UNDERSTANDING MANDATORY DETENTION

By ILRC Attorneys

I. Overview

Mandatory detention (MD) is a term used to describe the legal authority of Immigration and Customs Enforcement ("ICE") to physically detain a noncitizen with no discretion to release the individual, even upon payment of a bond. With a few exceptions, noncitizens subject to MD can remain in ICE detention during their entire removal case, including appeals, a process that can take months or years. One of the unfortunate effects of MD is to cause many noncitizens to give up trying to fight for their ability to remain in the United States and, instead, to accept deportation.

As of this writing, there are approximately 60,000 individuals in ICE detention, and approximately three-quarters of them have no criminal convictions.[1] The significant uptick in ICE detentions since January 2025 is not surprising, in light of recent ICE policies, new legislation signed into law, and agency interpretations, that have all greatly expanded the scope of MD to include many more individuals than before. As advocates, the goal in every case where a client is detained is to secure their release, if at all possible. However, in many cases recently, ICE is claiming that the noncitizen cannot legally be released under a theory of mandatory detention. It is, therefore, more important than ever for practitioners to understand MD and how to challenge its application to individual clients, so that no client who can legally be released remains in ICE custody without at least the opportunity to seek release on bond.

There are three mandatory detention provisions under the Immigration and Nationality Act (INA):

- INA § 236(c): applies to noncitizens in removal proceedings who have certain criminal histories. Until January 2025, the crimes-related MD provision only applied if a criminal conviction or conduct triggered inadmissibility under INA § 212(a)(2) or deportability under INA § 237(a)(2). But after passage of the Laken Riley Act (LRA)[2] on January 29, 2025, this is no longer the case. Mandatory detention under the LRA applies to certain noncitizens, even if their criminal history does not trigger inadmissibility or deportability.

[1] Vera, "More People are in Immigration Detention Than Ever Before" (Oct. 2, 2025), https://www.vera.org/news/more-people-are-in-immigration-detention-than-ever-before; TRAC (Transactional Records Access Clearinghouse), Immigration Detention Quick Facts, https://tracreports.org/immigration/quickfacts/.
[2] Pub. L. 119-1, 139 Stat. 3 (2025).

See **Part II** for further information on MD under INA § 236(c) and the new LRA provisions.

- INA § 235(b): applies to individuals in the expedited removal process and those deemed to be "arriving" noncitizens. ICE is currently interpreting this provision very expansively, to include all noncitizens who entered the United States without inspection. This interpretation has been subject to many successful challenges through habeas corpus petitions and is the subject of class action litigation in federal district court. The Board of Immigration Appeals (BIA) has also greatly expanded its interpretation of MD under section 235(b) to include individuals who were paroled in or released on their own recognizance soon after their arrival.[3] See **Part III** for further information on MD under INA § 235(b), and recent changes in agency interpretation and litigation in this regard.
- INA § 241(a): applies to those with a final order of removal, even if they are in "withholding-only" proceedings. See **Part IV** for further information.

This advisory will discuss each of the statutory bases for ICE to mandatorily detain a noncitizen. It will then explore specific defenses that practitioners can assert, so their noncitizen clients can be released from ICE detention or, at a minimum, get a bond hearing before an immigration judge.

When do mandatory detention rules not apply? By default, noncitizens cannot be mandatorily detained, that is, they should at least get a chance to request release upon posting bond. MD only applies to a noncitizen in one of the three statutory categories mentioned above (INA § 235(b), 236(c), or 241(a)), *if the noncitizen also*:

1. Is currently in removal proceedings,
2. Has a final order of removal,
3. Is being processed for expedited removal, including the credible fear process, or
4. Is deemed to be "seeking admission" as an "applicant for admission."

Since the summer of 2025, ICE has taken an unprecedented position regarding who it deems to be "seeking admission," asserting that this MD provision applies to all noncitizens who entered the United States without inspection. As discussed further in **Part III**, below, there is currently pending litigation regarding ICE's position in this regard, with significant victories in many federal district courts.[4]

[3] *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025).
[4] See *Maldonado Bautista v. Santacruz*, No. 5:25-CV-01873-SSS-BFM, 2025 WL 3288403 (C.D. Cal. Nov. 25, 2025) (certifying a nationwide class of noncitizens who are in MD on the allegation that they entered without inspection and holding that class members are eligible for bond).

If a person avoids mandatory detention, will they necessarily avoid detention? No, if MD is successfully challenged, the noncitizen will not necessarily be released unless ICE does so in the exercise of discretion or if the noncitizen is permitted to be released upon payment of a bond. Generally, avoiding MD means that the client can get a bond hearing before an immigration judge.[5] Unfortunately, thousands of people get a bond hearing but the immigration judge either does not grant them release on bond, or sets a bond that the noncitizen cannot afford. Still, many people, especially those with positive equities, eligibility for relief, and legal representation, are released on bond – which in turn not only gives them the fundamental right to physical freedom, but also significantly increases their chances of winning a right to remain in the country.[6]

II. Mandatory Detention Criminal Grounds: INA § 236(c)

Section 236(a) of the INA authorizes the Department of Homeland Security (DHS) to arrest and detain noncitizens at any point during their removal proceedings. That provision also authorizes the Attorney General (DHS or the immigration judge) to release these individuals upon payment of a bond or on "conditional parole" -- *unless* they are subject to "mandatory detention" because they have certain criminal records or come within the terrorist removal grounds. Even a minor criminal offense can subject a noncitizen in removal proceedings to MD, depending on the elements of the offense and the person's immigration history.

A. First Determine if the Noncitizen is Subject to Deportability or Inadmissibility

Only people who are in removal proceedings are subject to mandatory detention under this provision.[7] If the person was "**admitted"** into the United States, removal proceedings are brought under the grounds of **deportability** at INA § 237. If the person has not been admitted into the United States, removal proceedings are brought under the grounds of **inadmissibility** at INA § 212. Different MD criteria apply depending on whether or not the non-U.S. citizen is charged with being deportable or admissible.

A respondent in removal proceedings need not be charged in the NTA with the specific ground that provides the basis for mandatory detention.[8] But whether a person is deportable or inadmissible will determine whether the MD provisions relating to deportability or the provisions relating to inadmissibility apply to them. For example, an inadmissible person cannot be

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[5] Immigration bonds must be paid in full, not just a percentage. But see *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017) (holding that immigration judges and ICE must consider a respondent's ability to pay when setting a bond amount). But as legal advocates, the first step to securing a client's release is to understand whether the client is even eligible for a bond hearing, or whether they are statutorily subject to MD.

[6] See further discussion in ILRC's manual *Detention & Bond: Defending Noncitizens in Immigration Custody* (2024).

[7] *See* INA 236(a); 8 CFR 236.1.

[8] *Matter of Kotliar,* 24 I&N Dec. 124, 126 (BIA 2007) (where the record reflects that the respondent has committed an offense listed in § 236(c), they are subject to mandatory detention "without regard to whether [DHS] has exercised its prosecutorial discretion to lodge a charge based on the offense").

subject to MD due to an aggravated felony, since that is a ground of deportability, not inadmissibility. The criminal grounds of deportability (applicable to deportable individuals) and inadmissibility (applicable to inadmissible individuals) that trigger MD, are explained further below.

Whether the client was technically "admitted" into the United States will determine whether they can be charged with being removable under the deportability grounds (INA § 237(a)), versus under the inadmissibility grounds (INA § 212(a)). Therefore, the first task is to determine whether the client has been admitted to the United States.

PRACTICE TIP: If the client is in removal proceedings, carefully review whether the Notice to Appear (NTA) alleges that the person is deportable under INA § 237(a) or inadmissible under INA § 212(a). If this is wrongly charged – for example, if the proceedings are brought under INA § 212(a) when in fact the person was admitted - the issue can be litigated. See ILRC's manual *Removal Defense: Defending Immigrants in Immigration Court* (2024). If the client is not yet in removal proceedings, do the admission analysis in order to predict what type of removal proceedings they could be placed in, and whether they would be subject to mandatory detention.

1. Was the person admitted into the United States, therefore making them potentially deportable?

Noncitizens who were inspected and admitted at the border or a port of entry (e.g., airport) based on any visa have been admitted. Noncitizens who have adjusted status to lawful permanent residence within the United States also have been admitted, regardless of how they first entered the country.[9] The Fifth and Ninth Circuits held that a person who was "waved in" at the border (inspected and allowed to enter) has been admitted in some contexts. The BIA disagrees with this rule, but will apply it in cases arising within the Fifth and Ninth Circuits.[10]

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[9] Lawful permanent residents (LPRs) are generally "admitted" when they obtain LPR status through adjustment of status or consular processing. Upon return from travel abroad, LPRs are typically not seeking a new admission and are therefore subject to the grounds of deportability rather than inadmissibility, unless one of the exceptions in INA § 101(a)(13)(C) applies. Under INA § 101(a)(13)(C), a returning LPR is treated as seeking admission if they have abandoned their LPR status, been absent for more than 180 days, engaged in illegal activity abroad, departed while in removal or extradition proceedings, committed a crime described in INA § 212(a)(2) (absent applicable relief), or if they seek to enter without inspection. An LPR who falls within any of these exceptions is treated as an "arriving alien" and must establish admissibility. There is a limited exception for LPRs who were convicted of an offense described in §101(a)(13)(C)(v) *before* April 1, 1997. *See Vartelas v. Holder*, 566 U.S. 257 (2012); *Rosenberg v. Fleuti*, 374 U.S. 449, 461-62 (1963).

[10] *See Tula-Rubio v. Lynch*, 787 F.3d 288, 291-96 (5th Cir. 2015) (finding that a wave-through is an admission); *Saldivar v. Sessions*, 877 F.3d 812 (9th Cir. 2017) (same); *but see Matter of Castillo Angulo*, 27 I&N Dec. 194, 199-202 (BIA 2018) (disagreeing and holding that outside of the Fifth and Ninth Circuits, noncitizens must prove they possessed some form of lawful immigration status at the time of inspection in order to be considered "admitted"). However, for purposes of meeting the "inspected and admitted" requirement for adjustment of status at INA § 245(a), the BIA does recognize a "wave-through" admission. *See Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).

Thus, a person who was admitted on a border crossing card or visitor visa and currently has no lawful status, and a lawful permanent resident who adjusted status, both have been "admitted." They are subject to being removed if they are found to be "deportable" under INA § 237, which could be because they were convicted of certain crimes or simply no longer have lawful status or permission to be in the United States. In removal proceedings, they will be subject to mandatory detention if they come within the criminal deportation grounds, with some exceptions, or the terrorist grounds. See further discussion in **Part II.B.1.**, below.

2. Is the person in the United States without having been admitted, therefore making them potentially inadmissible?

A noncitizen who entered the United States without inspection, or was paroled in under INA § 212(d)(5) or other parole provision has not been admitted.[11]

Courts have considered whether some status that was granted *after* the person entered without inspection counts as an admission. They have concluded that:

- A grant of a T, U, or V visa should be held an admission for this purpose.[12]
- A grant of adjustment of status is also an admission for this purpose.[13]
- A grant of Special Immigrant Juvenile Status (SIJS) is not an admission for this purpose.[14]
- Temporary Protected Status (TPS) has also been found to not constitute an admission.[15]

WARNING: Until recently, DHS and the courts treated individuals who were granted a U visa as having been "admitted," regardless of whether they entered the United States with the U visa or they entered without inspection and were granted the U visa after they were already in the United States. However, in November 2025, USCIS dramatically changed course by announcing a new policy that it would not treat U visa holders as having been "admitted" into the United States, unless they entered the country with the U visa or some other valid visa.[16] This new policy suggests that if a U visa holder loses that status and is placed in removal proceedings, they will be treated as inadmissible rather than deportable unless they entered with a valid visa. It is unclear at this time how the courts will view this policy shift by USCIS. It is also unclear how this new interpretation will affect other individuals granted a

[11] *See*, *e.g.*, INA § 101(a)(13)(B).

[12] In unpublished opinions, the BIA has held that a grant of a U visa (*Matter of Saul Sandoval-Angelino*, A205 207 785 (BIA Feb. 23, 2023); *Matter of Alejandro Garnica Silva*, A098 269 615 (BIA June 29, 2017)), a T visa (*Matter of E-A-M-Z-,* AXXX XXX 207 (BIA June 4, 2019)), or a V visa (Matter of A-M-U-, AXXX XXX 567 (BIA Nov. 8, 2018) is an admission for purposes of determining whether the person was subject to inadmissibility or deportability grounds. Unpublished opinions are accessible, among other places, at the Immigrant and Refugee Appellate Center, www.irac.net.

[13] *See* INA § 101(a)(13(C) (a noncitizen "lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless …[they fall under certain exceptions])."

[14] *See Murillo-Chavez v. Bondi*, 128 F.4th 1076 (9th Cir. 2025) (finding that a noncitizen granted SIJS was not "admitted" until he adjusted to LPR status).

[15] *See Sanchez v. Mayorkas* , 539 U.S. 409, 414 (2021). However, TPS recipients who travel with government authorization using Form I-512T, are considered "admitted" upon returning to the United States.

[16] See USCIS Policy Manual, 7 USCIS-PM B.2.

temporary visa after their arrival in the United States, such as T visa holders. For now, immigration advocates should argue that the grant of a U or T visa is an admission and that such individuals should not be charged with inadmissibility.[17]

In removal proceedings, a noncitizen who has not been admitted is subject to being removed if they are found to be "inadmissible" under INA § 212, which could be because they were convicted of or committed certain crimes, or simply do not have current lawful status. These people are subject to mandatory detention if they are placed in removal proceedings and charged with inadmissibility, and (a) they come within the inadmissibility grounds relating to crimes or terrorism, or (b) they entered without inspection or were not otherwise lawfully admitted, and are subject to the Laken Riley Act provisions. See further discussion in **Section B.2.**

B. Who is subject to mandatory Detention under 236(c)?

As we have said, different MD rules apply depending on whether the person is subject to deportation grounds because they were admitted to the United States, or subject to inadmissibility grounds because they were not admitted.

In **Section 1** we will discuss MD for individuals charged with being deportable, in **Section 2**, will discuss MD for clients charged with being inadmissible, and in **Section 3** we will discuss MD rules and defenses that may apply in removal proceedings regardless of inadmissibility or deportability charges.

1. Mandatory Detention for Clients Charged with Being Deportable

Noncitizens in removal proceedings based on a charge of deportability are subject to MD if they are "deportable by reason of having committed any offense" set out in certain deportation grounds relating to crimes at INA § 237(a)(2).[18] The person must have been released from

[17] There may be advantages to being charged with deportability rather than inadmissibility, and vice versa, so it's always important to investigate how being charged with either could affect relief or detention status. In removal proceedings, if someone is charged with deportability, the government bears the burden of proof by clear and convincing evidence that the noncitizen is deportable, including proving the existence of a conviction and proving that the conviction triggers a ground of deportability. INA § 240(c)(3)(A), (B); 8 CFR § 1240.8(a). Further, if a person is already admitted, they may be able to adjust to LPR status in removal proceedings, despite a charge of deportability. Being charged with deportability instead of inadmissibility may also benefit someone in the mandatory detention context, as most triggers for the deportable ground of mandatory detention require a conviction, in contrast with the inadmissibility mandatory detention ground where in many cases mere conduct can trigger mandatory detention. However, for those charged as inadmissible, the mandatory detention grounds are triggered only by crimes involving moral turpitude (CIMT), controlled substance crimes, or the Laken Riley Act offenses; whereas, for those charged as deportable, an aggravated felony conviction could make them subject to mandatory detention. Similarly, an offense related to firearms may not necessarily be a CIMT for inadmissibility, but it could be considered a firearm offense or aggravated felony for deportability purposes. For further discussion, see below at **Part II.B.**

[18] See mandatory detention provisions at INA §§ 236(c)(1)((B), (C).

criminal custody for one of these offenses **after October 8, 1998**. It applies to individuals who are deportable for:

- Two or more convictions for crimes involving moral turpitude (CIMT) that did not arise as part of a single scheme. *See* INA § 237(a)(2)(A)(ii).
- A single conviction of a CIMT that the person committed within five years of admission, for which a sentence of one year or more was imposed. *See* INA § 237(a)(2)(A)(i).[19]
- An aggravated felony conviction as defined at INA 101(a)(43). *See* INA § 237(a)(2)(A)(iii).
- A conviction relating to a federally-defined controlled substance, with an exception for one or more convictions arising from a single incident involving possession for personal use of 30 grams or less of marijuana. *See* INA § 237(a)(2)(B)(i).
- A conviction for a qualifying firearm offense. *See* INA § 237(a)(2)(C).
- "Miscellaneous" federal convictions relating to espionage, sabotage, treason, etc. *See* INA § 237(a)(2)(D).

The 236(c) MD criteria do *not* include two other sections of the crimes deportation grounds. A person who comes within the following grounds is deportable, but is not subject to mandatory detention:

- The domestic violence deportation ground, INA § 237(a)(2)(E). That includes conviction of a crime of domestic violence, stalking, or child abuse, neglect, or abandonment, or a civil or criminal court finding of a violation of a DV stay-away order.
- The human trafficking ground, INA § 237(a)(2)(F). A person is deportable if immigration authorities know or have reason to believe that the person is described in the inadmissibility ground that defines significant human trafficking, INA § 212(a)(2)(H).

2. Mandatory Detention for Clients Charged with Being Inadmissible

If a noncitizen was not admitted to the United States (for example, they entered without inspection or were paroled in) and is now in removal proceedings based on inadmissibility under INA § 212(a), they face mandatory detention if they come within the criminal inadmissibility grounds at INA 212(a)(2). *See* INA 236(c)(1)(A). In addition, some people who were not admitted are subject to the 2025 Laken Riley Act (LRA).

Noncitizens in removal proceedings based on a charge of inadmissibility are subject to MD if either of the following is true:

- They are *inadmissible* under the criminal grounds at INA § 212(a)(2), and were released from criminal custody **after October 8, 1998**;
  or
- They (a) are *inadmissible* under INA §§ 212(a)(2)(6)(A) (for being present without being admitted or paroled), (6)(C) (for fraud, misrepresentation, or falsely claiming U.S.

[19] The MD criteria is slightly more lenient than the deportation ground, in that the deportation ground applies to a single CIMT conviction that has a *potential* sentence of a year or more, while the MD trigger applies only if a sentence of a year or more was actually *imposed* for the conviction. See INA § 236(c)(1)(C).

citizenship), or (7) (for lack of proper documentation at the time of application for admission), *and* (b) were arrested for, charged with, or admitted or were convicted of, "burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person," as those offenses are defined under the law of the state or other jurisdiction.[20] This was added by the LRA, which took effect on January 29, 2025.

We will discuss each category separately.

Inadmissible under INA § 212(a)(2). A noncitizen is subject to MD if they are "inadmissible by reason of having committed any offense" set out in the crimes inadmissibility grounds at INA § 212(a)(2).[21] These grounds include:

- A conviction of, or qualifying admission to immigration authorities that they committed, one CIMT ***unless*** it comes within the petty offense or youthful offender exception. If the offense comes within an exception, it does not make the person inadmissible or subject them to MD.[22]
    - Petty offense exception: The person committed just one CIMT, the potential sentence was not more than a year, and any sentence imposed was not more than six months.[23]
    - Youthful offender exception: The person committed just one CIMT, while under the age of 18, and was convicted as an adult. The conviction or release from imprisonment must have occurred at least five years before the current application.[24]
- A conviction of, or a qualifying admission to immigration authorities that they committed, an offense relating to a federally-defined controlled substance.[25]
    - This includes conviction or admission of possessing 30 grams or less of *marijuana*. (The deportation ground has an exception for simple possession of 30 grams or less of marijuana, but the inadmissibility ground does not).
- Conviction of two or more offenses of any kind with a total sentence imposed of at least five years.[26]
- Being found to have engaged in prostitution in the last ten years, or coming to the United States to engage in prostitution or commercialized vice.[27]
- Immigration authorities know or have "reason to believe" that the person aided or participated in:

[20] See INA § 236(c)(1)(E), (2) (added by the LRA).

[21] See INA § 236(c)(1)(B) (identifying inadmissibility grounds at INA 212(a)(2)).

[22] INA § 212(a)(2)(A)(i)(I). *See*, ILRC, All Those Rules About Crimes Involving Moral Turpitude (June 2021), https://www.ilrc.org/resources/all-those-rules-about-crimes-involving-moral-turpitude-june-2021.

[23] INA § 212(a)(2)(A)(ii)(II).

[24] INA § 212(a)(2)(A)(ii)(I).

[25] INA § 212(a)(2)(A)(i)(II).

[26] INA § 212(a)(2)(B).

[27] INA § 212(a)(2)(D).

  - Trafficking in a controlled substance (plus certain family members who benefitted from this);[28]
  - Severe trafficking in persons (plus certain family members who benefitted from this);[29] or
  - Money laundering.[30]
- Foreign government officials who committed severe violations of religious freedom.[31]

Note that some inadmissibility grounds do not require a conviction. A person who makes a qualifying admission that they committed a drug offense or an inadmissible CIMT is inadmissible and subject to MD, even without a conviction. If your client has admitted something, consider arguments that it was not a qualifying admission for this purpose.[32] Some inadmissibility grounds do not require a conviction or a formal admission. For example, a person is inadmissible if immigration authorities know or have "reason to believe" that they participated in drug trafficking.

The Laken Riley Act. The Laken Riley Act (LRA) was signed into law on January 29, 2025.[33] The LRA expands the categories of people who are subject to mandatory detention.[34]

Under the new INA § 236(c)(1)(E), a noncitizen is subject to MD if:

a. The person is *inadmissible* for being present without being admitted or paroled (INA § 212(a)(6)(A)); for fraud, misrepresentation, or falsely claiming U.S. citizenship (INA § 212(a)(6)(C)); or for lack of proper documentation at time of admission (INA § 212(a)(7)(A)); [35]

   AND

b. The person "is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person." The preceding offenses have "the meanings given such terms in the jurisdiction in which the acts occurred." [36]

Here are some key points and possible defenses on the LRA:

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[28] INA § 212(a)(2)(C).
[29] INA § 212(a)(2)(H).
[30] INA § 212(a)(2)(I).
[31] INA § 212(a)(2)(G).
[32] For further discussion of the requirements for an effective admission, see, e.g., ILRC, All Those Rules About Crimes Involving Moral Turpitude (June 2021), https://www.ilrc.org/resources/all-those-rules-about-crimes-involving-moral-turpitude-june-2021, Section II.C. (applied to CIMTs) and ILRC, Immigrants and Marijuana (May 2021), https://www.ilrc.org/resources/immigrants-and-marijuana.
[33] Pub. L. 119-1,139 Stat. 3 (2025).
[34] For a detailed discussion of the Laken Riley Act, see NIPNLG's practice advisory: National Immigration Project of the National Lawyer Guild (NIPNLG), *Practice Advisory: The Laken Riley Act's Mandatory Detention Provisions* (Feb. 5, 2025), https://nipnlg.org/sites/default/files/2025-02/Alert-Laken-Riley-Act.pdf.
[35] Note that this means that this new basis for mandatory detention does NOT apply to all noncitizens. It only affects some noncitizens who were not inspected admitted.
[36] INA § 236(c)(2).

The LRA does not apply to LPRs and other noncitizens who were admitted to the United States. The LRA only affects some noncitizens who were not admitted at the border and who are charged with being removable for being inadmissible. *It does not affect lawful permanent residents* and other noncitizens who were admitted, including those who overstayed their visas. Moreover, there is a strong argument that the LRA does not include a noncitizen who was admitted based on visa fraud because this qualifies as an "admission," at least for adjustment of status purposes.[37]

The LRA should not apply retroactively to an arrest, charge, admission of conduct, or conviction from before the LRA's effective date of January 29, 2025. A general rule is that where a new law will impose new adverse consequences on conduct that occurred before the law passed, the law should not apply retroactively to that past conduct unless Congress made clear that that was its intent.[38] That rule has been applied to hold that new immigration penalties for a conviction should not apply to *convictions* from before the law went into effect. Existing case law does not squarely address whether a new law similarly should not penalize the subject of an *arrest or criminal charge* that occurred before the law passed, because before the LRA no provision of the INA penalized people based on an arrest or charge. Counsel should investigate arguments that none of the LRA events, including an arrest or charge, will trigger mandatory detention if they occurred before January 29, 2025.[39]

"Is charged with, is arrested for" under the LRA should not apply if the criminal case has been resolved. First, advocates should assert that a "charge" means a formal charge filed by the prosecution, and an "arrest" means a lawful arrest by law enforcement based on probable cause. Second, based on the use of the present tense ("is" arrested, charged), as well as common sense, an arrest or charge should not be a basis for MD if the criminal case has since been resolved; for example, if charges were dropped or the person was convicted of a different offense. Thus, if a person was charged with shoplifting but then convicted of trespass, they should not be subject to the LRA. We must assume Congress's intent was to permit the person to be subject to MD after the criminal arrest or charge and only until the case is resolved. At least three district courts have agreed.[40]

The terms "convicted of" or "admitted committing" should adhere to immigration definitions. Under immigration law, a conviction requires a formal judgment of guilt entered by a court, and the imposition of some form of penalty.[41] This only includes programs such as diversion or deferred entry of judgment, where the noncitizen has entered a guilty or nolo contendere plea. For the "admitted committing" trigger, advocates should assert that this must

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[37] *See Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).
[38] *See Vartelas v. Holder*, 566 U.S. 257 (2012) (strong presumption against retroactivity where statute is not explicitly retroactive).
[39] For a detailed discussion of the arguments against the LRA's retroactive application, see National Immigration Project of the National Lawyer Guild (NIPNLG), *Practice Advisory: The Laken Riley Act's Mandatory Detention Provisions* (Feb. 5, 2025), https://nipnlg.org/sites/default/files/2025-02/Alert-Laken-Riley-Act.pdf.
[40] *Helbrum v. Williams*, No. 4:25-cv-00349-SHL-SBJ, 2025 WL 2840273 (S.D. Iowa, Sept. 30, 2025); *E.C. v. Noem*, No. 2:25-CV-01789-RFB-BNW, 2025 WL 2916264 (D. Nev. Oct. 14, 2025); *Rueda Torres v. Francis*, No. 25 Civ. 8408 (DEH), 2025 WL 3168759 (S.D.N.Y. Nov. 13, 2025).
[41] *See* INA §101(a)(48).

meet the strict requirements of the INA, where a noncitizen can only be deemed inadmissible for an "admission" of conduct if they are provided with an explanation of the elements of the offense, the noncitizen admits to committing acts that satisfy each element, and that the admission is given freely and voluntarily.[42]

The LRA should not apply to juvenile delinquency arrests, charges, admissions, or dispositions. The context and the specific language used in the LRA demonstrates that it addresses adult convictions and crimes, which are different from and do not include delinquency dispositions and juvenile delinquency. The BIA has long held "that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes."[43] They are civil rather than criminal in nature. Consistent with this, admitting to juvenile delinquency also does not constitute an "admission" of conduct under the INA because the person has to admit *to a crime* in order to trigger certain inadmissibility grounds requiring an admission, and delinquency is not considered a crime under immigration law.[44]

Although the drafting of the LRA is vague, the terms "charged with" and "arrested for" modify the terms "offense" and "crime." These two terms appear in the current grounds of inadmissibility and have long been interpreted to refer only to adult crimes.[45] Moreover, if Congress meant to upend decades of immigration law precedent with the LRA, it would have been explicit. The only times that the INA has imposed a mandatory bar or punishment based on delinquency, it was specifically stated in the statute or regulation.[46]

The terms burglary, theft, larceny, etc., have "the meanings given such terms in the jurisdiction in which the acts occurred." Generally, immigration adjudicators will use the "categorial approach" to determine if a state conviction triggers a ground of removal. They will compare the elements of the state offense to the corresponding federal definition. If the state offense is defined more broadly than the federal, it might not trigger the immigration penalty. But in an apparent effort to avoid the categorical approach, the LRA states that any state's definition of the terms burglary, theft, larceny, etc. is sufficient to trigger MD. Avoiding the categorical approach closes off possible defenses. For example, burglary as defined under

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[42] *See Matter of K*, 7 I&N Dec. 594 (BIA 1957). *See also* ILRC, *What Qualifies as a Conviction for Immigration Purposes* (April 2019), https://www.ilrc.org/resources/what-qualifies-conviction-immigration-purposes; Discussion of admission of conduct in ILRC, All Those Rules About Crimes Involving Moral Turpitude (June 2021), Section I.D.

[43] *Matter of Devison*, 22 I&N Dec. 1362, 1365 (BIA 2000), *citing*, *e.g., Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981), *Matter of C. M.*, 5 I&N Dec. 27 (BIA 1953).

[44] INA § 212(a)(2)(A)(i). *See Matter of M-U-*,2 I&N Dec. 92 (BIA 1944). *But see U.S. v. Gutierrez-Alba*, 128 F.3d 1324 (9th Cir. 1997).

[45] *See, e.g.*, INA § 212(a)(2)(A) (referring to convictions and admissions of certain crimes), INA § 212(a)(2)(B) (referring to people convicted of 2 or more offenses).

[46] Congress has explicitly penalized people for acts of delinquency in two contexts in immigration law: the Adam Walsh Act, and Family Unity. See the Adam Walsh Act provisions at INA § 204(a)(1)(A)(viii), which includes certain delinquency dispositions as defined at 34 USC § 20911(8). See the Family Unity inclusion of delinquency dispositions at 8 CFR § 236.13(d). For more information on the impact of LRA on juveniles, see ILRC, *The Laken Riley Act and Juvenile Delinquency* (Feb. 2025), https://www.ilrc.org/resources/laken-riley-act-juvenile-delinquency.

California law (Penal Code 459) does not meet the federal definition of burglary and often is a relatively safe conviction for immigrants. But under the LRA, a California burglary conviction may make anyone who entered without inspection subject to mandatory detention.

There still may be defenses if one can find alternative state offenses that are more broadly defined than the state's definition of theft, larceny, etc. For example, many states define "theft" or "larceny" as a taking with intent to deprive the owner of the benefit of their property permanently or substantially. If another state offense includes taking with intent to deprive the owner only temporarily (e.g., joyriding), that state offense does not meet the state definition of "theft" and should not trigger the LRA. For example, compare the California definition of theft (Penal Code 484), which requires intent to permanently or substantially deprive the owner, with California receipt of stolen property (Penal Code 496) and vehicle taking (Vehicle Code 10851), which have been held to include temporary takings.[47] See discussion, citations, and examples of other state offenses at NIPNLG Advisory, Part IV.B.[48]

C. MD Rules that Apply to all Individuals in Removal Proceedings, Regardless of Whether they Fall under Inadmissibility or Deportability

October 8, 1998 cut-off for convictions triggering mandatory detention. The mandatory detention provisions of INA § 236(c) only apply to individuals released from criminal custody after October 8, 1998.[49] The release from criminal custody after that date must be in relation to a crime that subjects the client to § 236(c).

Request a Joseph hearing and assert that the conviction is not of a deportable or inadmissible offense. Immigration advocates can assert that their client is not subject to mandatory detention and request a "Joseph hearing." [50] When ICE asserts that a noncitizen is subject to mandatory detention, counsel can request a separate hearing on the issue of eligibility for a bond hearing. A Joseph hearing can be utilized to assert that a client is not subject to mandatory detention. There are many technical arguments that can produce surprising victories to show that a conviction does not actually come with a removal ground, and thus, is not a basis for mandatory detention or even removability.[51]

Obtain post-conviction relief. Post-conviction relief (PCR) refers to the process of returning to criminal court to request the court to vacate a prior conviction, based on legal error. If the basis for mandatory detention is a conviction, obtaining effective post-conviction relief can save the day by eliminating the conviction for immigration purposes. If the case is handled correctly, and counsel obtains an adequate judicial order, the conviction will be eliminated for

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[47] *See, e.g.*, ILRC, *California Crimes Summaries § N.11, Burglary, Theft and Fraud* (Jan. 2019), https://www.ilrc.org/sites/default/files/resources/chart-note_11-burglary_theft_fraud-20190107.pdf.
[48] NIPNLG, *Practice Advisory: The Laken Riley Act's Mandatory Detention Provisions*, (February 5, 2025).
[49] *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).
[50] *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).
[51] Some states have extensive resources that analyze the immigration effect of specific state offenses. For example, for California offenses, see materials at www.ilrc.org/California-Crimes-summaries and a chart showing the immigration consequences of California offenses at https://calchart.ilrc.org/new-chart/. Get expert help if needed.

all immigration purposes, except potentially where the statute is worded in a way that does not require a conviction. It is critical to do this correctly or the hard-won order from the criminal court will not be accepted in immigration proceedings.[52]

Terrorism grounds of deportability and inadmissibility. Even without a criminal conviction, a noncitizen is subject to MD if they are found to come within the terrorism grounds of inadmissibility or removability.[53]

III. Mandatory Detention Under INA § 235(b)

INA § 235 separately provides for detention[54] of those who are subjected to expedited removal and those who are "arriving" noncitizens placed directly in full removal proceedings.[55] Under INA § 235(a)(3), all applicants for admission must be inspected by an immigration officer. If the officer determines that the noncitizen lacks a valid entry document or is inadmissible due to fraud, misrepresentation, or a false claim to U.S. citizenship, the officer can place the individual into an "expedited removal" process under 235(b)(1), for a summary removal without the opportunity to present a defense before an immigration judge. This determination can either be made at the time the noncitizen is "arriving" into the United States, or within two years of their entry without inspection. With regards to an individual who is being inspected at time of arrival, if the officer determines that the noncitizen is seeking admission but is not clearly and beyond a doubt entitled to be admitted, the officer shall detain the individual for removal proceedings under § 240.

ICE has sharply increased its reliance on INA § 235(b) to detain noncitizens, thus cutting off the option of seeking release from detention for thousands of individuals. The legality of ICE's position is being successfully challenged in habeas corpus petitions throughout the country, and practitioners should consider similar challenges in individual cases and also check the status of ongoing class-wide litigation in this regard.

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[52] *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). For more information relating to California PCR, see ILRC manual, *California Post-Conviction Relief for Immigrations: How to Use Criminal Courts to Erase the Immigration Consequences of Crimes* (2022) and ILRC, Overview of California Post-Conviction Relief for Immigrants (July 2022), https://www.ilrc.org/resources/overview-california-post-conviction-relief-immigrants.

[53] INA § 212(a)(3)(B) and 237(a)(4)(B). The terrorism grounds are complex and often very case specific. This advisory does not detail these provisions or the defenses that may be available if ICE asserts MD based on one of these grounds. It is important to seek out expert help and resources if a case raises these issues.

[54] Although this advisory refers to detention under § 235 as "mandatory," it is not technically a mandatory detention provision in that the statute does not prohibit the noncitizen's release in the way that § 236 does. Even if an individual is detained under § 235, DHS can choose to release the individual under § 212(d)(5) parole or by placing them in removal proceedings and releasing them (or allowing for their release) under § 236(a).

[55] INA § 235(b)(1)(B)(ii) & (iii)(IV) (detention of those subject to expedited removal) and INA § 235(b)(2)(A) (detention of "arriving" noncitizens who are directly placed into full removal proceedings). For a detailed discussion of MD under INA § 235(b); *see* American Immigration Council and The Legal Aid Society, *Detention Under INA § 235(b): The Statutory Scheme and Strategies for Release* (Sept. 2025), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/09/Practice_Advisory_Detention_Under_INA235.pdf.

A. Mandatory Detention of those Subjected to Expedited Removal

IINA § 235(b)(1) sets out MD for a noncitizen subjected to expedited removal. A person in this category will be unable to seek release before the IJ on bond, both before and after passing a credible fear interview, but can request parole directly with ICE.[56] While there is no right to a hearing during the expedited removal process, if an individual states a fear of persecution or torture in their native country, the officer must refer the individual for a credible fear interview with an asylum officer.[57] During the credible fear interview process and, if the noncitizen does not "pass" the credible fear screening, the statute provides for continuing ICE detention.[58]

A person in this category will be unable to seek release before the immigration judge on bond, neither before nor after passing a credible fear interview.[59] They can make a request to ICE for release through parole, but if ICE denies the request, the person will remain in detention throughout removal proceedings.[60]

B. Mandatory Detention of those Deemed "Arriving Aliens" under INA § 235(b)(2)

INA § 235(b)(2) sets out mandatory detention for a noncitizen who is "an applicant for admission," under INA 235(a)(1). INA § 235(a)(1) states,"[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) shall be deemed for purposes of this chapter an applicant for admission."

INA § 235(b)(2) indicates that such an "applicant for admission" is subject to mandatory detention: "In the case of [a noncitizen] who is an applicant for admission, if the examining immigration officer determines that [a noncitizen] seeking admission is not clearly and beyond a doubt entitled to be admitted, the [noncitizen] shall be detained for a proceeding under [INA § 240]."

Up until recently, this section generally only was applied to those who were apprehended at the border who were not subject to expedited removal. But as discussed below, many more individuals are now being detained under INA § 235(b), primarily due to the Board of Immigration Appeals' decisions in *Matter of Q. Li* and *Matter of Yajure Hurtado*, and ICE's

[56] For more on expedited removal, see National Immigration Law Alliance, *Everything Expedited Removal* (Feb. 2025), https://immigrationlitigation.org/wp-content/uploads/2025/04/25.02.28-ER-FINALx.pdf; *Jennings v. Rodriguez*, 583 U.S. 281 (2018); *see also Matter of M-S-*, 27 I&N Dec. 509 (AG 2019).
[57] INA §§ 235(b)(1)(A)(ii), (b)(1)(B); 8 CFR § 235.3(b)(4).
[58] INA §§ 235(b)(1)(B)(ii), 235(b)(1)(B)(iii)(IV).
[59] *See Jennings v. Rodriguez*, 583 U.S. 281 (2018); *see also Matter of M-S-*, 27 I. & N. Dec. 509 (AG 2019).
[60] For more on expedited removal, see National Immigration Litigation Alliance, *Everything Expedited Removal* (Feb. 2025), https://immigrationlitigation.org/wp-content/uploads/2025/04/25.02.28-ER-FINALx.pdf.

expanded interpretation of the statute.[61] As also discussed below, recent litigation victories have curtailed this expansion.[62]

1. *Matter of Q, Li*

On May 15, 2025, the BIA issued a decision in *Matter of Q. Li*, which expanded the application of mandatory detention under INA § 235(b)(2). In that case, the respondent had crossed the southern border without inspection in 2022, and was arrested about five miles from a port of entry and 100 yards north of the southern border. She was arrested without a warrant and then released on parole under INA § 212(d)(5)(A). A little over two years later, Interpol informed DHS that she had a red notice, and she was detained at a check-in appointment with DHS. At that time, DHS initiated removal proceedings, charging her under INA § 212(a)(6)(A)(i), as having entered without inspection. The IJ found her to be ineligible for bond because her detention was under INA § 235(b)(2)(A). The BIA held that "an applicant for admission" who is detained without a warrant while arriving in the United States, whether or not at a port of entry, and later placed in removal proceedings, is detained under INA § 235(b).

A noncitizen in this posture is therefore ineligible for bond under INA § 236(a). While those who are apprehended immediately after entering without inspection are deemed "arriving" and thus ineligible for bond, *Q. Li* allows for a potentially broadened application of detention for those who entered without inspection and were apprehend shortly after entering the United States. This includes those in a similar factual scenario as the respondent in *Q. Li*, who were apprehended by ICE shortly after entering the United States, released on parole or on their own recognizance, and detained again years later.

2. July 8, 2025 ICE Memo

On July 8, 2025, ICE issued a memo laying out a drastically expanded interpretation of MD under INA § 235.[63] The memo took the position that every person who is present in the United States without having been admitted is an "applicant for admission" under INA § 235(a)(1) and, therefore, subject to mandatory detention under INA § 235(b)(2). It further stated that those detained under INA § 235 may not be released from ICE detention except by INA § 212(d)(5) parole. ICE's new policy greatly increased the number of noncitizens in ICE detention under a theory that they were subject to MD merely due to a prior entry without inspection.

3. *Matter of Yajure Hurtado*

On September 5, 2025, the BIA issued a decision in *Matter of Yajure Hurtado*, which adopted ICE's position from the July 8, 2025 memo. It held that under section 235(b)(2), anyone who

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[61] *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025); *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025).
[62] *See Maldonado Bautista v. Santacruz,* (certifying a nationwide class of noncitizens who are in MD on the allegation that they entered without inspection and holding that class members are eligible for bond). For a more in depth discussion of this order and arguments *see* NWIRP, et al., *Practice Advisory: Seeking Bond Hearings for Maldonado Bautista Class Members – Those Who Entered Without Inspection and Are Subject to Yajure-Hurtado,* (Dec. 3, 2025). For continued updates on the case, please visit the ACLU at https://www.aclu.org/cases/bautista-v-noem.
[63] ICE Memorandum: *Interim Guidance Regarding Detention Authority for Applications for Admission* (Jul. 8, 2025).

entered without inspection is ineligible for bond. Mr. Yajure Hurtado was a citizen of Venezuela who entered without inspection in November 2022, and later obtained Temporary Protected status, which expired in 2025. DHS detained him and charged him with inadmissibility under INA § 212(a)(6)(A)(i), as a noncitizen "present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than designated by the Attorney General." Mr. Yajure Hurtado argued he was an "applicant for admission," but after being in the United States for three years, he was no longer "*seeking* admission" as required for detention under INA § 235(b)(2)(A) (emphasis added). The BIA rejected this argument, stating that it would leave Mr. Yajure Hurtado without any "legal status." The BIA was not persuaded by the argument that interpreting § 235(b)(2) of the INA in this way would render much of § 236(c) superfluous, as that statute contemplates application to those who have not been admitted (including the Laken Riley Amendments). Instead, the BIA said that limiting the reach of § 235(b)(2) to the border, as it had for decades, would render § 235(b)(2) superfluous.

This decision meant that immigration judges were now bound by the BIA's decision and could no longer hold bond hearings for any individual who entered without inspection.[64]

4. *Maldonado Bautista v Santacruz*

On November 25, 2025, the U.S. District Court for the Central District of California issued an order in *Maldonado Bautista v. Santacruz*,[65] which certified a nationwide class of noncitizens who are detained without a bond hearing based on the government's allegation that they entered without inspection, and the government's interpretation that § 235(b)(2) would render them mandatorily detained despite their arrest in the interior of the United States. The court granted declaratory relief to the entire class, holding that the government is unlawfully subjecting the class to mandatory detention, and that class members are eligible for release on bond under the immigration laws. Under the court's order, class members should be able to request a bond hearing before immigration judges who must consider whether they can be released upon posting a bond.[66] However, many practitioners have reported that the Department of Justice (DOJ) has instructed IJs to ignore the *Maldonado Bautista* order. Class counsel is returning to the court to make sure the order can be enforced.[67]

Who is a class member? The district court certified the following Bond Eligible Class:

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[64] For a more in depth discussion of the *Matter of Yajure Hurtado* decision *see* AIC, *Practice Advisory: Detention Under INA § 235(b): Matter of Yajure Hurtado* , 29 I&N Dec. 216 (BIA 2025), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/09/Detention-under-INA-%C2%A7-235-092025.pdf.

[65] See *Maldonado Bautista v. Santacruz,* No. 5:25-CV-01873-SSS-BFM, 2025 WL 3288403 (C.D. Cal. Nov. 25, 2025).

[66] For a more in depth discussion of this order and arguments *see* NWIRP, et al., *Practice Advisory: Seeking Bond Hearings for Maldonado Bautista Class Members – Those Who Entered Without Inspection and Are Subject to Yajure-Hurtado* (Dec. 3, 2025), https://www.nwirp.org/uploads/2025/Maldonado%20Bautista%20Practice%20Advisory_12%203%202025.pdf. The District Court for the Western District of Washington had already issued a similar order in *Rodriguez Vazquez v. Bostock,* 3:25-cv-05240 (W.D. Wash.), which covered detainees in the Northwest ICE Processing Center in Tacoma, WA.

[67] For continued updates on the case, please visit the ACLU at https://www.aclu.org/cases/bautista-v-noem.

> *All 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 the Department of Homeland Security makes an initial custody determination.*

*Maldonado Bautista, 2025 WL 3288403, at *9*. Thus, there are two groups of people who have claims for relief. The first group covers those who entered the United States without inspection and were not apprehended at or near the border or close in time to their entry, but were later arrested by immigration officials in the interior of the United States. This group is akin to the *Matter of Yajure Hurtado* situation described earlier. This group has a straightforward claim to class membership, and should be eligible for a bond hearing as long as they are not subject to the MD grounds under § 236(c).

The second group includes those who *were* apprehended at or near the border and close in time to their entry, were released, and then were re-detained by immigration authorities in the interior of the United States. This group is akin to the *Matter of Q. Li.* situation described earlier. The government is likely to contest class membership for this second group arguing that they were correctly arrested at the border under § 235 detention authority, and therefore the government can bring them back into detention under § 235 authority. Advocates should argue that the court should look to the most recent arrest within the interior of the United States to determine whether or not someone was apprehended "upon arrival," which would bring them under class membership. Even if the person is found not to be a class member, advocates should argue that the same legal analysis dictates that they should be detained under § 236(a), and so should be granted a bond hearing.

In the weeks following the court's order many immigration judges continued to deny bond hearings to class members, based on a misinterpretation of the district court's declaratory judgment as not yet binding. The Department of Justice, through the Office of Immigration Litigation, also issued guidance for immigration judges stating that the district court's order should be disregarded and that *Yajure Hurtado* remained good law. This made it necessary for the district court to issue a clarification on December 18, 2025, that the nationwide class certification and judgment regarding the government's misapplication of MD under INA § 235(b)(2) were, in fact, final.[68] **As of this writing, immigration judges must hold bond hearings for class members and disregard the BIA's decision in *Matter of Yajure-Hurtado*.** While implementation of this order continues, some noncitizens may still need to file a habeas petition if immigration judges fail to honor the court's orders.[69]

Additionally, *Maldanado Bautista* requires immigration judges to provide a bond hearing for class members, not outright release. However, many practitioners have been able to gain

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[68] See *Maldonado Bautista v. Santacruz,* No. 5:25-CV-01873-SSS-BFM (C.D. Cal. Dec. 18, 2025) (order clarifying prior order).

[69] For sample habeas petitions, see NWIRP, *Impact Litigation*, https://nwirp.org/our-work/impact-litigation/. The "*Maldonado Bautista*" section is a great place to start. For those who *were* apprehended at the border and then later released see the "Cases challenging re-detention" section. Additionally, for more information on how to file habeas petitions *see* NILA, *Practice Advisory: Habeas Corpus Petitions* (Jan. 15, 2025), https://immigrationlitigation.org/wp-content/uploads/2025/11/25.01.15-Habeasx.pdf.

outright release by filing habeas petitions before district courts, arguing that in addition to the statutory arguments, the procedural due process clause of the Fifth Amendment to the Constitution provides a liberty interest to those who were free before their detention (including those who were arrested at the border), and that these individuals should be released and provided a bond hearing before immigration officials can detain them.[70] Therefore, advocates may want to consider going straight to the district court for habeas relief despite the *Maldonado Bautista* order, especially where favorable caselaw exists in your district.[71] This might be the best option if ICE continues to incorrectly assert that individuals who entered without inspection are subject to MD.[72]

IV. Mandatory Detention under INA § 241(a)

Finally, INA § 241(a) provides for mandatory detention of noncitizens with final removal orders, including those subject to reinstatement of removal and those in withholding-only proceedings.[73] INA § 241(a)(1)(A) mandates that a final order of removal must be carried out within the ninety-day period after the removal order becomes final, called the "removal period." INA § 241(a)(2) requires that people subject to final orders of removal must be detained during the 90-day removal period and provides that "under no circumstances" should persons who have been found inadmissible or removable for criminal or security related grounds be released during this time. The INA does not indicate how long a person may be detained after the 90-day removal period. But INA § 241(a)(3) provides that persons subject to final orders of removal can be released under an order of supervision after the ninety-day removal period has lapsed.

In *Zavadas v. Davis*,[74] the Supreme Court took up the question of whether a noncitizen can be detained indefinitely beyond the 90-day removal period. The Court decided that the detention of noncitizens with final orders of removal under INA § 241 is limited to a period that is

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[70] *See Bernal v. Albarran*, No. 25-CV-09772-RS, 2025 WL 3281422 (N.D. Cal. Nov. 25, 2025) (granting a preliminary injunction, after a successful temporary restraining order granting release, prohibiting the government from re-detaining the petitioner absent a re-detention custody hearing before a neutral decision maker).

[71] Note, some advocates may wonder if exhaustion of claims before the agency (immigration court) will be required in this case. Some courts have recognized that there is no exhaustion requirement in habeas cases, although exhaustion may be prudential (required by the court). However, where "administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void," exhaustion may be waived by the district court. *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004); *see also Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007). There are strong arguments that prudential exhaustion should be waived in cases where ICE detains an individual under an improper theory that the person is subject to mandatory detention. For further discussion, *see* NILA, *Practice Advisory: Habeas Corpus Petitions* (Jan. 15, 2025), https://immigrationlitigation.org/wp-content/uploads/2025/11/25.01.15-Habeasx.pdf.

[72] Within the Ninth Circuit, where the *Maldonado Bautista* and *Rodriguez Vazquez* cases are being litigated, as well as at least six other circuits, the government is appealing district court orders granting habeas relief for individuals detained under INA § 235(b)(2). ICE's continued reliance on the reasoning in *Yajure Hurtado* indicates that individual habeas petitions may be necessary for the time being.

[73] *See Johnson v. Guzman Chavez*, 594 U.S. 523 (2021) (detainees subject to reinstatement of removal and in withholding-only proceedings not entitled to a bond hearing and were subject to mandatory detention).

[74] 533 U.S. 678 (2001).

reasonably necessary to execute the removal order and does not permit indefinite detention. The court designated six months as the "presumptively reasonable period" of detention to execute a removal order. After six months, if an individual provides good reason to believe that there is no significant likelihood that they will be removed in the reasonably foreseeable future, the government must rebut that showing to continue detention. In *Clark v. Martinez*,[75] the Supreme Court held that its ruling in *Zadvydas* applies equally to noncitizens who have never been admitted to the United States.

The principles of *Zadvydas* and *Clark* apply in situations where a noncitizen's country of nationality fails to cooperate with the U.S. government by issuing necessary documentation permitting the noncitizen's return. Individuals in this situation can request to be released. The individual may also file a petition for writ of habeas corpus based on prolonged detention. See further discussion in ILRC's manual Detention & Bond: Defending Noncitizens in Immigration Custody (2024).

V. Defense Strategy for All of the Above: Request a *Joseph* Hearing and/or File a Habeas Petition

Request a *Joseph* Hearing. Immigration advocates can assert that their client is not subject to mandatory detention and request a "*Joseph* hearing."[76] ICE may allege that clients are subject to mandatory detention at the initial ICE arrest or later in front of the immigration judge. Advocates should always do their own analysis and push back on ICE's assessment wherever possible. The person can request a *Joseph* hearing to assert that it is likely that they (a) are not subject to mandatory detention, and/or (b) are not removable at all. *Matter of Joseph* clarified that if a person is not "properly included" within the scope of INA § 236(c) if the IJ concludes that DHS "is substantially unlikely to establish a merits hearing . . . the charge or charges that would otherwise subject the [noncitizen] to mandatory detention." In determining whether or not a person has properly been included within a mandatory detention provision, the IJ must consider the bond record "as a whole." This will typically include conviction records submitted by DHS, and can also include documents the respondent submits, or testimony elicited at the hearing.

File a habeas petition. Immigration advocates can also challenge their client's detention through a petition for writ of habeas corpus to the district court, which can seek a bond hearing with the burden on the government and/or outright release.[77]

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[75] 543 U.S. 371 (2005).

[76] *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). *See also* 8 CFR § 1003.19(h)(2)(ii) ("nothing in this paragraph shall be construed as prohibiting [a noncitizen] from seeking a determination by an immigration judge that the [noncitizen] is not properly included within any of those paragraphs [including the mandatory detention grounds of § 236 (c)]."

[77] For more information on habeas petitions challenging immigration detention, see National Immigration Law Alliance, *Habeas Corpus Petitions* (Jan. 2025), https://immigrationlitigation.org/practice-advisories/ (see also template habeas corpus petition and template application for order to show cause available at the same link); ILRC, *Detention & Bond: Defending Noncitizens in Immigration Custody* (2024).

VI. California Central District and Ninth Circuit Exceptions

Bond hearings after six months in the California Central District. The federal Central District of California includes the following counties: Los Angeles, Orange, San Bernardino, San Luis Obispo, Santa Barbara, Riverside, and Ventura. Individuals detained in these counties may be able to have a bond hearing after six months of detention. In *Rodriguez v. Robbins*,[78] the Ninth Circuit had held that everyone in the Ninth Circuit, including those subject to mandatory detention, are entitled to a bond hearing after sixth months in ICE custody. The United States Supreme Court reversed *Rodriguez* and held that the mandatory detention statute itself does not provide the right to periodic bond hearings.[79] However, owing to a permanent injunction in California's Central District, at this time individuals in that district continue to receive hearings after six months of detention – known as, "*Rodriguez* hearings."[80]

Bond hearings in withholding-only proceedings in the Ninth Circuit. In 2021, the Supreme Court found that detainees subject to reinstatement of removal and in withholding-only proceedings were not entitled to a bond hearing and were subject to mandatory detention.[81] However, within the Ninth Circuit, an injunction remains in place as of this writing, even after *Guzman-Chavez*. Under this injunction, individuals with final orders of removal who are held in detention under INA § 241(a)(6) (criminal grounds), and who have a pending claim for withholding of removal, are entitled to an individualized bond hearing after 6 months. This will end, however, and could end as soon as January 14, 2026.[82]

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[78] 804 F.3d 1060, 1074-77 (9th Cir. 2015).
[79] *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), interpreting INA § 236(c).
[80] See discussion of *Rodriguez v. Marin*, No. CV 07-3229 (March 5, 2018), in *Practice Advisory: Prolonged Detention Challenges after Jennings v. Rodriguez,* ACLU, ACLU Southern CA, Mills Legal Clinic of Stanford Law School (March 21, 2018) Part II.A), at https://www.aclu.org/sites/default/files/field_document/2018_03_21_jennings_v_rodriguez_practice_advisory.pdf.
[81] *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021).
[82] *See Garland v. Aleman Gonzalez*, 596 U.S. 543, 142 S. Ct. 2057, 213 L. Ed. 2d 102 (2022); on remand *Aleman Gonzalez v. Barr*, No. 18-16465, 2023 WL 3158294 (9th Cir. Apr. 25, 2023), (remanding to the district court). The district court has re-set the next Case Management Conference to January 21, 2026 , and a status report will be provided to the court on January 14, 2026, thereby allowing those within the Ninth Circuit to continue to seek bond for those in this situation until at least mid-January 2026. *See Gonzalez v. Barr*, N.D. Cal. Case No. 3:18-CV-01869-JSC.

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About the Immigrant Legal Resource Center
The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.