"); *D.A.F. v. Warden, Stewart Detention Ctr.*, 2020 WL 9460467, *10 (M.D. Ga. May 8, 2020) (finding "that arriving [noncitizens], such as Petitioner, have at least some base level of due process rights against unreasonable detention," but finding 5 months not unreasonable), *report and recommendation adopted in part*, 2020 WL9460341 (M.D. Ga. July 24, 2020) (declining to decide whether due process requires a bond hearing for a person detained under § 235(b)(1)(B)(iii)(IV) after some prolonged length of detention where the period of detention at issue was not constitutionally unreasonable); *Kameron v. DHS*, 2020 WL 9460465 (M.D. Ga. Mar. 27, 2020) (finding an "arriving" petitioner had "some due process rights" but 18-month detention was not yet unreasonable).

But see D.A.V.V. v. Warden, Irwin Cnty. Detention Ctr., 2020 WL 13240240 (M.D. Ga. Dec. 7, 2020) (*report and recommendation*) (finding "arriving" petitioner had no due process rights related to detention beyond what is provided by the INA).

B. Prayer for Relief

Depending on the substance of the claim(s) brought, consider seeking some or all of the following types of relief:

- Immediate release[230]
- Release unless the government provides a constitutionally adequate bond hearing in immigration court within a set amount of time (such as 7 days)
- A custody determination in the district court rather than the immigration court, with the same burden of proof and consideration of ability to pay and of conditional release instead of detention[231]
- Release unless the government provides a legally proper parole determination within a set amount of time (such as 7 days);
- Declaratory judgment (i.e., identifying the proper statutory basis for detention, or declaring the detention is unlawful or unconstitutional, as appropriate)
- Injunction against transferring the petitioner away from the jurisdiction where habeas proceedings are pending
- Ask that the court maintain jurisdiction until compliance is complete
- Attorney's fees pursuant to the Equal Access to Justice Act (EAJA)[232]
- Grant any other further relief as the court deems just and proper

230 *See, e.g., Chipantiza-Sisalema v. Francis,* 2025 WL 1927931 (S.D.N.Y. July 13, 2025) (granting habeas and ordering immediate release of § 236(a) petitioner); *O-J-M-*, 2025 WL 1943008, at *1 (granting habeas and ordering immediate release); *N.Z.M. v. Wolf*, 2020 WL 2813557, *3 (S.D. Tex. May 28, 2020) (granting habeas and ordering immediate release on unsecured bond of § 235(b) arriving petitioner); *Dos Santos v. Noem*, 2025 WL 2370988, at *8-9 (D. Mass. Aug. 14, 2025) (ordering immediate release based on preexisting bond order).

231 *See, e.g., L.G.M. v. LaRocco*, Mem. & Order (ECF No. 30), 25-cv-2631 (PKC) (E.D.N.Y. June 25, 2025) (granting bond hearing in federal habeas court to § 236(c) petitioner because of important constitutional rights at issue and overburdened immigration court dockets); *cf. Jimenez*, 317 F. Supp. 3d at 656-57 (ordering district court hearing to conduct post-order custody review applying standards in 8 C.F.R. § 241.4 rather than ordering ICE to conduct such review because remanding would "not be equitable" where "ICE has repeatedly demonstrated an inability to perform lawfully and to decide fairly whether detention is justified").

232 *See, e.g.*, *Vacchio v. Ashcroft*, 404 F.3d 663, 667-72 (2d Cir. 2005) (holding EAJA fees available to prevailing petitioner in immigration habeas); *In re Hill*, 775 F.2d 1037, 1040-42 (9th Cir. 1985) (same); *but see Obando-Segura v. Garland*, 999 F.3d 190, 192-95 (4th Cir. 2021) (finding EAJA fees unavailable for immigration habeas); *Barco v. Witte*, 65 F.4th 782, 784 (5th Cir. 2023) (same); *Daley v. Choate*, No. 24-1191 (10th Cir. argued May 14, 2025) (to decide whether EAJA fees are available for immigration habeas); *see also* American Immigration Council, National Immigration Litigation Alliance & National Immigration Project, *Requesting Attorneys' Fees Under the Equal Access to Justice Act* (Aug. 14, 2020), https://www.americanimmigrationcouncil.org/practice-advisory/requesting-attorneys-fees-under-equal-access-justice-act/.

C. Seeking Release During Pendency of Habeas Petition

In addition to seeking direct release as a remedy for a successful habeas petition, if there are sufficiently compelling circumstances, petitioners can ask the habeas court to order release from detention pending resolution of the habeas claim.

Precedent from various circuit courts of appeal creates standards for when a habeas court may grant a petitioner release, based on their inherent authority to set bail. A district court hearing a petition for habeas corpus "has inherent power to release the petitioner pending determination of the merits."[233] The Second Circuit in *Mapp v. Reno* explicitly held that "the federal courts have the same inherent authority to admit habeas petitioners to bail in the immigration context as they do in criminal habeas cases."[234] A petitioner must raise "substantial claims" and demonstrate that "extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective."[235] The First Circuit requires "an exigency of circumstances" for courts to exercise their discretion to release petitioners, and has cited likelihood of success on the merits or a "health emergency" as valid grounds for release on bail.[236] The Third Circuit has adopted a similar standard, requiring "extraordinary circumstances" before a federal habeas court can grant bail to a petitioner "prior to a ruling on the merits of the petition."[237] The Fifth and Sixth Circuits also require a "substantial" legal claim and "extraordinary or exceptional circumstances" before a habeas court may release a petitioner.[238]

While the required "extraordinary circumstances" often involve health complications, other relevant factors include unusual delay in proceedings, a credible claim to U.S. citizenship, a history of trauma or violence, and other particularly challenging or sympathetic personal circumstances.[239]

233 *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1083-84 (9th Cir. 2006) (finding authority to grant release pending appeal for immigration habeas petitioner in Fed. R. App. P. 23(b) and evaluating request under traditional standard for interim injunctive relief).

234 241 F.3d 221, 223 (2d Cir. 2001).

235 *Id.* at 230 (quoting *Iuteri v. Nardoza*, 662 F.2d159, 161 (2d Cir. 1981); *see, e.g., Coronel v. Decker*, 449 F. Supp. 3d 274, 289-90 (S.D.N.Y. 2020) (granting immediate release under *Mapp* based on health issues); *Kiadii v. Decker*, 423 F. Supp. 3d 18, 20-21 (S.D.N.Y. 2018) (granting release under *Mapp* based on credible claim to U.S. citizenship).

236 *Woodcock*, 470 F.2d at 94; *see also Savino v. Souza*, 453 F. Supp. 3d 441, 453-54 (D. Mass. 2020) (ordering release of immigration detainee).

237 *Lucas v. Hadden*, 790 F.2d 365, 367-68 (3d Cir. 1986); *see also, Jose B.R. v. Tsoukaris*, 2020 WL 2744586, at *13 (D.N.J. May 27, 2020) (finding sporadic delays and closures at immigration court and lack of access to counsel due to pandemic constituted extraordinary circumstances favoring immediate release of noncitizen petitioner).

238 *Calley v. Callaway,* 496 F.2d 701, 702 (5th Cir. 1974); *Nash v. Eberlin*, 437 F.3d 519, 526 n. 10 (6th Cir. 2006); *see also Singh v. Gillis,* 2020 WL 4745745, at *2 (S.D. Miss. June 4, 2020) (collecting cases in Fifth Circuit applying *Mapp* in immigration habeases); *Malam v. Adducci*, 2021 WL 836532 (E.D. Mich. Mar. 4, 2021) (granting individual bail application based on COVID-19 outbreak at facility).

239 *S.N.C. v. Sessions*, 2018 WL 6175902, at *6 (S.D.N.Y. Nov. 26, 2018) (collecting cases).

Habeas courts have also recently ordered the release of petitioners arrested at immigration court hearings, ICE check-ins, and other high-profile and unusual arrests while their cases proceed.[240]

Outside the habeas context, the Second Circuit has extended the right to seek bail to noncitizens who have pending petitions for review (PFR) of BIA orders of removal.[241] However, there is a circuit split on this question. The Seventh Circuit has held in *Bolante v. Keisler*, a case involving a noncitizen detained pursuant to INA § 235(b), that it would be inconsistent with the INA for a court of appeals to grant bail to an arriving noncitizen "challenging a removal order."[242] However, *Bolante* is arguably limited to petitions for review, as the court there reaffirmed the "inherent judicial authority to grant bail to persons" seeking habeas relief—"the vehicle by which a person questions to government's right to detain him."[243]

Conclusion

The first half of 2025 has been marked by unprecedented efforts by the Trump administration to dramatically expand the use of INA § 235(b) for both expedited removal and detention. With the infusion of congressional funding for immigration enforcement and detention in the 2025 reconciliation bill, the need to contest the government's attempted use of § 235(b) will only increase. Practitioners should be prepared to deploy all available tools, many of which have been discussed in this practice advisory, to seek freedom for their clients from DHS, immigration courts, and the federal courts.

240 *See, e.g., Mahdawi v. Trump*, 2025 WL 1243135, at *15 (D. Vt. Apr. 30, 2025) (ordering release pending decision on the merits of habeas); *Khalil v. Trump*, 2:25-CV-1963, Order, ECF No. 316 (D.N.J. June 20, 2025) (releasing petitioner on bail while petition pending); *Ozturk v. Trump*, 2025 WL 1420540 (D. Vt. May 16, 2025) (releasing petitioner following bail hearing); *Khan Suri v. Trump*, 2025 WL 1392143, at *1 (E.D. Va. May 14, 2025) (granting release on bail).

241 *Elkimya v. DHS*, 484 F.3d 151, 153-54 (2d Cir. 2007) (affirming circuit court's inherent authority to grant bond where pending PFR raises a substantial claim and extraordinary circumstances exist that make bail necessary to make the PFR remedy effective).

242 506 F.3d 618, 620-22 (7th Cir. 2007) (noting that arriving noncitizen with pending petition for review was not lawfully admitted and "had no right to be released").

243 *Id.* at 620; *see Vazquez Barrera*, 455 F. Supp. 3d at 338 n. 2 (distinguishing *Bolante* as limited to petition for review context).