STATE OF FLORIDA

ASHLEY MOODY
ATTORNEY GENERAL

May 27, 2022

The Honorable Merrick B. Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: *Biden v. Texas*, case no. 21-954 (U.S.)
Representations of the United States to the U.S. Supreme Court

Dear Attorney General Garland:

I write today to raise a matter that I believe warrants your personal and immediate attention. As a former judge, I believe the duty of candor to courts is a central tenet of the American legal system and essential to the fair and efficient functioning of the judicial branch. As a former Justice Department employee, I have always understood attorneys representing the United States to hold themselves to the highest possible standard. I therefore request that you review representations made in connection with the above-referenced case and evaluate whether these statements warrant a correction to the U.S. Supreme Court.

Biden v. Texas concerns a challenge brought by the States of Texas and Missouri against various federal government officials and agencies regarding the termination of the Migrant Protection Protocols (MPP). Under MPP, the Department of Homeland Security (DHS) returned certain aliens to Mexico pending final resolution of their immigration proceedings. Partially at issue in the case is whether DHS may consider detention capacity when exercising its parole authority under 8 U.S.C. § 1182(d)(5). I filed an amicus brief with the Court on behalf of the State of Florida, and Florida challenges related policies in litigation pending in the Northern District of Florida. *See Florida v. United States*, No. 3:21-cv-1066 (N.D. Fla.).

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In the Brief for Petitioners, filed March 14, 2022, the United States made the following representations to the Court regarding DHS's position on whether lack of detention capacity is a permissible basis for parole determinations:

- "And there is no inconsistency between making parole decisions cases-by-case (as the INA and DHS's regulations require) and **considering detention capacity (as the Executive has done since IIRIRA's enactment)**." Brief for Petitioners at 16, *Biden v. Texas*, No. 21-954 (U.S. Mar. 14, 2022) (emphasis added).
- "Ever since IIRIRA, **the Executive Branch has consistently exercised its authority to interpret and implement Section 1182(d)(5)(A)** by determining that, if a noncitizen in removal proceedings presents neither a security nor a flight risk, then release pending those proceedings may be warranted for urgent humanitarian reasons or significant public benefit, **especially where parole would free up limited detention capacity** for other, higher-priority noncitizens such as those with criminal records or who pose a national-security risk." Brief for Petitioners at 36, *Biden v. Texas*, No. 21-954 (U.S. Mar. 14, 2022) (emphasis added).

In the Reply Brief for Petitioners, filed April 19, 2022, the United States made further representations regarding this issue:

- "Substantively, **the Executive Branch has long determined that paroling some low-risk noncitizens achieves the significant public benefit of freeing limited detention space** for other noncitizens who are higher priorities for detention—because, for example, they might endanger the public or fail to appear for their proceedings, or because they are part of another class that Congress itself has prioritized." Reply Brief of Petitioners at 16, *Biden v. Texas*, No. 21-954 (U.S. Apr. 19, 2022) (emphasis added).
- "The INA commits parole decisions to the Secretary's 'discretion,' 8 U.S.C. 1182(d)(5)(A), and respondents do not show how **DHS's consistent interpretation across five presidential administrations** is unreasonable." Reply Brief of Petitioners at 16, *Biden v. Texas*, No. 21-954 (U.S. Apr. 19, 2022) (emphasis added).

Finally, at oral argument on April 26, 2022, the United States made the following representation to the Court:

- "Well, this is the **agency's consistent interpretation** of the parole provision. Congress has never disapproved it. It has known that DHS is exercising its parole authority that way." Oral Argument Transcript at 53, *Biden v. Texas*, No. 21-954 (U.S. Apr. 26, 2022) (emphasis added).
- "We have not just generated that -- that consideration of detention for purposes of this case. That has been **the executive branch's uniform, consistent interpretation of how our parole authority operates**." Oral Argument Transcript at 119, *Biden v. Texas*, No. 21-954 (U.S. Apr. 26, 2022) (emphasis added).

Given the firmness of these representations throughout the course of this litigation, I was surprised when I learned of documents produced during discovery in *Florida v. United States* that call these statements into question. I particularly call your attention to the following documents that I have attached to this letter:

- December 16, 2014 Customs and Border Protection Memorandum for Directors, Field Operations, Director, Preclearance Operations, and Office of Field Operations from Acting Executive Director of Admissibility and Passenger Programs re: Parole of Inadmissible Nonimmigrant Aliens: "Lack of detention space, requests from other law enforcement agencies . . . , or other purposes not considered essential for law enforcement **are not appropriate reasons to parole an inadmissible alien.**" (emphasis added.)
- May 12, 2015 Customs and Border Protection Memorandum for Directors, Field Operations, Director, Preclearance Operations, and Office of Field Operations from Acting Executive Director of Admissibility and Passenger Programs re: Parole of Inadmissible Nonimmigrant Aliens: "Lack of detention space, requests from other law enforcement agencies . . . , or other purposes not considered essential for law enforcement **are not appropriate reasons to parole an inadmissible alien.**" (emphasis added.)
- November 19, 2014 Customs and Border Protection Muster from Office of Admissibility and Passenger Programs re: Parole of Inadmissible Nonimmigrant Aliens: "The **lack of available detention space**, including cases where the traveler is not departing until the next day(s), or the case does not meet the prosecutorial guidelines for another agency **are not a 'legitimate law enforcement purpose'** [and therefore not eligible for parole]; and the traveler must remain in CBP custody." (emphasis added.)

These documents at a minimum call into question the veracity of the United States' submission that the "consistent" and "uniform" interpretation of the Executive Branch has been that lack of detention capacity is an appropriate basis for parole under 8 U.S.C. § 1182(d)(5). I believe the Court and interested parties deserve an explanation.

Our system of justice depends on advocates who respect their oaths and ethical duties. As head of the Florida Department of Legal Affairs, I require nothing but the utmost adherence to these values from the men and women who represent the State of Florida. I hope that you will take this opportunity to investigate whether any such duties were violated and take appropriate steps.

Sincerely,

Ashley Moody

Ashley Moody
Attorney General of Florida

CC:

The Honorable Alejandro Mayorkas
Secretary of the Department of Homeland Security