



STATE OF FLORIDA

**ASHLEY MOODY
ATTORNEY GENERAL**

February 6, 2024

Senator Marco Rubio
U.S. Senate
284 Russell Senate Office Building
Washington, D.C. 20510

Senator Rick Scott
U.S. Senate
110 Hart Senate Office Building
Washington, D.C. 20510

Re. Senate Immigration Bill

Dear Senator Rubio and Senator Scott:

For the last three years, Florida's Office of Attorney General has been litigating against the Biden Administration's unlawful and reckless border policies. The goal of that litigation has been to force the Biden Administration to follow the law. In one of our cases, a federal district court judge concluded that the Biden Administration "ha[s] effectively turned the Southwest Border into a meaningless line in the sand and little more than a speedbump for aliens flooding into the country by prioritizing 'alternatives to detention' over actual detention and by releasing more than a million aliens into the country—on 'parole' or pursuant to the exercise of 'prosecutorial discretion' under a wholly inapplicable statute—without even initiating removal proceedings." While I support strengthening the border, if this bill is passed, I do not doubt that it would lead to further disaster. I would urge each of you to vote against this bill.

First and foremost, it is important to recognize that federal immigration law is the same as it was during the Trump Administration. The problem is that the existing law is not being fully or faithfully executed by the President, Secretary Mayorkas, or any other official in the Biden Administration. Immediately preceding, President Biden's inauguration on January 20, 2021, the United States Department of Homeland Security ("DHS") rarely released aliens apprehended at the Southwest Border.¹ For example, in the entire month of December 2020, Border Patrol released only 17 aliens. DHS's then policy under President Trump was informed by the statutory language in 8 U.S.C. § 1225(b), which states that applicants for admission "shall be detained." The Trump interpretation of federal immigration law was consistent with the Supreme Court of the United States's interpretation in *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018). DHS's policy was also informed by President Trump's Executive Order 13767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8,793 (Jan. 25, 2017), which instructed DHS to "take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings." *Id.* at 8,795. That language related specifically to aliens

¹ I fully recognize that there have been periods of time where releases were conducted by prior administrations, but those releases typically occurred in Democratic administrations, who like the Biden Administration were not enforcing the law in full, or followed an adverse court decision that reduced the consequences of federal immigration law to a group of aliens, like the *Flores* decree.

apprehended while committing “[i]llegal [e]ntry.” *Id.* As former Border Patrol Chief Raul Ortiz testified at a trial in an action brought by the Florida Attorney General’s Office, the Trump policy was to only release aliens at the Southwest Border under “very exigent circumstances.” Those instructions applied both to releases under parole, 8 U.S.C. § 1182(d)(5), and releases under 8 U.S.C. § 1226(a).

Second, even if you believe the Biden Administration talking point that Biden needs new laws to get control of the border, any change in law should include meaningful accountability and oversight. Throughout the bill there is no real accountability. Instead, the bill makes almost every obligation on the federal government contingent on whether it is “practicable,” which practically makes every term meaningless if you have a chief executive who is not interested in enforcing the law. Worse, even in the data that the bill requires to be reported, the bill does not require DHS or any other federal agency to report metrics that could tell you whether it is following the law. Make no mistake, the crisis at the border is a direct result of policy decisions by the Biden Administration on not enforcing the law. Without including performance or accountability measures, it is insane to believe that the President, Secretary Mayorkas, or the Biden Administration would now, all the sudden, follow the law. The past is prologue. And, the past here conclusively demonstrates that the Biden Administration is not about to abandon its open border policies.

The evidence of the Biden Administration’s bad faith over the last three years is mountainous and staggering. Here are a handful of highlights that should cause each of you to not trust the Biden Administration to secure the border under this or any existing law. On January 20, 2021, then Acting Secretary of DHS David Pekoske signed a memorandum entitled Review of and Interim Revisions to Civil Immigration Enforcement and Removal Policies and Priorities (the “Pekoske Memo”). The Pekoske Memo substantially narrowed DHS’s immigration priorities. As most relevant here, the Pekoske Memo rescinded DHS’s guidance implementing Executive Order 13767—which instructed DHS to detain aliens apprehended at the Southwest Border—even though that Executive Order had not yet been formally rescinded. On January 27, 2021, seven days after inauguration, senior officials at ICE determined that the Pekoske Memo would result in 50% less aliens entering DHS detention as compared to the Obama Administration’s (not Trump’s) immigration priorities. On January 28, 2021, eight days after inauguration, senior officials at Border Patrol informed senior officials at CBP that Biden’s policy changes would result in the mass release of aliens into the interior of the United States. On February 2, 2021, thirteen days after inauguration, President Biden issued Executive Order 14010, Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8,267 (Feb. 2, 2021). That Executive Order formally rescinded President Trump’s Executive Order 13767, *id.* at 8,270, which had already been functionally abrogated by the Pekoske Memo. Consistent with these policy changes, DHS leadership communicated to Border Patrol officials that the Trump-era limitations on alien releases—specifically, limiting releases to “very exigent circumstances”—were no longer in effect. Those communications occurred by telephone to former Border Patrol Chief Ruiz and others less than two weeks after inauguration.

Consistent with those understandings, Border Patrol began exponentially increasing the number of aliens it was releasing at the Southwest Border. In February 2021, Border Patrol released 8,798 aliens at the Southwest Border, compared to only 17 in December 2020. These increased releases were not caused by an increase in apprehensions or by detention capacity constraints but by the express change in detention policy. For example, Border Patrol released only 91 aliens at the Southwest Border in February 2020, when apprehensions were 20% higher than in February 2021. From February 2021 to March 2021, the number of apprehensions at the Southwest Border more than doubled. Even as border traffic skyrocketed, DHS’s “daily detention population levels” remained “near historic lows.” In other words, DHS had excess detention capacity because of its change in detention policy, and DHS did not react to the resulting increase in border traffic by revisiting that change in detention policy. Within months, through executive action and guidance memoranda, President Biden and his administration systematically dismantled federal immigration policy and diminished almost all consequences for illegally entering the United States. Predictably, that quickly caused the existing border crisis that Biden now uses as justification to release hundreds of thousands of illegal immigrants into the interior each month. Even after the disaster the President was causing became readily apparent, the Biden Administration continued and to this day is continuing its ruinous policies denying all responsibility and accountability for the havoc that the border crisis is causing in Florida and

almost every state. Yet, this bill does nothing to provide oversight or allow states or Congress to prevent what is happening under the previous law to not happen again.

Third, the bill in nearly every area reduces the consequences for illegal aliens. The solution to the border crisis is to increase, not decrease the consequences for illegal immigration. According to the testimony of former Border Patrol Chief Ortiz, the effect of Biden's change in detention policy was a substantial increase in border traffic. He explained that was because immigration enforcement, including detention when required by the immigration laws, serves as a deterrent. The following exchange between Florida's Office of Attorney General and former Chief Ruiz on cross-examination at trial is illustrative:

Q. All right. Now, Chief Ortiz, would you agree that consequences can deter migrant flows?

A. Yes.

Q. And consequences that can deter migrant flows from coming to the United States include the detention of aliens attempting to illegally enter the United States, right?

A. Yes.

Q. And a consequence that can deter migrant flows from coming to the United States is expedited removal, right?

A. Yes.

Q. And if you do not have consequences that deter migrant flows illegal immigration is going to increase, right?

A. That's an assumption, yes.

Q. From your experience, from 31 years in Border Patrol, is that assumption correct?

A. Yes.

Q. And if you reduce consequences that deter migrant flows illegal immigration is going to increase in the United States, right?

A. Yes.

Q. And at the beginning of the Biden Administration, the Biden Administration reduced the potential consequences facing migrants traveling to the border, right?

A. Yes.

Q. At the beginning of the Biden Administration, the Biden Administration reduced the potential consequences facing migrants and that increased flows to the border, right?

A. I would imagine that it had an impact on the flows that we were experiencing, yes.

Florida v. Mayorkas, Trial Day 2, at 146, ln. 18- 147, ln. 21

Yet, this bill does nothing to increase consequences. It resurrects the Biden Administration's Alternatives to Detention ("ATD") program, which a federal court ruled to be unlawful in both iterations that the Biden Administration tried. It seems foolish to trade the current "shall detain" model for a modified "catch and release" model, which is what ATD was under the Biden Administration. But, the bill does exactly that. It attempts to ameliorate the absconding concern by suggesting that aliens will be processed much more quickly, within 90 days. The problem is that timeline seems to be an aspirational goal, not a hard and fast requirement as the "practicable" limitation is included. Only the Biden Administration could think that a program that saw a significant portion of aliens absconding is a good change to federal immigration law.

Finally, the bill's border closure requirements make little sense and will do little to reduce border traffic. The number of encounters that trigger closure of the border are set so high that they are essentially meaningless. The only time in United States history that the United States has had that many encounters, including under Presidents Clinton and Obama, is the Biden Administration. Given the sophistication of

transnational criminal organizations and the monies that they make from trafficking aliens, it is not farfetched to believe that they may control the flow to not to trigger the threshold and that could mean millions of aliens released each year with the hope and a prayer that it is practicable to remove them quickly. Similarly, if this an emergency authority, then why does the bill contain a limited number of days that the border can be closed. In the initial year, it is set at 270 days. If there are nearly 10,000 aliens a day coming to the border and the border must be open for 95 days in the first year, then under this proposal that would mean that the Biden Administration could release potentially at least 950,000 people. In subsequent years, the numbers would grow exponentially as the number of days the border can be closed decreases.

There are a number of other problems with this bill but given the timeline that the Senate is supposedly considering this measure, I thought it best to register my opposition to this bill and provide you some of the larger problems I see with this bill given that the language became available Sunday. I would urge each of you to vote against this bill.

Sincerely,



Ashley Moody
Florida Attorney General

cc: Representative Matt Gaetz
Representative Neal Dunn
Representative Kat Cammack
Representative Aaron Bean
Representative John Rutherford
Representative Michael Waltz
Representative Cory Mills
Representative Bill Posey
Representative Daniel Webster
Representative Gus Bilirakis
Representative Anna Paulina Luna
Representative Laurel Lee
Representative Vern Buchanan
Representative Greg Steube
Representative Scott Franklin
Representative Byron Donalds
Representative Brian Mast
Representative Mario Diaz-Balart
Representative Maria Salazar
Representative Carlos Gimenez