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August 24, 2021

VIA CM/ECF

Mr. David J. Smith
Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

Re: No. 21-11715, *State of Florida v. United States, et al.*

Dear Mr. Smith:

We write to advise the panel of a recent decision in *Texas v. United States*, No. 6:21-cv-00016, 2021 WL 3683913 (S.D. Tex. Aug. 19, 2021).

In *Texas*, the plaintiff-states challenged the same DHS memoranda at issue here. The court preliminarily enjoined the United States nationwide from “enforcing and implementing the policies” in those memoranda. *Id.* at *64.

In finding that the plaintiff-states have standing, the court agreed with several arguments Florida advances (Opening Br. 19–24), including that the memoranda are reducing immigration enforcement, resulting in additional costs to the states and more crime, and that enjoining the memoranda would redress these injuries. *Id.* at *10–12, *16–19. The court also agreed that in establishing standing in this context States “are entitled to special solicitude.” *Id.* at *19.

The court as well agreed with Florida (Opening Br. 25–31) that the memoranda are reviewable under the APA. *Id.* at *23–40. The court rejected the government’s contention that the memoranda are not final agency action and do not create legal rights and obligations, noting that they “effectively substitute[] a prioritization scheme in place of the enforcement mandates” set forth by statute. *Id.* at *25. The court held that “[t]he Executive Branch may neither alter [the applicable] statutory obligations through reprioritization nor dispense with them.” *Id.* at *40.

On the merits, the court agreed with Florida’s position (Opening Br. 32–35) that the memoranda are “wholly contrary to Section[] 1226(c),” which the court read as mandating the arrest and detention of the criminal aliens identified in the statute. *Id.* at *42. The court also agreed with Florida (Opening Br. 36–38) that the memoranda are arbitrary

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and capricious, *id.* at *43–51, including because they provide no good reason for prioritizing recent arrivals over “aliens who have drug offenses or crimes of moral turpitude,” *id.* at *45, and because “the cursory use of the COVID-19 pandemic to justify the new guidance comes across as implausible,” *id.* at *45. Finally, the court agreed with Florida (Opening Br. 38) that the memoranda are subject to notice and comment. *Id.* at *51–58.

Sincerely,

/s/ Jason H. Hilborn

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