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September 21, 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:

I write in response to appellees' September 19 letter regarding *Texas v. United States*, No. 21-40618 (5th Cir. Sept. 15, 2021). That case, decided in a stay posture, supports Florida's arguments in part, is distinguishable in part, and is wrongly decided in part.

The Fifth Circuit's decision supports Florida's argument that the challenged memos are reviewable under the APA. *See* Opening Br. 25–31. The district court denied Florida's preliminary-injunction motion solely because the memos are unreviewable, *id.* at 15–16, and the Fifth Circuit appeared to disagree, *see Texas*, No. 21-40618, slip. op. at 15 (affirming injunction in part).

The decision is distinguishable because the Fifth Circuit failed to address whether the memos are arbitrary and capricious or unlawfully dispensed with notice and comment. As Florida explained, the radical departure from federal law caused by the memos required notice and comment, and at a minimum required an explanation. But the memos do not even acknowledge Section 1226(c)'s existence, much less explain their departure from it. *See* Opening Br. at 36–39.

Finally, in concluding that the arrest command in Section 1226(c), despite its plain text, is not mandatory, the Fifth Circuit got it wrong and the district court in *Texas* got it right. Two points in particular demonstrate the Fifth Circuit's error.

First, the plaintiffs did not argue, as Florida argues, that Section 1226(c) requires the initiation of removal proceedings. *See Texas*, No. 21-40618, slip op. at 9 n.5. The Fifth Circuit thus reached its conclusion based on a false dichotomy, believing that either Section

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1226(c) is not mandatory or that it requires indefinite detention even without pending removal proceedings, which would likely be unlawful. *See Demore v. Kim*, 538 U.S. 510, 517–18 (2003) (explaining that “Section 1226(c) mandates detention *during removal proceedings*” (emphasis added)).

Second, the Fifth Circuit did not wrestle with the strong evidence Florida points to—besides the plain text—that Section 1226(c) is mandatory, including the amending history, legislative history, Transition Period Custody Rules, and the positions of Solicitors General from both political parties. *See* Opening Br. 5–7, 30–31, 35.

Sincerely,

/s/ Jason H. Hilborn

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