NATIONAL IMMIGRATION PROJECT

Lawyers for the Movement

Practice Advisory

The Laken Riley Act's Mandatory Detention Provisions[1]

February 5, 2025

Table of Contents

I. Introduction.......... 2
II. Summary of the LRA's Mandatory Detention Provisions.......... 2
III. Categories of Noncitizens Whose Detention Should Not Be Impacted by the LRA.......... 4
IV. Ideas for Arguing a Narrow Interpretation of the LRA.......... 6
A. Narrowing the Scope of Detention Triggers.......... 7
B. Strictly Applying State Law Definitions.......... 9
C. Arguments That the LRA Does Not Apply to Children.......... 10
D. Arguments Against Retroactive Application of the LRA.......... 11
V. Procedural Strategies for Challenging LRA Detention.......... 13
A. Joseph Hearings in Immigration Court.......... 14
B. Challenges to LRA Detention Through Habeas Petitions.......... 16
VI. Tips for Criminal Defense Attorneys.......... 19
A. Whom to Advise.......... 20
B. What to Advise.......... 21
C. When to Advise.......... 22
VII. Conclusion.......... 23

---

[1] Publication of the National Immigration Project (NIPNLG), 2025. This practice advisory is released under a Creative Commons Attribution 4.0 International License (CC BY 4.0). The advisory is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client's case. Counsel should independently confirm whether the law has changed since the date of this publication. The authors of this practice advisory are Khaled Alrabe, NIPNLG Senior Staff Attorney; Rebecca Scholtz, NIPNLG Senior Staff Attorney, and Matthew Vogel, NIPNLG Supervising Attorney. The authors would like to thank Russell Abrutyn, Abrutyn Law PLLC; Kathy Brady, Directing Attorney at Immigrant Legal Resource Center (ILRC); Tyler Brooks, NIPNLG extern; R. Linus Chan, Director, Detainee Rights Clinic, James H. Binger Center for New Americans, University of Minnesota Law School; Rebecca Eissenova, Senior Staff Attorney, ASISTA; Diane de Gramont, Attorney, National Center for Youth Law; Dan Kesselbrenner; Michelle N. Méndez, Director of Legal Resources and Training, NIPNLG; My Khanh Ngo, Staff Attorney, Immigrants' Rights Project, American Civil Liberties Union; Rachel Prandini, Managing Attorney, ILRC; Serena Taj, Staff Attorney, American Friends Service Committee; and Wendy Wayne, Founder and Principal of South End Strategies, for their comment and review.

I. Introduction

On January 29, 2025, President Trump signed the Laken Riley Act (LRA), Pub. L. 119-1, 139 Stat. 3, into law. The LRA undermines due process and will disproportionately target immigrant communities of color for detention and deportation. The law expands no-bond detention for certain noncitizens in immigration proceedings, and it also purports to give states the ability to sue the federal government over immigration decisions they dislike, opening the door to politically motivated and discriminatory actions.

The goal of this practice advisory is to support practitioners in defending noncitizens impacted by the LRA. This resource focuses on the detention implications of the LRA. It summarizes the law's detention provisions, discusses groups of noncitizens whose detention should *not* be impacted by the LRA, provides potential arguments for a narrow interpretation of the provisions' scope, describes procedural options for contesting a client's mandatory detention under the LRA, and identifies considerations for criminal defense attorneys.

The ideas offered here are merely starting points, with the hope that they will be useful to practitioners in developing arguments. The authors hope to update this resource as we learn more about how the law is being implemented by the Department of Homeland Security (DHS) and interpreted by immigration judges (IJ), the Board of Immigration Appeals (BIA), and federal courts. To that end, we also invite practitioners who have had clients detained pursuant to the LRA to fill out our survey here.

II. Summary of the LRA's Mandatory Detention Provisions

The LRA expands mandatory detention under section 236(c) of the Immigration and Nationality Act (INA), rendering more people in INA § 240 removal proceedings ineligible for a bond hearing.[2] It does so by adding § 236(c)(1)(E), which extends mandatory detention to noncitizens who meet two conditions: (a) they must be inadmissible under INA § 212(a)(6)(A) (present without being admitted or paroled), INA § 212(a)(6)(C) (misrepresentation), or INA § 212(a)(7) (lack of valid entry documents) and (b) they must be charged with, arrested for, convicted of, or admit to committing burglary, theft, larceny, shoplifting, or assault on a law enforcement officer, or any crime resulting in death or serious bodily injury.

As amended by the LRA, INA § 236(c)(1) now reads:

(c) Detention of criminal [noncitizens]

(1) Custody

The Attorney General shall take into custody any [noncitizen] who—

(A) is inadmissible by reason of having committed any offense covered in [INA § 212(a)(2)],

[2] INA § 236 regulates the arrest and detention of noncitizens. INA § 236(a) authorizes the arrest of noncitizens placed into removal proceedings under INA § 240 and provides for bond or other release of those arrested. Those subject to the statute's mandatory detention provision, INA § 236(c), are ineligible for bond.

(B) is deportable by reason of having committed any offense covered in [INA § 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)],
(C) is deportable under [INA § 237(a)(2)(A)(i)] on the basis of an offense for which the [noncitizen] has been sentence to a term of imprisonment of at least 1 year,
(D) is inadmissible under [INA § 212(a)(3)(B)] or deportable under [INA § 237(a)(4)(B)], or
(E) (i) is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 212(a); and
(ii) 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,

when the [noncitizen] is released, without regard to whether the [noncitizen] is released on parole, supervised release, or probation, and without regard to whether the [noncitizen] may be arrested or imprisoned again for the same offense.

The LRA also specifies that, for purposes of detention under INA § 236(c)(1)(E), "the terms 'burglary', 'theft', 'larceny', 'shoplifting', 'assault of a law enforcement officer', and 'serious bodily injury' have the meanings given such terms in the jurisdiction in which the acts occurred."[3]

The LRA also adds a new section, INA § 236(c)(3), which concerns immigration detainers and custody. It requires that DHS "shall issue" a detainer for a person described under this new INA § 236(c)(1)(E) and that, if the person "is not otherwise detained" in federal, state, or local custody, DHS "shall effectively and expeditiously" take custody of the person.[4] In other words, this section requires DHS to issue an immigration detainer for individuals subject to mandatory detention under the new INA § 236(c)(1)(E), presumably to the relevant detaining law enforcement agency, and then requires DHS promptly to take custody of the individual once they are "not otherwise detained" by the non-DHS law enforcement agency. Importantly, this detainer provision only applies to individuals subject to mandatory detention under the new INA § 236(c)(1)(E), and not to individuals that fall under INA § 236(c)(1)'s other provisions.[5]

[3] *Id.* § 236(c)(2).
[4] *Id.* § 236(c)(3).
[5] "The Secretary of Homeland Security shall issue a detainer *for [a noncitizen] described in paragraph (1)(E)* and, if the [noncitizen] is not otherwise detained by Federal, State, or local officials, shall effectively and expeditiously take custody of *the [noncitizen]*." *Id.* (emphasis added).

III. Categories of Noncitizens Whose Detention Should Not Be Impacted by the LRA

Even though the LRA is incredibly harmful, many noncitizens should *not* be impacted by it, because their detention is authorized by a different law than the one the LRA amends. This section describes who should not be impacted by the LRA's detention provisions.[6]

There are four main statutory provisions governing immigration detention of noncitizens. Each covers a different group of individuals:

- INA § 236(a), the general detention statute for people in INA § 240 removal proceedings which provides the right to an IJ bond hearing. Generally this is the most favorable detention authority and the one practitioners should argue the client's detention falls under, if a colorable argument is available.
- INA § 236(c), the mandatory detention statute that the LRA expands, under which certain noncitizens in INA § 240 removal proceedings are not eligible for an IJ bond hearing.
- INA § 235(b), which authorizes the detention of people placed into removal proceedings as "arriving" noncitizens[7] as well as people who are placed in removal proceedings after they pass a credible fear screening during expedited removal proceedings.[8] These individuals are not eligible for an IJ bond hearing but are eligible for discretionary release on parole by DHS.[9] In addition, people who are in the expedited removal process are subject to detention under INA § 235(b)(1)(B)(iii)(IV) and are not eligible for an IJ bond hearing.[10]
- INA § 241(a), which authorizes the detention of people with final removal orders.[11]

---

[6] While our view is that the groups of noncitizens described in this section are not subject to the LRA mandatory detention provisions, we also understand that DHS may well take a different view. It will be up to practitioners to argue for narrowing interpretations of the LRA.

[7] The government's position has been that people charged on their Notice to Appear as "arriving" noncitizens are detained under INA § 235(b)(2)(A). People detained under INA § 235(b)(2)(A) are not eligible for IJ bond hearings even if they have no criminal history. *See Jennings v. Rodriguez*, 583 U.S. 281, 297, 302-03 (2018). Immigration regulations provide that an "arriving" noncitizen in removal proceedings is not eligible for a bond hearing, even if they were previously granted parole under INA § 212(d)(5). 8 CFR § 1003.19(h)(2)(i)(B). Nevertheless, practitioners can try to argue that the re-detention of individuals charged on their NTA as "arriving" noncitizens who were previously paroled by DHS should be governed by INA § 236 rather than INA§ 235(b)—and thus they should be considered for a bond hearing unless they fall within INA § 236(c). *But see Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998). This is an emerging issue and outside the scope of this resource.

[8] *See* INA § 235(b)(1)(B)(ii), *Jennings v. Rodriguez*, 583 U.S. 281, 297, 302-03 (2018); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019).

[9] *See, e.g.*, ICE, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, Dir. No. 11002.1 (Jan. 4, 2010), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

[10] Individuals in the expedited removal process are not in INA § 240 removal proceedings, and, unless they pass a credible fear interview—which results in their placement in INA § 240 proceedings—they are typically swiftly and summarily removed from the United States. With the Trump administration's expansion of expedited removal to its statutory maximum, many more individuals are vulnerable to expedited removal. *See* DHS, Designating Aliens for Expedited Removal, 90 Fed. Reg. 8139 (Jan. 24, 2025).

[11] For more information about strategies for seeking release and preventing removal for these individuals, see NIPNLG, *A Guide to Obtaining Release from Immigration Detention* (May 28, 2024), https://nipnlg.org/work/resources/guide-obtaining-release-immigration-detention [hereinafter "NIPNLG Bond Guide"]; American Immigration Council (AIC) & NIPNLG, *Practice Advisory: Stays of Removal* (Jan. 17, 2025), https://nipnlg.org/work/resources/stays-removal; National Immigration Litigation Alliance & AIC, *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Apr. 25, 2022), https://www.americanimmigrationcouncil.org/practice_advisory/basics-motions-reopen-eoir-issued-removal-orders.

The LRA amends only INA § 236(c), which means that individuals whose detention is authorized by INA § 235(b) or INA § 241(a) should not be impacted by the detention provisions of the LRA.

For noncitizens whose detention is governed by INA § 236, only those subject to removal proceedings based on ground(s) of inadmissibility—in other words, individuals who have not been admitted to the United States—are potentially impacted by the LRA. Those who are subject to removal proceedings based on ground(s) of deportability—in other words, people who have been admitted to the United States—should not be impacted by the LRA's changes. This is because the LRA mandatory detention provisions only apply to a noncitizen with certain criminal history who "is inadmissible" for certain common immigration violations.

When analyzing whether a particular noncitizen falls within a mandatory detention category under INA § 236(c), only one set of the INA § 236(c)(1) grounds will apply—either the inadmissibility-based provisions or the deportability-based provisions.[12] INA § 236(c) tethers mandatory detention to whether a person "is inadmissible" for certain crimes, *see* INA § 236(c)(1)(A), "is deportable" for certain crimes, *see* INA § 236(c)(1)(B), (C), or is either inadmissible or deportable under the terrorism-related grounds, *see* INA § 236(c)(1)(D). The new LRA detention provisions, like INA § 236(c)(1)(A), tie mandatory detention only to a person who "is inadmissible" on certain grounds and therefore do not impact individuals not subject to the inadmissibility grounds.

Noncitizens who are "in and admitted" to the United States cannot be removed due to an inadmissibility ground under INA § 212; instead they are subject to deportability grounds of removal under INA § 237. This includes lawful permanent residents,[13] refugees,[14] and any noncitizen who enters the United States after being admitted[15]—regardless of whether they

[12] *Barton v. Barr*, 590 U.S. 222, 235 (2020) (noting that certain INA provisions, including those governing mandatory detention under INA § 236(c), explicitly tie their application to whether a noncitizen is removable based on a specific inadmissibility or deportability ground); *Matter of Kotliar*, 24 I&N Dec. 124, 127 (BIA 2007) (to determine whether a respondent falls within INA § 236(c)(1) ground, adjudicator must "look at the record to determine whether it establishes that he has committed an offense and whether the offense would give rise to a charge of removability included in that provision" (emphasis omitted)); *see also Matter of Fortiz*, 21 I&N Dec. 1199, 1201 n.3 (BIA 1998) (applying similar approach to AEDPA provision); O-P-W-, AXXX-XXX-498 (BIA Jan. 10, 2024) (unpublished), https://www.scribd.com/document/704354250/O-P-W-AXXX-XXX-498-BIA-Jan-10-2024?secret_password=Jk9UWoSjTB36zn7lh9yl (respondent not amenable to inadmissibility-based INA § 236(c) grounds since he was admitted on a visitor visa).

[13] *Matter of Alyazji*, 25 I&N Dec. 397, 399 (BIA 2011).

[14] *Matter of D-K-*, 25 I&N Dec. 761, 765 (BIA 2012).

[15] INA § 101(a)(13)(A) defines "admitted" as "the lawful entry of the [noncitizen] into the United States after inspection and authorization by an immigration officer." *See also Matter of Quilantan*, 25 I&N Dec. 285, 288 (BIA 2010) ("admission" requires only procedural regularity, not admission in any particular status; admission can include wave-through at port of entry).

currently have valid immigration status.[16] These noncitizens are not impacted by the LRA because they have been admitted.

Before turning to specific arguments for a narrow interpretation of the LRA, it is important to make one other overarching point about INA § 236(c). While its provisions use mandatory language, *i.e.* "[DHS] shall take into custody any [noncitizen]" meeting certain criteria, the LRA, like the rest of INA § 236(c), must be read in the context of the whole of INA § 236, particularly INA § 236(a). In our view, INA § 236(c) (and the LRA as part of it) only applies to those noncitizens that DHS elects in its discretion to commence removal proceedings against. INA § 236(a) grants authority for arrest and detention only "pending a decision on whether the [noncitizen] is to be removed from the United States." So, it is only with removal proceedings that arrest and detention are allowed at all under INA § 236. INA § 236(c), including the LRA, therefore does not require DHS to detain any particular noncitizen who is not in removal proceedings, even if they meet the substantive criteria for one of the INA § 236(c) provisions. This is because INA § 236 as a whole only deals with how DHS should detain noncitizens it elects to pursue removal proceedings against; it does not speak to which noncitizens DHS should prioritize for removal proceedings in the first place.[17] Whether to commence removal proceedings against any particular noncitizen falls within the province of longstanding prosecutorial discretion authority.[18] In other words, in our view, nothing about LRA or INA § 236(c) *requires* DHS to initiate removal proceedings against a particular noncitizen; and if DHS does not initiate removal proceedings, there can be no INA § 236(c) detention.

IV. Ideas for Arguing a Narrow Interpretation of the LRA

Practitioners should advance and preserve all arguments that limit the reach of the new mandatory detention provisions. This section identifies such potential arguments and strategies.

---

[16] On the other hand, certain forms of immigration protection are not considered to confer an "admission" and thus noncitizens who entered without inspection and then obtained these protections could be impacted by the LRA. Protections that are not considered to confer an "admission" include Temporary Protected Status, *see Sanchez v. Mayorkas*, 539 U.S. 409, 414 (2021), deferred action, and asylee status, *see Matter of V-X-*, 26 I&N Dec. 147, 152 (BIA 2013). That said, given that each of these statuses confers protection from removal, an individual could not be physically removed unless the status was terminated. *See* INA §§ 244(a)(1)(A) (TPS stay of removal provision); 208(c)(1)(A), (c)(2), (c)(3) (asylees can only be removed if their asylum status is terminated under a specified asylum termination ground). Further, in the case of TPS recipients who travel with government authorization using Form I-512T, by statute they are "admitted" upon their return. *See* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, § 304(c)(1)(A), Pub. L. 102-232, 105 Stat. 1749. Finally, the status itself may provide a basis for termination of proceedings. *See, e.g.*, 8 CFR § 1003.18(d)(1)(ii)(C) (authorizing discretionary termination for individuals with TPS and deferred action).

[17] *See Nielsen v. Preap*, 586 U.S. 392, 409–10 (2019).

[18] DHS under the current Trump administration has endorsed this precedent. *See* Memorandum from Caleb Vitello, Acting Dir., ICE, Guidance Regarding How to Exercise Enforcement Discretion, at 1-2 (Jan. 23, 2025), https://www.dhs.gov/sites/default/files/2025-01/25_0123_er-and-parole-guidance.pdf ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). That principle applies with equal force to immigration enforcement. *United States v. Texas*, 599 U.S. 670, 679 (2023); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (Scalia, J.) (describing the Executive Branch's broad discretion to initiate or abandon removal proceedings).").

A. Narrowing the Scope of Detention Triggers

The LRA mandatory detention provisions establish four separate triggers for mandatory detention, all of which practitioners should read narrowly:[19] (1) is charged with; (2) is arrested for; (3) is convicted of; or (4) admits having committed, or admits committing acts which constitute the essential elements, the enumerated offenses.

1. "Is charged with"

The meaning of "is charged with" should be understood to mean that the prosecuting authority has filed a formal complaint, indictment, information, or other charging document in court. Because "charged with" appears alongside "arrested for" and "convicted of" in the statute, the phrase must indicate a step beyond arrest but before conviction, namely a formal initiation of criminal proceedings.[20]

Practitioners should argue that Congress's use of the present tense in the phrase "is charged with" requires that this trigger apply only to individuals who are presently facing charges for one of the enumerated crimes and excludes those who were charged in the past but whose charges have been resolved.[21] Under this interpretation, individuals whose charges have been dismissed, or whose charges have been amended to exclude the enumerated offenses, are not subject to the LRA's mandatory detention provisions.

2. "Is arrested for"

"Is arrested for" in the LRA should be understood to mean a seizure of a person that is supported by probable cause that the person committed one of the enumerated offenses.[22] As with the "is

[19] Practitioners should assert that the LRA triggers—arrests, charges, convictions, and admissions—are unambiguously narrow as described in this resource. However, even if they were not, ambiguous immigration statutes that impose severe consequences on noncitizens should be construed narrowly in their favor. *See Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used"); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (recognizing "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]").
[20] *See United States v. Williams*, 553 U.S. 285, 294 (2008) ("[T]he commonsense canon of noscitur a sociis . . . counsels that a word is given more precise content by the neighboring words with which it is associated.").
[21] *See United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."); *Carr v. United States*, 560 U.S. 438, 448 (2010) ("[T]he Dictionary Act instructs that the present tense generally does not include the past."); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past . . . but it did not choose this readily available option.").
[22] *See Torres v. Madrid*, 592 U.S. 306, 312 (2021) ("As we have repeatedly recognized, 'the arrest of a person is quintessentially a seizure.'") (*quoting* Payton v. New York, 445 U.S. 573, 585 (1980)); *California v. Hodari D.*, 499 U.S. 624, 626 n.2 (1991) (finding that at common law, an arrest was the "quintessential 'seizure of the person'"); *Virginia v. Moore*, 553 U.S. 164, 171 (2008) (reaffirming that an arrest is constitutionally reasonable so long as an officer has probable cause to believe a person committed a crime); *see also Arrest*, Black's Law Dictionary (12th ed. 2024) ("1. A seizure or forcible restraint, esp. by legal authority. 2. The taking or keeping of a person in custody by legal authority, esp. in response to a criminal charge"). Courts also recognize that when Congress uses an old common law term, it intends to use the generally accepted meaning of the word under common law. *United States v. Hansen*, 599 U.S. 762, 778 (2023) ("When Congress transplants a common-law term, the 'old soil' comes with it").

charged" provision, because Congress phrased this language in the present tense, individuals who are not under arrest (*i.e.*, detained pending formal charges) at the time of the detention determination should not be subject to INA § 236(c). For example, if local law enforcement arrests a person for shoplifting and lawfully detains them pending a determination on whether charges should be brought, that person would meet the "is arrested" requirement in the LRA. If, however, the person is released from state criminal custody without formal charges filed, they cannot be said to be presently "arrested for" anything and so do not fall within the LRA's arrest-based mandatory detention provision.[23]

3. *"Is convicted of"*

Individuals will be subject to this trigger if they have a "conviction" that meets the immigration definition of a conviction found at INA § 101(a)(48).[24] Practitioners should be aware that the conviction definition found at INA § 101(a)(48) is generally more expansive than most jurisdictions' definition of "conviction" for criminal purposes. The INA's definition can include certain diversion, deferred prosecution, and similar resolutions, for example.[25] Additionally, vacated convictions remain convictions for immigration purposes unless the vacatur is based on a procedural or substantive defect in the underlying criminal proceedings.[26]

4. *"Admits having committed, or admits committing acts which constitute the essential elements of"*

Practitioners should assert that this trigger necessitates the strict requirements for an "admission" established in the context of the identically worded inadmissibility grounds under INA § 212(a)(2)(A)(i).[27] A person can only be deemed inadmissible for an "admission" under INA § 212(a)(2)(A) if the noncitizen is provided with an explanation of the elements of the alleged offense, the noncitizen admits to committing acts that satisfy each of those elements, and the admission is given freely and voluntarily.[28] Because Congress chose to adopt identical wording about admissions in the LRA, the admission language of the LRA should be interpreted in the

[23] Although if a noncitizen is released after being formally charged with one of the LRA enumerated offenses, they would be subject to detention under the "is charged with" language.
[24] The use of the present tense here, unlike the "is charged with" and "is arrested for" provisions, is not helpful in the same way to noncitizens: once convicted, a person remains convicted indefinitely unless they take affirmative steps to vacate, expunge, or overturn the conviction.
[25] For more information on the scope of the INA's definition of a conviction and arguments to address it, see ILRC, What Qualifies as a Conviction for Immigration Purposes (Apr. 5, 2019), https://www.ilrc.org/resources/what-qualifies-conviction-immigration-purposes; ILRC, *Immigration Consequences of Pretrial Diversion and Intervention Agreements* (June 3, 2021), https://www.ilrc.org/resources/immigration-consequences-pretrial-diversion-and-intervention-agreements.
[26] *See Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003); *Matter of Azrag*¸ 28 I&N Dec. 784 (BIA 2024).
[27] INA § 212(a)(2)(A)(i) renders inadmissible "any [noncitizen] convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of" a crime involving moral turpitude (CIMT) or a controlled substance offense (CSO).
[28] *Matter of K*, 7 I&N Dec. 594 (BIA 1957). For more information, *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.

same way.[29] Absent a clear explanation of the offense and its elements, a noncitizen's statement should be insufficient to qualify as an "admission" triggering mandatory detention. Practitioners should emphasize that DHS cannot rely on generalized or ambiguous statements as admissions. Practitioners should also advise their clients about the dangers of making admissions to DHS or any law enforcement officers.[30]

B. Strictly Applying State Law Definitions

Unlike other mandatory detention grounds or any crime-related provisions in the INA, the LRA uniquely ties immigration consequences to state law definitions of crimes. Specifically, the LRA defines "burglary," "theft," "larceny," "shoplifting," "assault of a law enforcement officer," and "serious bodily injury" as having "the meanings given *such terms* in the jurisdiction in which the acts occurred."[31] Practitioners should advocate that the plain meaning of this provision is that arrests, charges, convictions, or admissions must align precisely with state law definitions of these terms in order to trigger mandatory detention. In cases where state law does not define one of the LRA enumerated offenses, which is especially likely with respect to "assault of a law enforcement officer," practitioners should explore the argument that DHS cannot rely on that category of LRA offenses to trigger mandatory detention in that jurisdiction.

Practitioners should argue that state offenses that do not strictly match the elements of the enumerated LRA offense, *as defined under state law*, cannot trigger mandatory detention. For example, offenses such as joyriding or conversion, while sometimes grouped under theft statutes, do not necessarily reference larceny or theft and can differ materially in their elements from state definitions of these terms.[32] Joyriding under N.Y. Penal Law § 165.05, for instance, makes no reference to larceny or theft and is clearly broader than the state definition of larceny. While the New York joyriding statute criminalizes temporary takings, larceny—defined in N.Y. Penal Law § 155.05—requires an intent to permanently deprive or appropriate property.[33] Similar arguments could be made with respect to receipt of stolen property offenses.[34] In sum, practitioners should argue that a client has not triggered mandatory detention under the LRA if their arrest, charge,

---

[29] *See Robers v. United States*, 572 U.S. 639, 643 (2014) ("Generally, 'identical words used in different parts of the same statute are . . . presumed to have the same meaning.'") (*quoting Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006)) (internal quotation marks omitted).

[30] *See* National Immigration Project, *Community Explainer: Laken Riley Act* (Jan. 27, 2025), https://nipnlg.org/work/resources/community-explainer-laken-riley-act.

[31] INA § 236(c)(2).

[32] *See*, *e.g.*, N.J. Stat. Ann. § 2C:20-10 ("Unlawful taking of means of conveyance"); N.Y. Penal Law § 165.05 ("Unauthorized use of a vehicle in the third degree"); Ind. Code § 35-43-4-3 ("Criminal conversion").

[33] *Compare* N.Y. Penal Law §§ 155.0, 155.05 (together defining larceny as requiring an intent to permanently deprive or appropriate property), *with* § 165.05 (criminalizing unauthorized use of a vehicle without an intent to permanently deprive or appropriate); *see also People v. Jennings*, 69 N.Y.2d 103, 119 n.4 (1986) ("It was because larceny was held to include the element of an intent *permanently* to deprive or appropriate that the Legislature enacted Penal Law § 1293–a (since replaced by Penal Law §§ 165.00, 165.05, 165.06 and 165.08) to bring intentional temporary misuse of another's property within the purview of the criminal law")(emphasis in original)..

[34] For example, while Cal. Penal Code § 484, defining theft, requires a specific intent to permanently deprive another, Cal. Penal Code § 496(a), receiving stolen property, does not. *See Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160 (9th Cir. 2009) ("Under Californian law, a conviction for grand theft or petty theft under Cal. Penal Code § 484 requires . . . 'the specific intent to deprive the victim of his property permanently.' Receipt of stolen property under Cal. Penal Code § 496(a) has no such requirement, but rather permits conviction for an intent to deprive an individual of his property temporarily.") (citations omitted).

conviction, or admission is for a state law offense whose elements[35] do not align with the elements of the state definition of the offenses listed in the LRA.[36]

C. Arguments That the LRA Does Not Apply to Children

For clients who are currently under 18 years of age, or in whose case the alleged offense occurred while they were under 18 years old, practitioners should consider arguments that the LRA's provisions do not apply.

If ICE detains a client who is under 18 years old and who meets the definition of "unaccompanied [noncitizen] child" [UC],[37] practitioners should argue that the child must be promptly transferred into the custody of the U.S. Department of Health and Human Services (HHS). The Trafficking Victims Protection Reauthorization Act (TVPRA) gives HHS exclusive authority over the detention of UCs and requires that DHS transfer any UC in its custody to HHS within 72 hours.[38] After receiving a UC, HHS is then required to promptly place the UC "in the least restrictive setting that is in the best interest of the child," which could be with "a suitable family member."[39] In contrast, INA § 236(c), where the LRA amendments are found, mandates that *DHS* maintain certain noncitizens in its custody,[40] but INA § 236(c) does not impose any directive on *HHS* or preclude *HHS* from releasing a UC under HHS's procedures. Practitioners should also consider pushing back against attempts by DHS to take a restrictive view of what it means to be "unaccompanied" by a parent or legal guardian; for example, if DHS arrests a child, removes them from their parents' care, and detains them, practitioners could consider arguing that DHS has rendered this child "unaccompanied" and they must thus be promptly transferred to HHS custody.[41] For children under 18 whom ICE insists are "accompanied" and are thus detained in ICE custody, practitioners should consider invoking the *Flores* Settlement Agreement to argue that they are entitled to a bond hearing.[42]

---

[35] Advocates should employ the definition of an element as used in *Mathis v. United States*, 579 U.S. 500, 506–07 (2016), and *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and look to state law for guidance on the elements of each offense referenced by the LRA.

[36] This element-based argument would not apply to LRA detention triggered by "any crime that results in death or serious bodily injury," § 236(c)(1)(E)(ii), because this language does not tie detention to a specific state-defined crime, but rather the results of any crime. Even so, in such cases, the relevant definition of "serious bodily injury" must align with the state definition.

[37] 6 U.S.C. § 279(g)(2) defines UC as a child who has no lawful immigration status, is under 18 years old, and has no parent or legal guardian in the United States available to provide care and physical custody.

[38] 8 U.S.C. § 1232(b)(1)-(3); *see also* Immigration Court Practice Manual Ch. 9.2(b), https://www.justice.gov/eoir/reference-materials/ic/chapter-9/2 ("When DHS determines that a juvenile is unaccompanied and must be detained, he or she is transferred to the care of [HHS]. . . .").

[39] 8 U.S.C. § 1232(c)(2)(A).

[40] Although INA § 236(c)(1) commands the "Attorney General" to detain certain noncitizens, that provision now refers to DHS. *See Nielsen v. Preap*, 586 U.S. 392, 397 n.2, 404-05 (2019).

[41] *But see* ICE Juvenile and Family Residential Management Unit Field Office Juvenile Coordinator Handbook, at 65-67 (Nov. 2021), https://www.ice.gov/doclib/foia/policy/handbooikFOJC_Nov2021.pdf (discussing ICE detention of "accompanied minors").

[42] Flores Settlement Agreement ¶ 24A, https://live-ncyl-ci.pantheonsite.io/sites/default/files/wp_attachments/Flores-Settlement-Agrement-.pdf ("A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing."). The *Flores* Settlement Agreement continues to apply to children detained in DHS custody. *See Flores v. Rosen*, 984 F.3d 720, 744 (9th Cir. 2020). Among other things, children in immigration detention must be placed "in the least

For clients whose alleged arrest, charge, conviction, or admission occurred while they were under 18 years old, practitioners should make arguments, based on longstanding case law regarding conduct of children, that the LRA provisions are not triggered. First, it is well established that a juvenile delinquency adjudication is not a "conviction" for immigration purposes.[43] Second, admitting to conduct that would have been handled in juvenile delinquency proceedings in the relevant jurisdiction or under the Federal Juvenile Delinquency Act (FJDA) is not an "admission" for immigration purposes.[44] Third, longstanding BIA precedent affirms that "an act of juvenile delinquency is not a crime in the United States,"[45] and the FJDA, upon which BIA precedents frequently draw, distinguishes between an "alleged act of juvenile delinquency" and an "alleged criminal offense" handled in adult court.[46] Practitioners should use this case law to argue that an arrest or charge that would be handled in juvenile delinquency proceedings—which are civil in nature—is not for an "offense" or "crime" under INA § 236(1)(E)(ii) and thus does not trigger the LRA's mandatory detention provisions. Practitioners could also point out that in rare instances where Congress has intended acts of juvenile delinquency to trigger "crime" or "conviction"-related consequences, they have specified this unusual result.[47] Since Congress did not include any such language in the LRA provisions, the natural reading is that they are triggered by *criminal* conduct, not acts of delinquency which are handled in *civil* proceedings.[48]

Practitioners should also take care not to violate, and to object to DHS attempts to violate, any applicable laws regarding the confidentiality of juvenile records.[49]

D. Arguments Against Retroactive Application of the LRA

Practitioners should consider arguing that the LRA mandatory provisions are not retroactive under two separate theories.

First, the LRA's detainer provision provides a basis for an argument that the new mandatory detention grounds do not apply to individuals released from criminal custody for LRA-enumerated offenses before the act's effective date. That provision mandates that DHS

---

restrictive setting appropriate to [their] age and special needs" and children charged with isolated non-violent offenses or petty offenses such as shoplifting may not be placed in secure detention on that basis alone. *See Flores* Settlement Agreement ¶¶ 11, 21.A.

[43] *Matter of Devison-Charles*, 22 I&N Dec. 1362, 1365 (BIA 2001) ("We have consistently 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.").

[44] *Matter of M-U-*, 2 I&N Dec. 92 (BIA 1944); *Matter of F-*, 4 I&N Dec. 726, 727 (BIA 1952) (17-year old who admitted to perjury was not inadmissible because "his offense must be considered a delinquency and not a crime").

[45] *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 137 (BIA 1981), *accord Devison-Charles*, 22 I&N Dec. at 1367.

[46] 18 U.S.C. § 5043(a)(1); *id.* § 5039; *see also id.* § 5031 (act of delinquency not a "crime").

[47] *See, e.g.*, INA § 204(a)(1)(A)(viii) (Adam Walsh Act provisions triggered by a "conviction," defined at 34 U.S.C. § 20911(8) to include certain juvenile delinquency dispositions); 8 CFR § 236.13(d) (Family Unity benefits unavailable based on commission of certain "acts of juvenile delinquency").

[48] The statutory interpretation canon *noscitur a sociis* supports treating all of the verbs in the LRA in the same manner, as referring to criminal conduct rather than civil delinquency. *See, e.g.*, *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (noting that under this canon, words grouped in a list are given related meaning).

[49] *See, e.g.*, Rachel Prandini, ILRC, *Confidentiality of Juvenile Records in California* (Sept. 27, 2022), https://www.ilrc.org/resources/confidentiality-juvenile-records-california-guidance-immigration-practitioners.

"shall issue a detainer for a [noncitizen] described in paragraph (1)(E)" and shall "effectively and expeditiously" take them into custody if they are "not otherwise detained by Federal, State or local officials"—in other words, if those officials would otherwise release the noncitizen were it not for the detainer.[50] The detainer provision is written in a way that presumes that a noncitizen covered by the new LRA detention ground must be in non-DHS federal, state, or local custody. Notably, this detainer provision applies only to individuals who fall under 236(c)(1)(E) and not to any other category of individuals detained under 236(c). Therefore, if a client has never been in non-DHS custody, or has not been in non-DHS custody since the LRA's effective date, they should not be covered by the new mandatory detention provision.[51]

Second, practitioners should argue that the LRA mandatory provisions do not apply retroactively to individuals whose arrest, charge, conviction, or admission predate the enactment of the LRA. There is a long-established presumption against retroactive legislation in U.S. law.[52] In light of this presumption, courts employ the two-step *Landgraf* analysis to determine if a statute applies to actions that predate its enactment.[53]

Courts first ask whether Congress provided a clear expression of intent on retroactivity, and if so, the analysis ends and the intent of Congress applies.[54] Second, if the statute is silent on retroactive application, Courts ask whether applying the new legislative scheme to past actions would have an impermissible retroactive effect.[55] An impermissible retroactive effect occurs if applying the statutory scheme to past conduct "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."[56]

---

[50] "Not otherwise detained" means that the custodian would otherwise release the person for example "as a result of having been granted bail" but is asked via the detainer to maintain custody so that DHS can arrest them. *United States v. Ventura*, 96 F.4th 496, 498 n.1 (2d Cir. 2024); *see United States v. Valdez-Hurtado*, 638 F. Supp. 3d 879, 890–91 (N.D. Ill. 2022); *Morales v. Chadbourne*, 793 F.3d 208, 214–15 (1st Cir. 2015); *Galarza v. Szalczyk*, 745 F.3d 634, 641–42 (3d Cir. 2014); *Davis v. Gregory*, No. 20-12716, 2021 WL 2944462, at *2 (11th Cir. July 14, 2021).

[51] There is case law holding that the pre-LRA INA § 236(c) mandatory detention provisions do not apply retroactively to individuals released from custody prior to the enactment of those provisions. *See Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999) (holding that the then-new INA § 236(c) provisions did not apply to noncitizens whose release from custody predated the date the mandatory detention provisions took effect). This case law was premised on the language of specific "Transition Period Custody Rules," which applied at the time but are not relevant to the LRA, and which expressly stated that "after the end of such 1-year or 2-year periods, the provisions of such section 236(c) shall apply to individuals released *after such periods.*" *Id*. at 1107 (emphasis added). Additionally, some courts have held that the "when released" language of INA § 236(c) itself mandates that the detention provisions do not apply retroactively to individuals released before the law came into effect. *See*, *e.g.*, *Grant v. Zemski*, 54 F. Supp. 2d 437, 442–45 (E.D. Pa. 1999). However, it is unlikely that this latter statutory argument remains viable post-*Preap*. *See Nielsen v. Preap*, 586 U.S. 392, 418 (2019).

[52] *See Landgraf v. USI Film Prods.,* 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.").

[53] *Id.* at 280.

[54] *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) ("Accordingly, the first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively.").

[55] *Id.*

[56] *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269).

With respect to step one, the LRA mandatory detention provisions are silent as to retroactivity which indicates no clear congressional intent on the matter.[57] Practitioners should argue that, under step two of *Landgraf*, applying the LRA provisions to arrests, charges, convictions and admissions that predate the enactment of the act would have an impermissible retroactive effect. In *Vartelas v. Holder*, the Supreme Court addressed whether a new provision of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) that restricted LPRs from reentering the country after a short trip abroad for having committed prior criminal acts applied retroactively to LPRs whose offenses occurred prior to IIRIRA's enactment.[58] In applying the *Landgraf* analysis, the court held that retroactive application would be impermissible because the law "attached a new disability (denial of reentry) in respect to past events (Vartelas' pre-IIRIRA offense, plea, and conviction)."[59] Similarly, one could argue that the LRA mandatory provisions, applied to past conduct, would impermissibly attach a new disability (mandatory detention) to past events (charges, convictions, or admissions that predate the enactment of the LRA).[60] For these reasons, advocates should argue that the presumption against retroactive legislation bars the application of the LRA to arrests, charges, admissions, or convictions that occurred before January 29, 2025, the date the LRA came into effect.

V. Procedural Strategies for Challenging LRA Detention

This section briefly describes the procedures for how a noncitizen might challenge their detention under the expanded LRA provisions, first describing immigration court procedures and then covering federal court habeas corpus actions.

Separate from challenging a noncitizen's detention following the strategies below, practitioners should consider challenging, during the removal proceedings, DHS's allegations of the noncitizen's removability or otherwise challenging the adequacy of the Notice to Appear. Successfully challenging removability results in termination of proceedings, and if there are no pending removal proceedings under INA § 240 then there can be no mandatory detention under INA § 236(c).[61] Challenging removability is beyond the scope of this practice advisory; it

---

[57] *Id.* at 316 ("The standard for finding such unambiguous direction is a demanding one. 'Cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation.'") (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).
[58] *See Vartelas v. Holder*, 566 U.S. 257 (2012).
[59] *Id*. at 261; *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 325 (2001) (applying *Landgraf* factors to determine that IIRIRA and the Antiterrorism and Effective Death Penalty Act (AEDPA)'s elimination of discretionary relief under § 212(c) was impermissibly retroactive because it imposed new and harsher legal consequences to past conduct).
[60] *See also Sivongxay v. Reno*, 56 F. Supp. 2d 1167, 1171-73 (W.D. Wash. 1999) (applying the *Landgraf* factors to hold that the post-order mandatory detention provision, INA § 241(a), does not apply retroactively to noncitizens whose order became final before that provision went into effect).
[61] Note, however, that for noncitizens who are potentially vulnerable to expedited removal because they have been physically present in the United States for fewer than two years and have not been admitted or paroled, INA § 235(b)(1)(A)(iii)(II), or because DHS considers them to be "arriving" noncitizens, INA § 235(b)(1)(A)(i), termination of removal proceedings may make it easier for DHS to pursue expedited removal against a noncitizen. It is important to discuss individualized pros and cons of various removal proceedings strategies with clients so that they can make an informed decision.

typically involves denying the NTA's allegations and charge and putting DHS to its burden of proof on alienage.[62]

A. *Joseph* Hearings in Immigration Court

While individuals detained under INA § 236(c) are not entitled to an IJ bond hearing, they are entitled to an IJ hearing regarding whether they are properly classified as falling within INA § 236(c)'s mandatory detention provisions—called a *Joseph* hearing.[63] Under the BIA's framework for *Joseph* hearings, once DHS establishes that there is a "reason to believe" the noncitizen is properly included within INA § 236(c), the burden shifts to the noncitizen to show that the government is substantially unlikely to prevail in establishing the charge that triggers mandatory detention.[64] However, in *Joseph* hearings occurring in the jurisdiction of the Third Circuit, DHS bears the burden to prove that an individual is properly included within INA § 236(c), by a preponderance of the evidence.[65] Practitioners in jurisdictions outside of the Third Circuit should preserve arguments challenging the BIA's *Joseph* standard and arguing that due process requires DHS to carry the burden of proof that a noncitizen is subject to mandatory detention.

If no custody redetermination hearing has been scheduled, practitioners can request one by filing a motion for a custody redetermination hearing.[66] Practitioners may be aware of INA § 236(c) provisions that DHS may raise or practitioners may be surprised by DHS's allegations that the LRA applies. Under either scenario, practitioners should be ready. If the practitioner knows that INA § 236(c) provisions are likely to be raised, it is wise to file a written argument, attaching supporting evidence if relevant such as a certified copy of any court dismissal, about why the client is not subject to INA § 236(c) detention and is eligible for bond under INA § 236(a). It is also possible that a practitioner could be taken by surprise at a client's bond hearing by allegations from DHS or the IJ that the client is subject to mandatory detention under the LRA amendments; for example based on an alleged arrest or charge the practitioner is unaware of. This may be particularly likely under the new LRA provisions because many such clients will be charged on their Notice to Appear with only an immigration violation such as INA § 212(a)(6)(A)(i), and ICE's custody paperwork, Form I-286, generally does not specify whether ICE believes the noncitizen's detention is mandatory.[67] In this situation, practitioners could argue

---

[62] Proving that a respondent is not a citizen or national of the United States is a jurisdictional fact, which DHS bears the burden of establishing before an IJ can consider whether a respondent is subject to a ground of removal. *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923); *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971). An inference from even unprivileged silence is insufficient to establish a prima facie case that a respondent is a noncitizen. *Matter of Guevara*, 20 I&N Dec. 238, 241-42 (BIA 1990).

[63] *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999); *see* 8 CFR § 1003.19(h)(2)(ii); *see also* Memorandum from Sirce E. Owen, Acting Dir., EOIR, Laken Riley Act, at 1-2 (Jan. 30, 2025), https://www.justice.gov/eoir/media/1387731/dl?inline.

[64] *Matter of Joseph*, 22 I&N Dec. at 800; *Matter of Joseph*, 22 I&N Dec. 660, 668 (BIA 1999); *Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 12 F.4th 321, 330 (3d Cir. 2021).

[65] *Gayle*, 12 F.4th at 331–32.

[66] For detailed practice tips on immigration court custody redetermination hearings, see NIPNLG Bond Guide, *supra* note 11.

[67] In New Jersey, ICE issues Form I-286 with an addendum indicating whether ICE believes the noncitizen's detention is governed by INA § 236(a) or INA § 236(c). Even if ICE issues such an addendum, it may not state any alleged facts giving rise to mandatory detention, it may not specify which of the mandatory detention provisions allegedly applies, and it is possible that DHS could take a different position during the hearing than what is on the

that due process requires DHS to provide notice of what specific INA § 236(c)(1) provision is allegedly at issue, as well as evidence to support that assertion.[68] In other words, practitioners could argue that they cannot adequately respond to DHS's mandatory detention allegation without having notice of the specific INA § 236(c)(1) provision at issue. If DHS offers evidence in support of mandatory detention during the hearing, practitioners should request a short recess to assess and determine whether to proceed with the hearing or request additional time.

If the practitioner needs additional time to develop arguments as to why INA § 236(c) is not triggered based on DHS's new allegations or evidence presented during the hearing, they could withdraw the request for a custody redetermination hearing. They could then, when ready, file a motion for a *Joseph* hearing with written argument as to why mandatory detention has not been triggered despite DHS's assertions. Practitioners should also object to any unreliable evidence DHS offers to argue a noncitizen falls within INA § 236(c)(1)(E), such as a hearsay statement in Form I-213 reporting that a database query identified a prior arrest.[69]

Practitioners should prepare clients in advance of custody redetermination hearings to avoid creating an "admission," see section IV.A.4 above, that could trigger "admission"-based mandatory detention.[70] If DHS begins to elicit the testimony from the client during the hearing that appears to be laying the foundation for an admission, it may be wise for the client to invoke their Fifth Amendment right to remain silent.[71]

If the practitioner can persuade the IJ during the *Joseph* hearing that the client does not in fact fall within INA § 236(c), they can then ask the IJ to grant a bond or release them with conditions under INA § 236(a).[72] Under prevailing BIA case law, to win release on bond the respondent must establish that they are not a danger to the community nor a flight risk.[73] In the First Circuit, however, DHS has the burden to prove continued detention is warranted by proving the respondent's dangerousness or flight risk.[74] For practice tips on advocating for bond before an IJ, see NIPNLG's *Guide to Obtaining Release from Immigration Detention*.[75]

---

addendum—though practitioners could object on notice grounds to such position reversals and/or argue that DHS has waived such argument.

[68] *See Matter of Kotliar*, 24 I&N Dec. 124, 127 (BIA 2007) ("[W]here the basis for detention is not included in the charging document, the [noncitizen] must be given notice of the circumstances or convictions that provide the basis for mandatory detention and an opportunity to challenge the detention before the Immigration Judge during the bond redetermination hearing."); *see also* INA § 240(b)(4)(B) (affording noncitizens the right to a "reasonable opportunity to examine the evidence against [them]").

[69] For tips on challenging unreliable DHS evidence, see NIPNLG Bond Guide, *supra* note 11.

[70] INA § 236(c)(1)(A), (c)(1)(E) (providing for mandatory detention where the noncitizen "admits committing acts which constitute the essential elements of" certain offenses including theft and shoplifting).

[71] While a respondent's silence allows the IJ to draw a negative inference in some circumstances, *see Matter of Guevara*, 20 I&N Dec. 238 (BIA 1991), practitioners should oppose any DHS argument that a respondent's silence alone can establish "reason to believe" that an INA § 236(c)(1)(E) admission-based ground is triggered.

[72] Regulations allow DHS to invoke an "automatic stay" of the IJ's release decision if DHS files a Notice of Intent to Appeal of the decision (Form EOIR-43) with the immigration court within one business day of the IJ's order. 8 CFR § 1003.19(i)(2). For more on regulatory stays of IJ bond decisions, see NIPNLG Bond Guide, *supra* note 11.

[73] *See, e.g.*, *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

[74] *Brito v. Garland*, 22 F.4th 240, 256–57 (1st Cir. 2021) ("[I]f the government refuses to offer release subject to bond to a noncitizen detained pursuant to 8 U.S.C. § 1226(a), it must either prove by clear and convincing evidence that the noncitizen is dangerous or prove by a preponderance of the evidence that the noncitizen poses a flight risk.")

[75] NIPNLG Bond Guide, *supra* note 11.

If the IJ rules against the noncitizen at the *Joseph* hearing, concluding that the noncitizen does fall within INA § 236(c)'s mandatory detention provisions, this ruling can be appealed to the BIA without waiting for the removal proceedings to conclude.[76]

B. Challenges to LRA Detention Through Habeas Petitions

One way to challenge the LRA's mandatory detention provisions in federal court is through a habeas petition. This practice advisory highlights a few key issues that may arise in the context of federal habeas petitions challenging detention under the new § 236(c)(1)(E); it does not provide a comprehensive discussion of immigration habeas petitions.

1. Exhaustion

There is no statutory requirement for exhaustion in immigration habeas petitions, which proceed under 28 U.S.C. § 2241.[77] However, courts may nevertheless, as a prudential matter, require exhaustion; this is known as prudential exhaustion. There are arguments that prudential exhaustion should not be required for immigration habeas petitions challenging detention under INA § 236(c)(1)(E)[78] and that exhaustion should not be required for any constitutional claims brought in habeas because neither the immigration court nor the BIA are capable of adjudicating constitutional claims.[79]

However, particularly where a petitioner is challenging whether they are properly subject to LRA's mandatory detention provisions, courts may require a *Joseph* hearing in order to allow the immigration court to adjudicate that claim in the first instance. There are strong arguments that *Joseph* hearings themselves have serious constitutional due process defects and therefore do not constitute an adequate process for challenging detention under INA § 236(c)(1)(E).[80]

---

[76] 8 CFR § 1003.19(f), BIA Practice Manual Ch. 7.2(b)(3), 7.3 (describing bond appeal procedures), https://www.justice.gov/eoir/reference-materials/bia/chapter-7.

[77] Nothing in the text of § 2241 requires exhaustion and federal law does not otherwise provide for statutory exhaustion regarding immigration habeas petitions. *See* 8 U.S.C. § 1252(d)(1); *Garza-Garcia v. Moore*, 539 F. Supp. 2d 899, 904 (S.D. Tex. 2007) ("Under the INA exhaustion of administrative remedies is only required by Congress for appeals on final orders of removal.").

[78] *See, e.g.*, *McCarthy v. Madigan*, 503 U.S. 140, 144, 147-48 (1992), *superseded by statute on other grounds as stated in Booth v. Churner*, 532 U.S. 731 (2001) (explaining that courts should not require prudential exhaustion where it would cause "undue prejudice to subsequent assertion of a court action," where there is "some doubt as to whether the agency was empowered to grant effective relief," where it would be futile because "the administrative body is shown to be biased or has otherwise predetermined the issue before it[,]" or where there is an "unreasonable or indefinite timeframe for administrative action," where plaintiff "may suffer irreparable harm if unable to secure immediate judicial consideration of his claim," or where the "challenge is to the adequacy of the agency procedure itself") (internal quotation marks omitted).

[79] *See id.* at 147-48 (holding that an administrative remedy is inadequate when it "lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute"); *Gallegos-Hernandez v. United States*, 688 F.3d 190, 194 (5th Cir. 2012) (holding exhaustion is futile for constitutional challenges); *Taylor v. U.S. Treasury Dep't*, 127 F.3d 470, 477 (5th Cir. 1997) (same); *Matter of Valdovinos*, 18 I&N Dec. 343, 345-46 (BIA 1982) (disclaiming jurisdiction to rule on constitutionality of immigration statute).

[80] *See Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 12 F.4th 321, 330-34 (3d Cir. 2021), for a discussion of the constitutional defects of *Joseph* hearings.

Nevertheless, it may be cleanest to eliminate any prudential exhaustion questions by, where possible, seeking a *Joseph* hearing in immigration court prior to filing the habeas petition, and appealing any unfavorable decision to the BIA.[81] Where counsel is able to obtain a *Joseph* hearing, counsel should argue first that there is no statutory exhaustion requirement and that the court should not require exhaustion as a prudential matter, that *Joseph* hearings do not provide constitutionally sufficient process, and then that, regardless, the petitioner has exhausted all available administrative remedies through the *Joseph* hearing.

2. *Potential habeas claims*

While other habeas legal theories and grounds may be available to particular individuals and in particular factual circumstances, the two that appear most directly relevant to habeas challenges to mandatory detention under the LRA are:

- a challenge based on statutory arguments that the detained person does not, in fact, come within the class of people described in § 236(c)(1)(E); and
- as-applied substantive and procedural due process constitutional challenges under the Fifth Amendment.

Again, there may be other habeas legal theories available, but these appear, at this early point, to be the most readily available. For both, practitioners should seek relief in the form of release in the first instance, or, in the alternative, a bond hearing within a set number of days.

a. Statutory challenges

A statutory challenge would present arguments that the detained person does not actually come within § 236(c)(1)(E) and is therefore not properly subject to mandatory detention. Such a challenge argues that DHS and/or the IJ did not correctly do the relevant analysis. Broadly speaking, to be properly included within § 236(c)(1)(E), individuals must satisfy both the inadmissibility component and the offense component of the LRA provisions. Practitioners should examine both to see if there are arguments that their clients are not inadmissible under one of the enumerated grounds and/or do not meet one of the enumerated criminal grounds. These could include arguments such as those developed in section IV of this advisory, or other, similar arguments that the detained person does not fall within the statute's ambit.

b. Constitutional due process challenges

The baseline rule is a person cannot be deprived of their liberty without adequate procedural protections to ensure that civil detention, including immigration detention, serves a valid governmental purpose.[82] Although the Supreme Court sanctioned mandatory detention in

---

[81] Note that appeal to the BIA may also be required to exhaust any claims which may be adjudicated by the BIA, including statutory claims that the petitioner falls outside of the LRA's mandatory detention provisions. *See, e.g.*, *Leonardo v. Crawford*, 646 F.3d 1157, 1160-61 (9th Cir. 2011) (requiring appeal to the BIA to exhaust adverse IJ bond decision).

[82] *See Zadvydas v. Davis*, 533 U.S. 678 (2001); *Demore v. Kim*, 538 U.S. 510, 527 (2003) (recognizing that detention must "bear[] a reasonable relation to the purpose for which the individual was committed").

Demore v. Kim, 538 U.S. 510 (2003), that was limited to a narrow class of noncitizens with certain serious criminal convictions, and to detention for a relatively short period of time.[83] Because *Demore* appears to foreclose a facial due process challenge to mandatory detention under INA § 236(c), the government will likely rely on *Demore* to argue that mandatory detention under the new grounds of the LRA raises no constitutional concerns. However, there are as-applied challenges still available.[84] Such challenges include that there is no constitutionally adequate administrative process to challenge the mandatory detention, because of the extraordinarily deferential standard used in *Joseph* hearings as well as the fact that, in a *Joseph* hearing, the burden is placed on the respondent to show why they should not be mandatorily detained. These constitutional infirmities are discussed at some length by the Third Circuit and the lower court in the *Gayle* litigation.[85] Justice Breyer, in his *Demore* dissent,[86] and Senior Ninth Circuit Judge A. Wallace Tashima in his concurrence in *Tijani v. Willis*[87] also discuss some of the constitutional issues relating to *Joseph* hearings.

Another potential challenge could be that mandatory detention under LRA as applied to an individual client's circumstances violates substantive and procedural due process. For instance, mandatory detention of an individual for an arrest that never led to a charge or conviction bears no reasonable relation to either preventing flight risk or danger; and under the *Mathews v. Eldridge* balancing test,[88] the liberty interest of the individual is high, as is the risk of erroneous deprivation without a bond hearing, while the burden on the government of providing a hearing is extremely low. Note, however, that such a challenge depends on an application of the mandatory detention provisions of the LRA that is at odds with what we have presented in this resource. It presumes, for example, that the LRA allows for detention based on a previous arrest, or based on an arrest for a charge that falls within the LRA's criminal grounds that has since been amended, dismissed, or otherwise resolved either without charges or with LRA-"'safe"' charges. Contrast that interpretation with the interpretation this resource presents of the "is arrested" language in section IV.A, above.

An additional as-applied due process challenge that may be available to some individuals concerns prolonged detention. It is beyond the scope of this advisory to discuss in depth such challenges, which are, by now, relatively common. Accordingly, the various circuits and district courts have developed their own law as to how to adjudicate such challenges.[89] Counsel should

---

[83] 538 U.S. at 528–31.
[84] *See Neilsen v. Preap*, 586 U.S. 392 (2019); *Jennings v. Rodriguez*, 583 U.S. 281 (2018); *Demore*, 538 U.S. at 514 (explaining that the Court did not review the sufficiency of *Joseph* hearings).
[85] The Third Circuit's decision is *Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 12 F.4th 321 (3d Cir. 2021). The underlying district court decision, *Gayle v. Warden Monmouth Cnty.*, No. CV 12-2806 (FLW), 2019 WL 4165310, at *1 (D.N.J. Sept. 3, 2019), may also be helpful in crafting arguments.
[86] 538 U.S. at 578 (Breyer, J., concurring in part and dissenting in part).
[87] 430 F.3d 1241, 1247 (9th Cir. 2005) (Tashima, J., concurring).
[88] *Mathews v. Eldridge,* 424 U.S. 319 (1976).
[89] Some successful post-*Jennings* challenges to prolonged detention under § 236(c) include: *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203 (3d Cir. 2020); *Dorley v. Normand*, No. 5:22-CV-62, 2023 WL 3620760 (S.D. Ga. Apr. 3, 2023); *Hylton v. Decker*, 502 F. Supp. 3d 848 (S.D.N.Y. 2020); *Rodriguez v. Nielsen*, No. 18-cv-04187-TSH (N.D. Cal. Jan. 7, 2019); *Sajous v. Decker*, No. 18-CV-2447, 2018 WL 2357266 (S.D.N.Y. May 23, 2018); *Hechavarria v. Sessions*, No. 15-CV-1058, 2018 WL 5776421 (W.D.N.Y. Nov. 2, 2018); *Portillo v. Hott*, 322 F. Supp. 3d 698, 709 (E.D. Va. 2018).

thoroughly research the law applicable to any potential habeas petition prior to filing and consider consulting a habeas practitioner given the novelty of some of these arguments.

VI. Tips for Criminal Defense Attorneys

This section will address how criminal defense counsel can identify whom to advise, what criminal defense counsel should advise regarding the LRA, and when to do so. While individuals subject to the LRA are already removable and the LRA does not create any new grounds of inadmissibility or deportability, the LRA significantly expands the scope of who is subject to mandatory detention. The LRA, therefore, presents new considerations for criminal defense counsel advising their noncitizen clients of the potential immigration consequences of their involvement with the criminal legal system. The below discussion primarily focuses on state court criminal defense attorneys, although much of it is applicable in federal court as well. It is important to note that, for the most part, the considerations described herein are in addition to, and do not replace, the typical analysis and advice criminal defense counsel would undertake regarding their noncitizen clients' involvement in the criminal legal system. Note in particular that it may be the case that an individual is subject to multiple grounds of mandatory detention under INA § 236(c). Therefore, counsel must continue to engage in holistic analysis of their client's case and not just focus on the changes brought about by the LRA.

As an initial matter, because of the great uncertainty surrounding how the mandatory detention provisions of the LRA will be interpreted and applied, criminal defense counsel should advise conservatively and assume a broad reading of the LRA's mandatory detention provisions until DHS, the BIA, and/or the courts narrow it. It is better to be overinclusive in advising than to miss some who may fall within a broader reading.

Certain features of the LRA combine to complicate criminal defense counsel advising on immigration consequences. Because the mandatory detention provisions of the LRA may be triggered by events prior to conviction—including arrest, charging, or admission—mandatory detention, removal proceedings, and deportation may all occur before the criminal proceedings have concluded. Indeed, in many, if not most, jurisdictions, ICE does not bring individuals in its custody to state criminal proceedings. Complicating matters further, the LRA also purports to require DHS to issue an immigration detainer for all individuals included within the LRA's mandatory detention provisions, and to promptly take custody of such individuals. How law enforcement agencies might react to such detainers in light of existing statutes and ordinances regulating cooperation with ICE remains to be seen.

A description of a possible scenario may help to illustrate some of the special concerns raised by the LRA. It is possible that the mere arrest of an undocumented noncitizen for a minor shoplifting offense may lead to mandatory detention and ultimately deportation. In such a situation, following arrest, ICE would issue a detainer pursuant to the LRA. Because of the relatively minor nature of the shoplifting offense, the person may very likely then be released by the police or the criminal court on their own recognizance. However, because of the immigration detainer, local law enforcement might continue to hold the noncitizen in order to allow ICE to take them into custody, or if prohibited to do this by local or state law or policy, may at a minimum notify ICE to pick up the noncitizen prior to their release from criminal custody. Then,

ICE could initiate removal proceedings, mandatorily detain the person through the conclusion of those removal proceedings, and eventually deport the person—all while the state court shoplifting case is pending, and perhaps even before the person has even formally been charged. Indeed, because of the speed with which initial bail setting on such relatively minor charges happens in many jurisdictions and because many public defender offices and other criminal defense counsel are not present for the initial bail setting—particularly if it is set according to a bail schedule—some noncitizens may find themselves mandatorily detained under the LRA provisions and even deported without ever being advised of their options by either immigration or criminal counsel.

A. Whom to Advise

Whether the LRA even applies to a noncitizen client is the threshold question. Counsel should first identify all noncitizen clients whose cases might fall within the LRA's enumerated criminal grounds—assuming, as always, a broad reading of those grounds. See section III above.

The second step is to determine whether those noncitizen clients fall within the enumerated inadmissibility grounds. Working with immigration counsel is critical. If clients have immigration counsel, criminal defense counsel should inquire as to whether the client falls within the LRA's enumerated inadmissibility grounds.

If the client does not have immigration counsel, and the client is already in immigration proceedings, the client's Notice to Appear (NTA), the charging document in immigration court, may be helpful (although not necessarily determinative) in ascertaining whether DHS considers the client to fall within the LRA's enumerated inadmissibility grounds. The NTA may directly state that the client is charged with being inadmissible under one of those grounds. However, the absence of such a charge should not be taken to indicate that the client does not fall within the LRA's inadmissibility grounds.

In the absence of a clear indication in the client's immigration documents, criminal defense counsel should screen noncitizen clients with cases falling into the enumerated LRA criminal grounds for their method of entry into the United States. Because such conversations could involve incriminating information, counsel should ensure that such discussions are conducted in a manner to protect attorney-client privilege and confidentiality. Counsel should assume that all people who crossed the U.S. border unlawfully (*i.e.* without inspection/between ports of entry) fall within the LRA's inadmissibility grounds. Counsel should also assume that a client meets the inadmissibility grounds ***unless*** a client can demonstrate they were "admitted" to the United States, *e.g.*, with a stamped Form I-94 (Arrival/Departure Record) showing they were "admitted' on a visa, or with documentation of their refugee or lawful permanent resident (LPR) status. Clients who have not been "admitted" to the United States (*i.e.,* clients who crossed the U.S. border without being inspected by an immigration officer)[90] are subject to mandatory detention under the LRA if arrested for the LRA enumerated offenses. Some clients who entered the

[90] Individuals who arrive at a port of entry seeking admission but are not admitted, also known as "arriving" noncitizens, are subject, in the government's view, to detention under a different section of the INA, INA § 235(b), and not under INA § 236(c) or the LRA. These individuals may have been initially paroled into the United States at the port of entry by immigration officials. *See* section III *supra*.

United States unlawfully and subsequently gained a form of legal protection, such as deferred action or Temporary Protected Status,[91] are still subject to the LRA inadmissibility grounds because under case law their grant of legal protection is not considered an "admission," see section III above.

B. What to Advise

Having determined which clients to advise regarding the LRA, counsel must then determine how to advise them. Unfortunately, because, by definition, individuals subject to the LRA's mandatory detention provisions are inadmissible and therefore already removable, regardless of what happens in the criminal proceedings, and because of the LRA's immigration detainer and custody provisions, such individuals have limited options.

First, all clients susceptible to the LRA's mandatory detention provisions should be counseled as to what those provisions are and what they require DHS to do, as well as to their possible impact on removal.

Second, counsel can also contact DHS and/or DHS counsel to advocate for the lifting of an immigration detainer. If pursuing this option, counsel will need to demonstrate that the client does not fall within the LRA's enumerated grounds, either criminal or inadmissibility, in addition to any other arguments for lifting the detainer. Given the current enforcement climate, this route is not likely to be effective.

Third, a client could remain in criminal custody. As long as an individual is in pre-trial criminal custody, they will not be in immigration custody. If they remain in criminal custody, they will be able to resolve their criminal proceedings, potentially in a favorable manner, which may provide more options for immigration counsel to contest any mandatory detention under the LRA as well as assist any substantive defenses to removal. While counsel may have limited ability to shape what an arrest is for, counsel may be able to work with prosecutors to shape what an offense is formally charged as or to amend the charges, as well as what the offense of conviction is. Counsel can also shape what facts or elements a client admits, allocates, or stipulates to. In so doing, counsel may be able to avoid triggering the LRA's mandatory detention provisions. Taking advantage of this option may mean not paying bail, not seeking a personal recognizance release, perhaps even not challenging whether there was probable cause for the arrest. This highlights the need for competent advising at the initial bail setting.

Fourth, if a client is taken into DHS custody, counsel could contact DHS and/or DHS counsel to advocate that DHS set a bond or even release the client from custody. Much like advocacy to get a detainer lifted, counsel will need to demonstrate that the client does not fall within the LRA's enumerated grounds, either criminal or inadmissibility, in addition to any other arguments for

[91] Method of entry is the salient analytical point: some TPS and deferred action recipients, for example, will have acquired their status after entering the United States on a visa and thus are not subject to the LRA's mandatory detention provisions. In addition, some TPS recipients may have originally entered the United States without inspection but then, after obtaining TPS, traveled and returned with government authorization via Form I-512T. Because of a 1991 law, TPS recipients who travel in this manner are admitted when they return to the United States and thus do not satisfy the LRA's inadmissibility grounds and are not subject to the LRA's mandatory detention provisions. *See supra* note 16.

setting bond or release. Again, just as with detainer advocacy, given the current enforcement climate, this route is not likely to be effective.

Fifth and finally, clients should also be counseled as to any potential effect of the LRA on their criminal case. If, for example, a client is released from criminal custody and then is taken into ICE custody, the mandatory detention provisions of the LRA mean that the client will likely not be able to proceed with and resolve their criminal case, because ICE often does not bring people to their state criminal court proceedings. Further, if the removal proceedings that come with mandatory detention under the LRA result in deportation, clients should be advised as to how the court will handle their criminal case. In many jurisdictions, such a result would lead to a judge issuing a bench warrant for their client's failure to appear on the open charges. Clients should be advised that, should they subsequently enter the United States following deportation, and they have such an open warrant, any interaction with law enforcement would likely lead to their arrest, and perhaps to mandatory detention as well under the LRA's "is charged with" language if they satisfy the LRA's inadmissibility grounds at that time. Counsel may be able to prevent the issuance of such a warrant or persuade the prosecution or judge to dismiss the case, particularly with evidence of deportation.

C. When to Advise

The LRA's mandatory detention provisions can trigger stark consequences very early in a criminal case. The LRA thus generates special considerations for the timing of relevant criminal defense counsel advising. While much immigration consequences advising is applicable prior to conviction—and all that advising still applies here—the LRA's mandatory detention provisions raise special issues.

Because the LRA's mandatory detention provisions apply to those who are "charged" with the enumerated criminal grounds, counsel should work to amend those charges or, if not possible, advise current clients susceptible to the LRA's provisions with pending cases falling within the enumerated grounds that they are immediately susceptible to the LRA's mandatory detention provisions and advise them accordingly. The same is true if counsel represents an individual at arrest for one of the criminal grounds as well as for those clients who may be or are going to be convicted for one of the criminal grounds. We do not yet know how DHS and the courts will interpret the LRA's "admission" language, so counsel should try to help clients avoid "admissions" that could trigger the LRA. These could include the admission of sufficient facts or elements, even where a formal judgment of guilt or conviction is ultimately withheld or deferred, such as in some sort of deferred sentencing, deferred prosecution, or diversion program or proceeding. It may also include confessions to law enforcement, see section IV.A.4, above. Important points in criminal proceedings that may implicate LRA advising include arrest, formal charging decisions, amendment of charges, any factual stipulations or admissions that go to the elements of the LRA's criminal grounds, pleas, allocutions, and convictions. Because any of those may bring the criminal case within the LRA's criminal grounds, counsel should review the criminal case accordingly at each of those points.

In addition to advising current clients as to their susceptibility to mandatory detention under the LRA and all that may flow from that, counsel will have to be involved earlier in the criminal

process in order to fully advise clients of their options. In particular, in jurisdictions where individuals may be released without bail or with low bail for any of the criminal grounds enumerated in the LRA, public defender offices that do not currently provide counsel for the initial bail setting may want to consider whether to screen for noncitizens potentially susceptible to the LRA's mandatory detention provisions and provide counsel at that point.

VII. Conclusion

Please continue to check the National Immigration Project website for updates to this resource and additional, related resources, as we learn more about how DHS and the courts are interpreting and applying the LRA. To further that end, we ask any counsel who have had clients detained pursuant to the LRA to fill out our survey here. The survey is geared toward immigration practitioners, but we welcome and encourage comments from criminal defense attorneys as well.