Nos. 13-1994 & 13-2509

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 13-1994

LEITICIA CASTAÑEDA,

Petitioner-Appellee,

v.

STEVE SOUZA, Superintendent, Bristol County House of Corrections, in his official capacity and his successors and assigns,

Respondent-Appellant.

No. 13-2509

CLAYTON RICHARD GORDON, on behalf of himself and others similarly situated, et al.,

Petitioners-Appellees,

v.

ERIC H. HOLDER, JR., U.S. Attorney General, et al.,

Respondents-Appellants.

APPELLANTS' PETITION FOR REHEARING EN BANC

INTRODUCTION

En banc rehearing of the panel's decision in this case is warranted because it involves a "question of exceptional importance." Fed. R. App. P. 35(a)(2); *see also Igartúa v. United States*, 654 F.3d 99, 111-12 (1st Cir. 2011). Specifically, the panel created a conflict of authority between this circuit and the Third and Fourth Circuits. *See* Fed. R. App. P. 35(b)(1)(B). This conflict relates to an important and recurring issue of federal law: whether a criminal alien is exempt from mandatory detention under 8 U.S.C. § 1226(c) if the Government does not take the alien into immigration custody immediately after he or she is released from criminal custody.

The panel not only broke from its sister circuits, but its novel interpretation of 8 U.S.C. § 1226(c) also contains clear legal error. The decision fails to properly apply the Supreme Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1983), because even while recognizing that there is ambiguity in section 1226(c), the panel nonetheless declined to defer to the Board of Immigration Appeals' ("BIA") reasonable interpretation of section 1226(c) in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001). The panel improperly relied on Justice Kennedy's concurrence in *Demore v. Kim*, 538 U.S. 510, 531 (2003), and on this Court's earlier decision in *Saysana v. Gillen*, 590 F.3d 7, 15-17 (1st Cir. 2009). Moreover, the panel improperly distinguished Supreme Court precedent that permits the Government to act pursuant to its statutory obligations, even when it misses a

deadline to do so. *See, e.g.*, *United States v. Montalvo–Murillo*, 495 U.S. 711, 717-720 (1990); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158-63 (2003).

The panel's error undermines U.S. Immigration and Customs Enforcement's ("ICE") ability to comply with its statutory mandate to detain criminal aliens within the First Circuit pending their removal proceedings. Implementation of the panel's "reasonableness" standard presents myriad operational challenges for the Government, as it will require the development of policies and procedures within the First Circuit that differ from other jurisdictions, and will impose additional and unwarranted burdens on agency officials that distract them from their primary mission.

STATEMENT

1. In section 1226(c), entitled "Detention of criminal aliens," Congress provided that aliens who commit certain serious offenses are subject to mandatory detention while they are in removal proceedings. Paragraph 1226(c)(1) provides that the Government "shall take into custody" specified aliens who qualify for detention under this provision because of criminal or terrorist activities, and paragraph 1226(c)(2) provides that the Government may not "release an alien described in paragraph (1)" except in one narrow circumstance – witness protection – that is not applicable here. 8 U.S.C. § 1226(c)(1)-(2). The statute evidences Congress's intent that all qualifying aliens be detained during removal proceedings to avoid the risk of

their absconding or committing further crimes during the pendency of those proceedings. *See Demore*, 538 U.S. at 518-20.

2. In *Matter of Rojas*, the BIA considered whether a criminal alien who has been convicted of a qualifying offense listed in paragraph 1226(c)(1) is exempt from mandatory detention under paragraph 1226(c)(2) if the Government did not take the alien into custody immediately upon his release from criminal custody. The BIA recognized that section 1226(c) is ambiguous as to whether mandatory detention applies if the Government does not take an alien into custody immediately upon release from criminal custody. On the one hand, the "when . . . released" provision could require the Government to apprehend and detain a qualifying alien immediately upon release from criminal custody. Under this interpretation, if ICE does not detain the alien immediately, he or she must receive a bond hearing under section 1226(a). *Matter of Rojas*, 23 I. & N. Dec. at 121. On the other hand, the provision could mean that the Government's duty to take a qualifying alien into custody arises "when the alien is released" from criminal custody. *Id.*; *see also Hosh v. Lucero*, 680 F.3d 375, 379-380 (4th Cir. 2012). Under this interpretation, once the Government takes a covered criminal or terrorist alien into custody following his or her release from criminal custody, section 1226(c)(2) would prohibit the Government from releasing that alien.

3. Paragraph 1226(c)(2) further contributes to this ambiguity. Paragraph

1226(c)(2) provides that the Government must detain "an alien described in paragraph (1)[,]" but it is not clear which portions of paragraph 1226(c)(1) "describe[]" the aliens who must be detained. That is, aliens "described in" paragraph 1226(c)(1) could be the four classes of aliens enumerated in subparagraphs (A) through (D), or they could be aliens who qualify under the four enumerated classes *and* were taken into immigration custody immediately following their release from criminal custody. *See Matter of Rojas*, 23 I. & N. Dec. at 121. Because of these ambiguities, the BIA determined that the better reading is that "the statutory language imposes[s] a duty" on the Government "to assume the custody of certain aliens, and specifies the point in time at which that duty arises," but that it does not limit the applicability of mandatory detention under section 1226(c)(2). *Id.* at 120-21. Thus, the BIA "read the phrase 'when the alien is released' . . . as modifying the command that the '[U.S. Department of Homeland Security ("DHS")] shall take into custody' certain criminal aliens by specifying that it be done 'when the alien is released' from criminal incarceration." *Id.*

4. The BIA explained that this interpretation is consistent with the statute's purposes, because the timing of the alien's release from criminal custody has no impact on whether the alien is removable or inadmissible. *See id.* at 121-22 ("[T]here is no connection in the Act between the timing of an alien's release from criminal incarceration, the assumption of custody over the alien by the Service, and

the applicability of any of the criminal charges of removability."). Congress's concern was expediting "the removal of criminal aliens in general," not only those aliens who were immediately taken into immigration custody. *Id*. at 122.

5. On October 6, 2014, in a consolidated decision, a panel of this Court concluded that the "when . . . released" clause of 8 U.S.C. § 1226(c) requires the Government to take certain criminal aliens into immigration custody within a reasonable time after their release from criminal custody, and that the delay for the aliens in this case – a delay of "several years" – was not reasonable. *Castaneda v. Souza*, 769 F.3d 32 (1st Cir. 2014).

6. The panel first found that Justice Kennedy's concurrence in *Demore v. Kim*, 538 U.S. 510 (2003), was binding on this case. *Castaneda*, 769 F.3d at 39 ("Justice Kennedy's concurrence suggests that an 'unreasonable delay by [ICE] in pursuing . . . deportation proceedings' could make mandatory detention under subsection (c) constitutionally suspect and requires a limiting construction").

7. The panel then turned to the "when . . . released" language of the statute. Although the panel acknowledged that "when" has many different meanings, it concluded that the meaning urged by the Government was not supported by "the statute's text, structure, purpose, or legislative history . . . ." *Id*. at 42. In a footnote, the panel also rejected the Government's reliance on *Matter of Rojas*, and found that the BIA, in *Matter of Rojas*, did not interpret "when" to mean "any time after." *Id*. at

44, n.8. Moreover, in yet another footnote, the panel dismissed the Government's contention that any structural ambiguity required the court to defer to *Matter of Rojas*, and instead the panel observed that the structural reading of the statute urged by the Government is inconsistent with the language of the statute. *Id*. at 45, n.10. The panel then turned to the meaning of the statute urged by the Petitioners, and concluded that the statute also did not contain an immediacy requirement. *Id*. at 44. The panel ultimately concluded that section 1226(c) requires that ICE detain criminal aliens within a reasonable time after their release from state criminal custody. *Id*. The panel further held that "what is a reasonable time must account for the inherent difficulties in identifying and locating an alien upon release from state custody. The statute does not tolerate unreasonable delays, but neither does it require strict immediacy." *Id*.

8. The panel noted that under *Chevron*, "the Attorney General therefore has considerable latitude to define what constitutes a reasonable time . . . ." *Id*. The panel further stated that "the reasonable time within which the government must detain an alien to satisfy the 'when . . . released' clause will depend on the practical necessities at hand." *Id*. Recognizing that in the cases under review the Petitioners had each been apprehended by ICE more than four years after their release from criminal custody, the panel stated that "it would not be "a reasonable interpretation to view a reasonable period of time as including a delay of several years." *Id*. The

panel concluded "that the petitioners were not detained within a reasonable time after their detention, and that the 'when . . . released' clause was not satisfied here." *Id*.

9. The panel also expressly opened a circuit split as to whether an alien is exempt from mandatory detention and entitled to a bond hearing if the Government fails to detain an alien "when the alien is released." The panel recognized that the Third and Fourth Circuits "have concluded" that aliens remain "subject to mandatory detention despite years-long delays by the government" in initiating detention. *Id*. at 46; see *Sylvain v. Att'y Gen. of the U.S.*, 714 F.3d 159 (3d. Cir. 2013) ("[T]he mandatory-detention statute is intended to protect only the public . . . ."); *Hosh*, 680 F.3d at 382 ("[Section] 1226 was undeniably not written for the benefit of criminal aliens facing deportation like Hosh." (emphasis removed)). Relying on its reading of Justice Kennedy's concurrence in *Demore*, however, the panel concluded that, as a matter of constitutional avoidance, section 1226(c) should be read to benefit aliens and thus to require a bond hearing if there is such a delay in initiating detention.

DISCUSSION

This case warrants rehearing *en banc* for several reasons.

1. The panel's decision creates 2-1 circuit split between the First Circuit and the Third and Fourth Circuits on the question of whether an criminal alien is exempt from mandatory detention under 8 U.S.C. § 1226(c) if the Government does

not take the alien into immigration custody for several years after he or she is released from criminal custody.

a. In *Hosh*, the Fourth Circuit held that a criminal alien who ICE did not take into custody for three years after his release from criminal custody was subject to mandatory detention under section 1226(c). The Fourth Circuit reasoned that section 1226(c)'s "when . . . released" language was susceptible to more than one interpretation and deferred to the BIA's interpretation of the statute in *Matter of Rojas* as the more plausible construction. 680 F.3d at 378. The Fourth Circuit further held that, even assuming that the BIA's interpretation was not permissible, the petitioner still would be subject to mandatory detention because the Government's failure to immediately take petitioner into custody "when the statute does not specify a consequence for such noncompliance—does not bestow a windfall upon criminal aliens." *Id*. at 384.

b. In *Sylvain*, the Third Circuit similarly held that mandatory detention applied after a four-year delay in initiating detention. The Third Circuit did not resolve the meaning of "when . . . released," but concluded that regardless the Government would not lose its section 1226(c) "mandatory detention" authority if it failed to immediately detain an alien when he or she is released from criminal custody. 714 F.3d 157-58. The Third Circuit relied on the Supreme Court's line of cases addressing aspirational statutory deadlines for agency action. *Id*. at 157-58

(citing *United States v. Montalvo-Murillo*, 495 U.S. 711, 720 (1990); *Brock v. Pierce County*, 476 U.S. 253, 262-63 (1986); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 161 (2003).

c. The panel here reached the opposite result on materially identical facts, reasoning that "when . . . released" requires detention with a reasonable time; that several-year delays were not "reasonable"; and – in an express departure from *Hosh* and *Sylvain* – that that the remedy for failing to detain an alien "when … released" is a bond hearing under section 1226(a). This circuit split itself warrants rehearing *en banc*. See Fed. R. App. P. 35(b)(1)(B).

2. The panel's decision also contains clear legal error that directly affects the exceptionally important issue of ICE's ability to comply with its statutory mandate to detain criminal aliens within the First Circuit pending their removal proceedings.

a. First, the panel erred in failing to give *Chevron* deference to the BIA's decision in *Matter of Rojas*. As set forth above, section 1226(c) is ambiguous as to what exactly "when ... released" means, the impact of a delay on mandatory detention authority, and what the consequence is, if any, if the Government does not take an alien into custody for several years. Indeed, the existence of a circuit split illustrates that the statute is ambiguous, as two sister circuits have reached an opposite interpretation of the statute on materially identical facts. The panel here

also recognized that there is some ambiguity in 8 U.S.C. § 1226(c), *see Castaneda*, 769 F.3d at 42 ("the term 'when' can be used in different ways"), but nonetheless declined to defer to the existing interpretation in *Matter of Rojas*.

b. The panel also erred both by treating Justice Kennedy's concurrence in *Demore* as binding, and by misinterpreting it. *See Castaneda*, 769 F.3d at 39 (finding that "Justice Kennedy's vote was necessary to the majority"). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotations and citations omitted). But the *Marks* principle does not apply to any part of an opinion that five justices have joined in full; instead the five-justice opinion becomes the opinion of the Court, and any concurrences lack precedential weight. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1148-49 (D.C. Cir. 2006); *United States v. Farley*, 607 F.3d 1294, 1342 n.33 (11th Cir. 2010). In *Demore*, Justice Kennedy joined Justice Rehnquist's opinion "in full" and without reservation. *See Demore*, 538 U.S. at 533. Because that entire opinion had the support of five justices, it became the Court's opinion. Thus, Justice Kennedy's concurrence in *Demore* does not bind this Court, and the panel erred by believing itself so bound. *See Stewart v. Cate*, 757 F.3d 929, 948 (9th Cir. 2014).

c. The panel also misread Justice Kennedy's concurrence in *Demore*. *See Castaneda*, 769 F.3d at 39. Justice Kennedy observed that "an unreasonable delay by [ICE] in pursuing and completing deportation proceedings" might suggest that continued detention is for some other purpose and thus might raise due process concerns. *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). But this reference to delay in "pursuing and completing" deportation proceedings is not properly read to refer to a delay in *initiating* detention. The initiation of detention was not at issue in *Demore*, and any delay in starting detention would not deprive an alien of his or her personal liberty. *Demore* instead addressed delay – after detention had already started – in moving the case forward to a final order of removal, which the alien asserted gave rise to a specter of detention that was indefinite. Justice Kennedy's statement is thus properly understood to refer to delays in pursuing removal once detention has begun. There is no suggestion here that Petitioners' detention is for any reason other than to detain them during the pendency of their removal proceedings, and there is no dispute over the facts that Petitioners have been placed in removal proceedings, are removable, and committed predicate criminal offenses under section 1226(c).

d. The panel also improperly relied on this Court's earlier decision in *Saysana*. The panel first relied on *Saysana* for the proposition that the presumption of dangerousness and flight risk is eroded by the years an alien lives

peaceably in the community. *See Castaneda*, 769 F.3d at 43. However, Congress has recognized that because certain criminal aliens face near "certain" removal, *INS v. St. Cyr*, 533 U.S. 289, 325 (2001), they possess a strong incentive to flee after—but not necessarily before—immigration authorities turn their attention to them, *see Ofosu v. McElroy*, 98 F.3d 694, 700 (2d Cir. 1996) (a released alien "may not be so easy to find once his litigation options are exhausted").

e. Additionally, the panel mistakenly relied on *Saysana* for the proposition that Congress was not seeking to justify mandatory detention many months or even years after an alien had been released from criminal custody. *See Castaneda*, 769 F.3d at 43. However, *Saysana* addresses a different legal issue than the one before this Court. *Saysana* did not examine whether section 1226(c) required immigration detention immediately after release from criminal detention. Instead, *Saysana* was concerned with the retroactive application of section 1226(c). This is not the case here where the requisite criminal releases occurred after the effective date of section 1226(c).

f. Finally, the panel also inappropriately distinguished Supreme Court precedent establishing that when a statute imposes on the Government a mandatory duty to act by a certain time, the Government does not lose the authority to act after that deadline, absent a clear indication that Congress intended that result. *See Barnhart*, 37 U.S. at 161 (2003); *Montalvo-Murillo*, 495 U.S. at 720. The panel

conducted its own analysis of this issue, distinguishing *Montalvo-Murillo*, on three grounds: (1) "mandatory detention under subsection (c) is an exception; general detention under subsection (a) is the default rule[;]" (2) "unlike *Montalvo-Murillo*, the district court decisions here did not strip the Attorney General of authority to detain the petitioners[;]" and (3) "unlike *Montalvo-Murillo*, the remedy here is not drastic." *See Castaneda*, 769 F.3d at 48.

g. In holding that section 1226(c) "must be construed as benefitting aliens detained years after release in order to avoid constitutional doubts" *id.*, the panel once again relied on Justice Kennedy's concurrence in *Demore*. However, the concerns expressed by Justice Kennedy in *Demore* are inapplicable to the questions presented here. "Here, § 1226(c) was undeniably not written for the benefit of criminal aliens facing deportation . . . ." *Hosh*, 680 F.3d at 382. "Congress designed the statute to keep dangerous aliens off the streets," but the panel's reading "would lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline." *Sylvain*, 714 F.3d at 160-161.

3. Finally, the question presented has considerable practical importance.

a. At the outset, the panel's ruling creates a prospect that criminal or terrorist aliens who would otherwise be detained under section 1226(c) will be released, in contravention of Congress's basic judgment that criminal and terrorist

aliens should be detained without bond because they were so likely to abscond or commit additional crimes. *See Demore*, 538 U.S. at 517-521.

b. Implementation of the First Circuit's "reasonableness" standard also presents myriad operational challenges for the Government. By opening a circuit split with *Hosh* and *Sylvain*, the panel decision will require ICE's Enforcement and Removal Operations to develop and establish policies and procedures within the First Circuit that differ from other jurisdictions. As Congress has expressed, uniform application of the immigration laws throughout the country is important. *See* Immigration Control and Reform Act of 1996, Pub. L. No. 99-603, 100 Stat. 3359, § 115 ("It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly"); *see, e.g.*, *Chen v. Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008) (*quoting Kaganovich v. Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006)).

c. The Government also foresees a marked increase in litigation resulting from the panel's "reasonableness" interpretation, both in immigration court as more bond hearings are conducted, and in habeas petitions in federal district court. In particular, immigration courts will be required to conduct more bond hearings and weigh additional considerations not currently within their practice, as immigration judges historically have never addressed the reasonableness of the gap in time between criminal custody and DHS detention.

d. Finally, the "reasonableness" rule imposes an unwarranted burden on the Government to explain why ICE officials did (or did not) take a particular alien into custody at a particular time, which threatens to distract those officials from their primary mission of enforcing the immigration laws. Many factors influence whether or when ICE takes an alien into immigration custody, and weighing those factors and exercising that prosecutorial authority is ordinarily beyond judicial review. *Cf. Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012); *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). Moreover, ICE continues to face increased challenges in its attempts to take criminal aliens into custody, and a gap in custody cannot always be attributed to ICE's discretion or by a simple failure of ICE to act.[1] It is not clear how any "reasonableness" determination may be made when there is a substantial likelihood that delays may not be attributable to ICE's own conduct.

CONCLUSION

For the reasons discussed above, the Government requests that the court grant its petition for rehearing *en banc*.

[1] For example, Trust Act legislation passed in Connecticut reflects recent trends by state and local governments to refuse to honor immigration detainers or share information on aliens in criminal custody. *See H.R.* 6659, Pub. Act No. 13-155 (Conn. 2013); Connecticut Trust Act, http://www.cga.ct.gov/2013/ACT/PA/2013PA-00155-R00HB-06659-PA.htm.

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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