No. 12-493

In the Supreme Court of the United States

CRAIG JOHN PASICOV, AKA JOHN CRAIG PASICOV,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner, who was arrested and placed in immigration detention two years after he was released from custody following his criminal conviction, is subject to mandatory detention under 8 U.S.C. 1226(c) during the pendency of his removal proceedings.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unreported but is available at 2012 WL 2899400.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2012. The petition for a writ of certiorari was filed on October 15, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, Immigration and Customs Enforcement (ICE) has the authority to detain any alien pending a decision on whether the alien should be removed from the United States. 8 U.S.C. 1226(a). For certain criminal and terrorist aliens,

Congress has made detention pending removal proceedings mandatory. Specifically, in 8 U.S.C. 1226(c), Congress provided that "[t]he Attorney General shall take into custody any alien who" has committed or been convicted of certain listed crimes "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. 1226(c)(1). The statute then provides that the government may release an "alien described in paragraph (1)" from detention only in limited circumstances not applicable here. 8 U.S.C. 1226(c)(2).

In a precedential decision, the Board of Immigration Appeals (Board) held that the mandatory detention provision applies when ICE does not take a qualifying alien into immigration custody immediately following his release from criminal custody, but takes the alien into custody at a later time. See *In re Rojas*, 23 I. & N. Dec. 117 (B.I.A. 2001). The Board explained that the statute makes detention of aliens with certain qualifying crimes mandatory, and the phrase "when the alien is released" is best understood to state when ICE's duty to take the alien into custody arises, not to limit the class of aliens subject to mandatory detention based on when they were detained. *Id.* at 120-125.

2. Petitioner is a native and citizen of Canada. Pet. App. A3. He became a lawful permanent resident of the United States in 1977. *Ibid.* Petitioner has a lengthy criminal history in the United States. Gov't C.A. Br. 4. As relevant here, in January 2009, he was convicted in Virginia state court of credit card theft, credit card forgery, and credit card fraud. Pet. App.

A3; Gov't C.A. Br. 4. He was sentenced to two concurrent ten-year terms of imprisonment and one five-year term of imprisonment, all suspended. Pet. App. A3.

In March 2011, federal immigration officials arrested petitioner and charged him with being removable as an aggravated felon and as an alien convicted of a crime involving moral turpitude. Pet. App. A3; see 8 U.S.C. 1227(a)(2)(A)(ii) and (iii). Petitioner requested an individualized bond hearing under 8 U.S.C. 1226(a); the immigration judge (IJ) denied that request on the ground that petitioner is subject to mandatory detention under 8 U.S.C. 1226(c). See Pet. App. A26; Gov't C.A. Br. 5.*

3. Petitioner filed a habeas corpus petition in federal district court, arguing that he is not subject to mandatory detention under 8 U.S.C. 1226(c) because he was not taken into immigration custody immediately upon his release from state criminal custody. Pet. App. A3. Petitioner did not dispute that he had been convicted of numerous felonies that are qualifying offenses under 8 U.S.C. 1226(c). Gov't C.A. Br. 6.

The district court agreed with petitioner that he is not subject to mandatory detention under 8 U.S.C. 1226(c) and ordered the IJ to hold an individualized bond hearing. Pet. App. A26-A28. In the district court's view, "aliens who are released from state custody, but not taken into immigration custody for an extended period of time after their release, * * * are

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* Petitioner appealed that determination, and the Board dismissed his appeal on mootness grounds because by that time, the district court had ordered the IJ to conduct a bond hearing, the IJ had conducted the hearing, and petitioner had been released on bond. See Board Opinion (July 20, 2012); see pp. 3-4, *infra*.

not subject to mandatory detention under 8 U.S.C. § 1226(c)." Pet. App. A26.

The IJ then conducted a bond hearing, and petitioner was released on bond. Pet. App. A3. Petitioner's removal proceedings remain pending. *Ibid.*

4. The court of appeals vacated and remanded. Pet. App. A1-A4. The court held that "aliens who are not immediately detained by immigration authorities upon their release from state custody are indeed subject to mandatory detention pursuant to § 1226(c)." *Id.* at A4. In so holding, the court relied (*ibid.*) on its recent decision in *Hosh* v. *Lucero*, 680 F.3d 375 (4th Cir. 2012).

In *Hosh*, the court held that an alien who had been convicted of a qualifying crime, released from criminal custody, and then taken into immigration custody approximately three years later was subject to mandatory detention under 8 U.S.C. 1226(c). 680 F.3d at 377-378. Using the two-step analysis set out in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court concluded that Section 1226(c) is ambiguous and that the Board's interpretation of the relevant language in *In re Rojas*, *supra*, is reasonable and therefore controlling. *Hosh*, 680 F.3d at 378-384. The court determined that the meaning of the phrase "when the alien is released" is "not plain," *id.* at 379, and then concluded that the Board's interpretation is reasonable based on "the natural and ordinary reading of the statute, the overall statutory context, certain predecessor provisions, and practical considerations," *id.* at 380. The court explained that it would make no sense for Congress to take an "aggressive stance against criminal aliens" by requiring their detention during removal proceedings but then exempt an alien who

was not "immediately detained after release due to an administrative oversight or any other reason." *Ibid.*

The *Hosh* court further held that even if the statute "commands federal authorities to detain criminal aliens at their exact moment of release from other custody," the government does not lose its power to detain an alien under this provision if it detains an alien "*after* that exact moment." 680 F.3d at 381. The court explained that the "statute does not specify a consequence" for "Government's supposed failure to comply with a statutory immediacy requirement," and in those circumstances, "'the federal courts will not in the ordinary course impose their own coercive sanction.'" *Id.* at 381, 384 (quoting *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)).

ARGUMENT

Petitioner contends (Pet. 9-28) that the court of appeals erred in upholding his mandatory detention during removal proceedings under 8 U.S.C. 1226(c) because the Board erred in its interpretation of the statute and because immigration officials lose the power to act under Section 1226(c) if they do not immediately detain a qualifying criminal when he is released from criminal custody. The court of appeals' decision is correct, and there is no disagreement in the courts of appeals on the question presented. Indeed, only one court of appeals has considered the issue. Further review is therefore unwarranted.

1. The court of appeals correctly deferred to the Board's construction of Section 1226(c). That section provides that "[t]he Attorney General shall take into custody any alien who" has committed or been convicted of certain crimes "when the alien is released, without regard to whether the alien is released on

parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. 1226(c)(1). The statute then provides that the government may not release an "alien described in paragraph (1)" from detention except in limited circumstances that do not apply here. 8 U.S.C. 1226(c)(2).

a. In its precedential decision in *In re Rojas*, 23 I. & N. Dec. 117 (B.I.A. 2001), the Board considered whether an alien is subject to mandatory detention pending removal proceedings if he is not taken into immigration custody at the moment of his release from criminal custody. The Board focused on two key phrases in the statute—the requirement to detain an "alien described in paragraph (1)," and the requirement to take the alien into immigration custody "when the alien is released" from criminal custody. *Id.* at 120. In the Board's view, the statute is ambiguous about whether the phrase "when the alien is released" limits the class of aliens "described in paragraph (1)" to only those immediately taken into immigration custody, or whether "when the alien is released" simply sets out when the government's duty to detain the alien arises. *Ibid.*

The Board concluded that the latter was the better view of the statute. It explained that, as a textual matter, "[t]he 'when released' clause is no more a part of the *description* of an alien who is subject to detention than are the other concluding clauses," all of which "simply make it plain that the duty to detain is not affected by the character of an alien's release from criminal incarceration or the possibility that an alien may be rearrested on criminal charges." *In re Rojas*, 23 I. & N. Dec. at 121. Those concluding clauses, the

Board explained, relate to the statutory directive that the "Attorney General shall take into custody" certain categories of aliens, but do not describe or limit those categories. *Ibid.* The Board noted that its reading of the text was consistent with the "other statutory provisions pertaining to the removal process," none of which place any "importance on the timing of an alien's being taken into [immigration] custody." *Ibid.*

The Board also examined the purposes of the mandatory detention provision, finding that "Congress was frustrated with the ability of aliens, and particularly criminal aliens, to avoid deportation if they were not actually in [immigration] custody when their proceedings were completed." *In re Rojas*, 23 I. & N. Dec. at 122. The Board explained that "Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Ibid.*

Finally, the Board discussed practical considerations that reinforced its conclusion that Section 1226(c) applies to all qualifying criminal aliens, not just those detained by immigration officials immediately following criminal custody. The Board observed that it would be impractical to require immigration officials either to immediately detain a criminal alien after release from criminal custody or to lose the ability to detain him under Section 1226(c), and such a reading of the statute would raise questions about when the alien must be "literally taken into custody 'immediately' upon release," or whether there would be a "greater window of perhaps 1 minute, 1 hour, or 1 day." *In re Rojas*, 23 I. & N. Dec. at 124. The Board also determined that it would not make sense to read

the statute to "permit[] the release of some criminal aliens, yet mandate[] the detention of others convicted of the same crimes," based on the fortuity of when they were taken into immigration custody. *Ibid.*; see *In re Noble*, 21 I. & N. Dec. 672, 681 (B.I.A. 1997) (Board found it "incongruous" that Congress would have enacted a new rule to create stricter detention standards but, under that same rule, "permit[ted] the release of a subgroup of criminal aliens (based on the wholly fortuitous date of release from incarceration) under a more lenient standard").

b. The court of appeals correctly deferred to the Board's interpretation of Section 1226(c). See Pet. App. A3-A4 (relying on prior decision in *Hosh* v. *Lucero*, 680 F.3d 375 (4th Cir. 2012)). Under the two-step approach set out in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-844 (1984), "[i]f the intent of Congress is clear, that is the end of the matter," but if "Congress has not directly addressed the precise question at issue," then "a court may not substitute its own construction of a statutory provision" when the agency's interpretation is "reasonable."

Petitioner contends (Pet. 10) that the statutory text unambiguously exempts from mandatory detention an alien who has a qualifying criminal conviction but was not taken into immigration custody immediately following his release from criminal custody. The Board in *In re Rojas* and the Fourth Circuit in *Hosh* correctly rejected that contention. Contrary to petitioner's assertion (Pet. 13-14), the statutory text does not unambiguously establish a single point in time at which immigration detention must occur in order for the alien to come within Section 1226(c). The statute directs immigration officials to take an alien into cus-

tody "when [he] is released" from criminal custody. It does not say "at the moment of release, *and not later*." *Hosh*, 680 F.3d at 380.

Petitioner himself acknowledges (Pet. 12) that the word "when" can have more than one meaning. In *United States* v. *Willings*, 8 U.S. (4 Cranch) 48 (1807), for example, this Court found "when" ambiguous and examined the statutory context to clarify whether it "designates the precise time when a particular act must be performed" or "the occurrence which shall render that particular act necessary." *Id.* at 55. Here, "when" can reasonably be read in the latter sense, to identify the "occurrence"—the alien's release from criminal custody—that renders the "particular act" of detention under Section 1226(c) "necessary," without limiting its lawful performance to only one "precise time." Modern dictionaries similarly identify one meaning of "when" to be "if," thereby specifying a condition on which, or circumstances in which, something is to occur. See *Webster's Third New International Dictionary* 2602 (1993) (²when, def. 2: "in the event that: on condition that: IF"); 20 *Oxford English Dictionary* 209 (2d ed. 1989) (def. 8.a: "In the, or any, case or circumstances in which; sometimes nearly = if."). Again, under this reading, Section 1226(c) provides that a specified criminal alien shall be detained by immigration authorities "if" or "in the event that" he is released from criminal custody, without mandating that there is only one specific time at which they may do so. Thus, under this reading, the phrase "when the alien is released" does not serve to narrow the category of criminal aliens who are subject to mandatory detention. It instead identifies the situation in which the government's duty to take an alien

into immigration custody arises, see *Hosh*, 680 F.3d at 379-380—a duty that then continues until the alien is actually apprehended and detained.

Having concluded that the text of Section 1226(c) is ambiguous, the court of appeals correctly concluded that the Board's interpretation "is a permissible, and more plausible, construction" of the statute. *Hosh*, 680 F.3d at 378. The court explained that "Congress had a range of options available to it with respect to how aggressively it sought to detain criminal aliens," and it would not make sense to interpret Section 1226(c) to say that Congress decided to "take an aggressive stance against criminal aliens" by requiring them to be detained by immigration officials immediately following criminal custody but then say that Congress also intended to exempt an alien if immigration officials happened not to detain him quickly enough. *Id.* at 380. In the court's view, it would be a "strained" reading of the statute to say that the phrase "when the alien is released" means "at the moment of release, *and not later*." *Ibid.* (internal quotation marks omitted).

The court of appeals also found the Board's interpretation consistent with the statute's purposes. The court observed that in *Demore* v. *Kim*, 538 U.S. 510, 518 (2003), this Court had noted that Congress adopted Section 1226(c) "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens," including the "near-total inability to remove deportable criminal aliens" because those aliens were not being detained during their immigration proceedings. See *Hosh*, 680 F.3d at 381 (internal quotation marks and citation omitted). The court of appeals recognized that it would not

make sense to say that Congress required mandatory detention of qualifying criminal aliens to solve this problem but then allow some of those aliens to be released based on the fortuity of when immigration officials arrested them. *Ibid.* The court could not "deem it clear that Congress would, on one hand, be so concerned with criminal aliens committing further crimes, or failing to appear for their removal proceedings, or both, that Congress would draft and pass the mandatory detention provision," but "on the other hand, decide that if, for whatever reason, federal authorities did not detain the alien immediately upon release, then mandatory detention no longer applies." *Id.* at 380 n.6.

Accordingly, the court of appeals correctly deferred to the Board's conclusion that the mandatory detention provision applies to qualifying aliens, regardless of when the aliens were detained. As the court noted, it simply would not make sense for Congress to be concerned about failure to detain and remove criminal aliens but then decide to exempt an alien who "was released from state custody and then got as far as the adjacent parking lot before being detained by federal authorities." *Hosh*, 680 F.3d at 380 n.6, 381.

Petitioner nonetheless contends (Pet. 17) that, assuming the statute is ambiguous, the Board's construction is unreasonable because Section 1226(c)'s purposes "are best served by construing the statute to require detention of dangerous criminal aliens *immediately* upon their release from state or federal custody, before they have a chance to vanish." But the point of *Chevron* is that the agency responsible for administering the law is charged with determining

how best to further Congress's purposes in the case of ambiguity. See, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). The Board did just that here, considering the context of the statute, the purposes underlying it, and the practical consequences of petitioner's proposed reading, and concluding that Section 1226(c) requires mandatory detention in these circumstances. See *In re Rojas*, 23 I. & N. Dec. at 120-125. While it can be assumed that Congress would prefer expeditious action, its purpose in enacting Section 1226(c) was to ensure detention of certain criminal aliens during removal proceedings, and that purpose would not be furthered by exempting aliens with qualifying crimes who were not immediately taken into immigration custody. See *In re Rojas*, 23 I. & N. Dec. at 122; see also *Demore*, 538 U.S. at 518-520.

2. The court of appeals also correctly held that, even if Section 1226(c) were read to direct that an alien be detained at the precise moment of release from criminal custody, immigration officials who did not take an alien into custody at that point would not lose their power to act under 8 U.S.C. 1226(c). As *Hosh* explained, this Court's decisions establish that "if a statute does not specify a consequence for non-compliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." 680 F.3d at 381 (quoting *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)).

This Court has applied that principle in the context of detention in *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 713-714 (1990). In that case, a federal statute specified that a suspect must be provided a

detention hearing "immediately upon the [suspect's] first appearance before the judicial officer," 18 U.S.C. 3142(f), and the question was whether a suspect must be released when the detention hearing was not held within the time contemplated. See 495 U.S. at 716. The Court held that "a failure to comply with the first appearance requirement does not defeat the Government's authority to seek detention of the person charged," because "public policy * * * forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided," and "there is no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants." *Id.* at 717-718, 720.

Relying on *Montalvo-Murillo* and similar decisions, the *Hosh* court correctly concluded that because Section 1226(c) "does not specify any consequences for the Government's failure to detain a criminal alien immediately upon release," the government does not lose its power to act under that section if it fails to detain the alien immediately. 680 F.3d at 382. The court concluded that the "negligence of officers, agents, or other administrators, or any other natural circumstance or human error" that would prevent strict compliance with Section 1226(c), "cannot be allowed to thwart congressional intent and prejudice the very interests that Congress sought to vindicate." *Ibid.* Accordingly, even if the Board were not entitled to deference in its interpretation of the statute, petitioner would still be subject to mandatory detention under the principles recognized by this Court.

Petitioner's only response (Pet. 19) is that *Montalvo-Murillo* and similar cases are not applicable because release of a qualifying criminal alien is not a "coercive sanction." That is beside the point. The court of appeals' point is that Section 1226(c) embodies a clear legislative policy that certain criminal aliens must be detained pending immigration proceedings, and that policy should not be sacrificed if immigration officials fail to act quickly enough. This Court has repeatedly relied on the "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *United States* v. *Nashville, Chattanooga & St. Louis Ry.*, 118 U.S. 120, 125 (1886); see also, *e.g.*, *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 161 (2003); *James Daniel Good Real Prop.*, 510 U.S. at 63; *Montalvo-Murillo*, 495 U.S at 717-720; *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 260 (1986). This principle turns not on how one characterizes the consequence for the government, but on the fact that the government and the public should not be prejudiced by a government official's failure to act sufficiently promptly. Petitioner contends (Pet. 19-22) that release of an alien who qualifies for mandatory detention is unproblematic because the alien could still be detained after a bond hearing under Section 1226(a). But that judgment was for Congress to make, and Congress mandated detention during removal proceedings for aliens who committed one of the listed crimes.

3. There is no disagreement in the circuits on the question presented. The only court of appeals to have ruled on this question is the Fourth Circuit, in *Hosh*

and in this case (in which the court applied *Hosh*). The issue is pending in several cases in the Third Circuit. See *Mira Munoz* v. *Lospinuso*, No. 12-3578 (3d Cir.); *Gonzales-Ramirez* v. *Napolitano*, No. 12-3813 (3d Cir.); *Dimanche* v. *Taylor*, No. 12-3928 (3d Cir.); *Sylvain* v. *Holder*, No. 11-3357 (3d Cir.); *Desrosiers* v. *Hendricks*, No. 12-1053 (3d. Cir.). But no other court of appeals has ruled on the question presented. See *Hosh*, 680 F.3d at 379 (noting that, at the time of its decision, "[n]o circuit court ha[d] yet considered the meaning and applicability of § 1226(c) under these precise circumstances"). Accordingly, review of the question presented would be premature at this time.

Petitioner contends (Pet. 24-26) that the decision below conflicts with the First Circuit's decision in *Saysana* v. *Gillen*, 590 F.3d 7 (2009). He is mistaken, because the two cases address different legal issues. The First Circuit in *Saysana* was concerned with the retroactive application of Section 1226(c) to aliens released from custody based on qualifying crimes before the effective date of Section 1226(c). In particular, the question in *Saysana* was whether an alien is subject to mandatory detention "only when an alien is released from a criminal custody the basis for which is one of the offenses listed in § 1226(c)(1)(A)-(D)," or whether it applies "whenever an alien, previously convicted of an offense that falls within (c)(1)(A)-(D), is released from any criminal custody regardless of the reason for that detention." 590 F.3d at 11. The Board had considered this question, and it had concluded that the mandatory detention provision should not be limited to aliens who have been released from "criminal custody that is related to, or that arises

from, the basis for detention under that section." *In re Saysana*, 24 I. & N. Dec. 602, 605-606 (B.I.A. 2008). The court of appeals rejected that view, finding that the statutory text "makes clear that the congressional requirement of mandatory detention is addressed to the situation of an alien who is released from custody for one of the *enumerated* offenses." *Saysana*, 590 F.3d at 13 (emphasis added).

This case raises a different question. All agree that petitioner committed offenses that qualify him for mandatory detention under Section 1226(c) and that his immigration detention followed a release from custody for a qualifying criminal offense. The question here, which *Saysana* did not consider, is whether an alien is no longer subject to mandatory detention when immigration officials fail to arrest him immediately following his release from criminal custody. Accordingly, there is no disagreement in the circuits on the question presented, and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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