

Record No. 11-1763

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In the  
**United States Court of Appeals**  
For The Fourth Circuit

HOSH MOHAMED HOSH, # A 076 863 283  
Petitioner-Appellee,

v.

ENRIQUE LUCERO, Field Office Director, Office of Enforcement and Removal, U.S. Immigration and Customs Enforcement; JOHN MORTON, Director, U.S. Immigration and Customs Enforcement; JAMES CHAPPARO, Executive Associate Director, U.S. Immigration and Customs Enforcement; JANET NAPOLITANO, Secretary, Department of Homeland Security; ERIC H. HOLDER, JR., Attorney General of the United States,  
Respondents-Appellants,

and

DAVID L. SIMONS, Superintendent, Hampton Roads Regional Jail,  
Respondent.

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Appeal from the United States District Court for the  
Eastern District Court of Virginia

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**BRIEF OF AMICUS CURIAE**  
**AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF**  
**PETITIONER-APPELLEE AND IN SUPPORT OF PETITION FOR REHEARING**  
**AND PETITION FOR REHEARING EN BANC**

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July 16, 2012

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UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

DISCLOSURE OF CORPORATE AFFILIATIONS  
AND OTHER INTERESTS

No. 11-1763

Caption: Hosh v. Lucero, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1, American Immigration

Lawyers Association, who is Amicus, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

NO

2. Does party/amicus have any parent corporations?

NO

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?

NO

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?

NO

5. Is party a trade association?

N/A

6. Does this case arise out of a bankruptcy proceeding?

NO

Dated: July 16, 2012

/s/ Andres C. Benach  
Andres C. Benach

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## Introduction

Amicus, the American Immigration Lawyers Association, respectfully requests that the U.S. Court of Appeals rehear *Hosh v. Lucero*, 680 F.3d 375 (4<sup>th</sup> Cir. 2012),<sup>1</sup> en banc pursuant to Fed. R. App. P. 35 because the panel decision was incorrect as a matter of law and because the case raises issues of exceptional importance.

In *Hosh v. Lucero*, a panel of this court created a statutory ambiguity where none exists in determining whether deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) was owed to the Board of Immigration Appeals' ("BIA" or "Board") interpretation of 8 U.S.C. § 1226(c) in *Matter of Rojas*, 23 I.&N. Dec. 117 (BIA 2001). In analyzing whether the "when the alien is released" language of 8 U.S.C. § 1226(c) requires mandatory detention of certain removable individuals (1) at the time of their release or (2) at any time after, the panel in *Hosh* spent a single paragraph analyzing a single word in the statute – the word "when" – to determine that the statute was ambiguous and the Board's interpretation was entitled to deference. This cursory analysis under "Chevron step one" ignored the plain meaning of the statutory language as well as the remainder of the section of 8 U.S.C. § 1226(c) and the overall statutory scheme. As this case is fully resolved at *Chevron* step one, there is no need to

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<sup>1</sup> The panel decision as appended and cited as A#.

determine whether the Board's decision in *Rojas* was a reasonable interpretation of the statute.

The issue of the limits of mandatory detention is of exceptional importance. The panel's decision deferring to the BIA's interpretation subjects thousands of noncitizens to lengthy detention without any review of their individual circumstances. The right to challenge detention and receive an individualized hearing before a neutral decisionmaker is among the most cherished of constitutionally protected interests, namely, liberty.

### **Statement of Interest**

AILA is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS") and before the Executive Office for Immigration Review (immigration courts and the BIA), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

## Argument

In *Hosh v. Lucero*, a panel of this court became the first Court of Appeals to consider the “when the alien is released” language of 8 U.S.C. § 1226(c). The panel had to decide whether this language applied mandatory detention only to those enumerated removable individuals “when the alien is released” or required mandatory detention of such individuals regardless of when the government apprehends them. The panel analyzed the meaning of the “when the alien is released” language under the standards established in *Chevron*, and determined that the “when . . . released” language is ambiguous and that the BIA had reasonably interpreted the provision in *Rojas* as allowing the government to detain without bond certain enumerated classes of individuals regardless of when they were apprehended by the government and without relation to their release from non-DHS custody.

**I. The plain language of “when released” is unambiguous and the court must give it effect.**

The panel’s decision failed to perform a proper analysis under *Chevron*. Under *Chevron*, a reviewing court must first determine whether a statutory provision is “unambiguous with respect to the question presented.” *Bracamontes v. Holder*, 675 F.3d 380, 384 (4th Cir. 2012). If Congress has spoken clearly, the court should give effect to the plain meaning of the statute. *Id.* Only if Congress’

intent is ambiguous with respect to the specific issue, should a court defer to an agency's reasonable determination.

At issue in this case is the statutory language at 8 U.S.C. § 1226(c), which subjects certain foreign nationals to mandatory detention during the pendency of removal proceedings. The statute provides that the Attorney General shall detain certain classes of foreign nationals “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).

While conceding that the statute's command “connotes some degree of immediacy,” A10, the panel determined that this language was ambiguous by focusing on the variety of possible definitions for the word “when.” The panel found that the word “when” in § 1226(c) “can be read, on one hand, to refer to action or activity occurring at the time that or as soon as other action has ceased or begun.” A8, *quoting Waffi v. Loiselle*, 527 F.Supp.2d 480, 488 (E.D.Va. 2007) (*internal quotations omitted*). However, the panel also consulted the dictionary and found that “when” “can also be read to mean the temporally broader ‘at or during the time that,’ ‘while,’ or ‘at any or every time that . . .’” *Id.* This is the extent of the panel's analysis of whether Congress spoke clearly when it stated that

certain removal individuals are to be taken into custody “when the alien is released.”

*Chevron* requires more. By attempting to add an ambiguity to the statute, the panel ignored the canon of statutory construction that the language of a statute must be given its plain and ordinary meaning. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987), citing *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). See also *Bracamontes*, 675 F.3d at 384. The plain meaning cannot ordinarily be ascertained by picking one word in a statute in isolation. *Chevron*’s analysis requires a much more thorough inquiry than that performed by the panel, and the Supreme Court explicitly has warned against focusing on a single part of a statute to ignore the broader context. “In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1850). “The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). The Fourth Circuit has recognized the error of focusing on a single word in a statutory scheme in performing a *Chevron* step one analysis. In *Prudencio v. Holder*, the Fourth Circuit admonished the government for interpreting the word “involving” in isolation. *Prudencio v. Holder*, 669 F.3d

472 (4th Cir. 2012). “The word ‘involving’ must be considered in its statutory context.” *Id.* at 481.

Rather than ascertaining the plain and ordinary meaning of the term “when released,” the panel referred to alternate meanings in order to create an ambiguity. As the Court of Appeals for the Third Circuit found in *Prestol-Espinal v. Attorney General*, 653 F.3d 213, 220 (3d Cir. 2011), “the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of [the statute.]” *quoting Cuomo v. Clearing House Ass’n, L.L.C.*, 129 S.Ct. 2710, 2715 (2009). By identifying alternative definitions for a word like “when,” which has a plain and ordinary meaning, the panel sought to identify uncertainty rather than to give effect to the plain language of the statute.

In fact, the panel notes that although the far more natural reading of the statute “connotes some degree of immediacy,” it does not accept that “Congress clearly intended to exempt a criminal alien from mandatory detention and make him eligible for release on bond if the alien is not *immediately* taken into custody.” A10-11 (emphasis in original). This is an ambiguity of the panel’s own making. “The government manufactures an ambiguity from Congress’ failure to specifically foreclose each exception that could possibly be conjured or imagined. This approach would create an ‘ambiguity’ in almost all statutes, necessitating deference to nearly all agency determinations.” *Prestol-Espinal* 653 F.3d at 220.

In *Prestol-Espinal*, the Third Circuit rejected the BIA's determination that a motion to reopen could not be filed by an individual outside the U.S. The court analyzed the statute and noted that there was nothing in the language that limited the opportunity to file a motion to reopen to individuals in the U.S. The government argued that there was nothing in the statute that authorized the filing of motions to reopen from outside. In response, the court stated that the statute's failure to foreclose "each exception that could possibly be conjured or imagined" did not create ambiguity. *Id.*

The panel in this case is taking a similar approach to that offered by the government in *Prestol-Espinal*. By demanding that Congress explicitly foreclose mandatory detention for those not taken into custody when released, the panel has created an ambiguity of its own making to avoid the consequences of applying the plain meaning of the "when released" language. The panel has demanded that Congress explicitly disavow mandatory detention for those not taken into custody when released, when it has already done so by limiting mandatory detention to those apprehended when released from criminal custody.

In addition, the panel's decision conflicts with the finding of the U.S. Court of Appeals for the First Circuit in *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009), which found that there is no ambiguity in the term "when released." The First Circuit noted that the plain meaning may only be clear, however, "not only by the

words of the statute but by its structure as well.” *Saysana*, 590 F.3d at 14, *citing Alexander v. Sandoval*, 532 U.S. 275, 288 (2001). The First Circuit examined the words and structure and concluded the following:

The “when released” provision immediately follows the list of enumerated offenses, indicating that the former modifies the latter. Additionally, § 1226(c) provides that the alien shall be detained upon release regardless of whether he is subsequently arrested for the “same offense,” reinforcing the notion that the entire clause applies to the list of enumerated offenses immediately preceding it.

*Id.* (internal citations omitted). Although *Saysana* addressed a different issue, its analysis of the statutory language at issue here presents an analysis more faithful to the plain meaning of the statute than the *Hosh* panel’s strained reading.

The panel also finds support for its position in *Demore v. Kim*, 538 U.S. 510 (2003), where the Supreme Court rejected a due process challenge to the mandatory detention scheme. The *Demore* court did not consider the contours of the “when released” language, but rather found that the due process clause did not preclude mandatory detention of certain classes of foreign nationals. The panel cites the Congressional history of the mandatory detention provision, which reflects Congress’ finding that the then-INS failed “to deal with increasing rates of criminal activity by aliens” and failed “to remove deportable criminal aliens” because the INS failed to “detain those aliens during ... proceedings.” A10 *citing Demore v. Kim*, 538 U.S. at 519. In citing *Demore*, the panel did not cite another key finding of Congress: “Congress’ investigations showed, however, that the INS

could not even *identify* most deportable aliens, much less locate them and remove them from the country.” *Demore*, 538 U.S. at 518 (emphasis in original).

By tying mandatory detention to the immediacy of release from non-DHS custody, Congress was very clearly focused on ensuring that INS identify criminal aliens promptly and securely, and put into a place a system to detain them. Congress was telling the INS that it must take removable criminal aliens into custody when released so as to avoid any chance that they might evade removal proceedings. “Congress’ point in enacting § 1226(c) was to assure that a certain class of deportable aliens would not abscond before they could be deported. Perhaps the most obvious step towards such a goal is to detain such aliens *immediately* upon their release from state or federal custody, before they have a chance to vanish.” *Keo v. Lucero*, No. 1:11-cv-464, 2011 U.S. Dist. LEXIS 75619 at \*11-12 (E.D. Va. July 13, 2011). The panel’s decision, which allows for mandatory detention of individuals for weeks, months, and years after the completion of a sentence frustrates the Congressional intent that the government ensure that those Congress deems most dangerous or likely to flee are taken immediately into DHS custody.

## **II. This is an issue of exceptional importance.**

Rehearing en banc is also warranted because the issue of mandatory detention of noncitizens is of exceptional importance, as it implicates a liberty

interest. As the Supreme Court noted in *Zadvydas v. Davis*, 533 U.S. 678 (2001), “freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [due process] Clause protects.” *Zadvydas*, 533 U.S. at 690 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

The panel’s decision means that thousands of individuals who may be removable for an offense years in their past can be subjected to prolonged detention without the right to individualized bond hearings. These individuals have completed their criminal sentences and have re-entered society. They have jobs and families, all of which will be impacted if they are subjected to prolonged detention. Importantly, many of them will be eligible for relief from removal. The average wait for a removal hearing nationwide today is 519 days. See TRAC Immigration, available at [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (Last accessed July 16, 2012). While this average includes non-detained cases, the statistics reflect the state of the immigration courts today. An individual who is eligible for relief and is detained can wait several months for a hearing, well beyond the typical month and a half cited by the Supreme Court in *Demore v. Kim*, 538 U.S. at 530.

## Conclusion

En banc rehearing is appropriate because the panel decision is contrary to the plain and ordinary meaning of the statute, and the decision implicates the exceptionally important fundamental interest of liberty and freedom from restraint. For the foregoing reasons, amicus, American Immigration Lawyers Association respectfully requests that the Petition for Rehearing En Banc be granted, the judgment ordering the grant of the petition for a writ of habeas corpus reversed vacated, and the District Court judgment granting relief affirmed.

Respectfully submitted,

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Dated: July 16, 2012

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,456 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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Dated: July 16, 2012

**CERTIFICATE OF SERVICE**

I certify that on July 16, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF filer:

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