



## STATE OF FLORIDA

**ASHLEY MOODY  
ATTORNEY GENERAL**

### PETITION FOR RULEMAKING

October 10, 2023

Secretary Alejandro Mayorkas  
c/o Jonathan E. Meyer, General Counsel  
U.S. Department of Homeland Security  
Office of the General Counsel  
Mail Stop 0485  
Attn: Regulatory Affairs Law Division  
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Dear Secretary Mayorkas,

The crisis at our Southwest Border is nothing short of an unmitigated disaster. As a federal court recently found, you and President Biden have implemented a “non-detention policy” for aliens illegally entering our country, and that policy is the cause of our current border crisis. *See Florida v. United States*, No. 3:21-cv-1066, 2023 WL 2399883, at \*2 (N.D. Fla. Mar. 8, 2023) (explaining that you “have effectively turned the Southwest Border into a meaningless line in the sand and little more than a speedbump for aliens flooding into the country”). The court made these findings after a four-day trial in which many of your own employees, including your Chief of Border Patrol, provided live testimony.

The purpose of this Petition to Initiate Rulemaking, 5 U.S.C. § 553(e); 6 C.F.R. §§ 3.1–3.9, is to demand that you fix the problem you created. Specifically, you should promulgate changes to your regulations to close the catch-and-release loophole that the Department of Homeland Security (DHS) is currently exploiting to implement its mass release policy at the Southwest Border.

## Background

Aliens arriving at the Southwest Border are subject to mandatory detention, which means that DHS must detain them pending removal proceedings and may not release them. Specifically, whether an alien presents himself at a port of entry or is apprehended crossing illegally, he “shall be detained” pending removal proceedings unless he is “clearly and beyond a doubt entitled to be admitted.” See 8 U.S.C. § 1225(b); *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018). The principal exception to mandatory detention is that an alien subject to § 1225(b) may be released under 8 U.S.C. § 1182(d)(5), but “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.”

DHS has abused the parole authority in § 1182(d)(5) for several years by using it as a tool for the mass release of aliens at the Southwest Border. Those abuses are subject to multiple pending legal challenges, see *Florida v. Mayorkas*, No. 3:23-cv-9962 (N.D. Fla.); *Texas v. DHS*, No. 6:23-cv-7 (S.D. Tex.); *Indiana v. Mayorkas*, No. 1:23-cv-106 (D.N.D.), but they are not the subject of this petition. Rather, this petition focuses on a different release mechanism that DHS uses at the Southwest Border—releases under 8 U.S.C. § 1226(a).

Unlike § 1225(b), § 1226(a) makes detention discretionary. It states that an alien to whom § 1226(a) applies “may be . . . detained.” 8 U.S.C. § 1226(a). And even if DHS detains the alien, the alien “may [be] release[d].” 8 U.S.C. § 1226(a)(2).

Notwithstanding § 1225(b)’s clear detention mandate, DHS routinely uses § 1226(a) to release illegal border crossers. In August 2023 alone, Border Patrol released 100,585 aliens at the Southwest Border under § 1226(a).<sup>1</sup>

## Suggested Regulatory Changes

DHS’s practice of releasing aliens at the Southwest Border under § 1226(a) is flagrantly unlawful. Section 1226(a) “applies to ‘certain aliens *already in the country*.’” *Florida*, 2023 WL 2399883, at \*26 (quoting *Jennings*, 138 S. Ct. at 837–38). It does not apply to aliens caught crossing the border illegally. As the court explained in *Florida*, “§ 1225(b) requires detention of applicants for admission at the Southwest Border,” and “DHS may not release these aliens under § 1226(a).” *Florida*, 2023 WL 2399883, at \*28; see also *id.* at \*26–28 (relying on several grounds to find DHS’s practices unlawful).

It is not at all clear that any regulation expressly authorizes DHS’s uses of § 1226(a) at the Southwest Border. But because it is quite clear that the practices violate the statute, *Florida*, 2023 WL 2399883, at \*26–28, DHS should amend its regulations to expressly prohibit these releases.

The amendment could be made to either 8 C.F.R. § 235 or § 236. And all the amendment needs to say is something to the effect of “aliens who are subject to § 1225(b) because they meet the definition of ‘applicant for admission’ in § 1225(a) may not be released under § 1226(a) because that provision does not apply to them.” See *Florida*, 2023 WL 2399883, at \*26–28 (further explaining that conclusion). In other words, the amendment should clarify that § 1225 and § 1226 do not overlap but “apply to different classes of aliens.” *Florida*, 2023 WL 2399883, at \*26 (quoting *Matter of MS*, 27 I. & N. Dec. 509, 516 (Att’y Gen. 2019)).

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<sup>1</sup> <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

## Reasons for Granting the Petition

The first and most important reason for granting the petition is that DHS's current practices are unlawful. DHS should take seriously whether its practices comply with the law, and it should grant a petition that seeks to stop its officers from committing unlawful acts.

The second reason to grant the petition is that DHS's catch-and-release policies are having horrendous effects on the country. As the court found in *Florida*, DHS's mass release policies have been "akin to posting a flashing 'Come In, We're Open' sign on the southern border." *Florida*, 2023 WL 2399883, at \*6. In August 2023, Border Patrol released 100,585 aliens under § 1226(a).<sup>2</sup> We anticipate that the numbers in September will be even higher, especially given DHS's decision to set release quotas for Border Patrol to meet.<sup>3</sup> Even if the numbers merely remain the same, DHS is releasing aliens at a rate of over one million per year, and that does not include the aliens being released on parole under § 1182(d)(5).

Making matters worse, DHS is giving aliens released under § 1226(a) their first court date ten or more years in the future.<sup>4</sup> This means that released aliens remain in the interior for ten years before their immigration proceedings *even begin*, which can take "five years or more" from that time to complete. *Florida*, 2023 WL 2399883, at \*7. And this does not account for aliens who fail to show up to their hearings, many of whom DHS has difficulty locating because the aliens provide false addresses.<sup>5</sup> All told, DHS's unlawful decisions to release aliens subject to mandatory detention are allowing millions of unauthorized aliens to remain in the interior of the country for fifteen years or longer before they can be removed.

## Conclusion

While we may disagree on a great many things, we hope we agree that DHS must follow the law. We ask you to grant this petition and initiate rulemaking. If you disagree with our legal position and with the legal position of the court in *Florida*, or if you disagree that DHS must follow the law, we ask that you promptly deny this petition on that basis so that we may seek judicial review.

Sincerely,



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<sup>2</sup> <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>3</sup> <https://www.foxnews.com/politics/border-patrol-set-bookout-targets-bring-migrant-numbers-manageable-levels-amid-new-surge>.

<sup>4</sup> <https://apnews.com/article/immigration-courts-wait-54bb5f7c18c4c37c6ca7f28231ff0edf>.

<sup>5</sup> <https://www.oig.dhs.gov/sites/default/files/assets/2023-09/OIG-23-47-Sep23-Redacted.pdf>.



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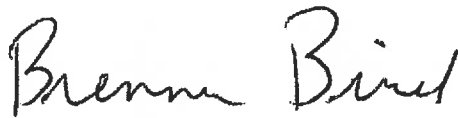
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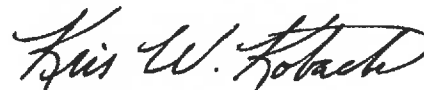
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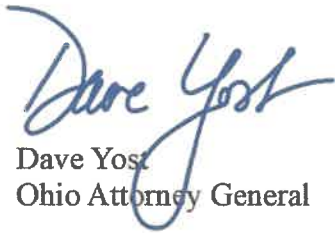
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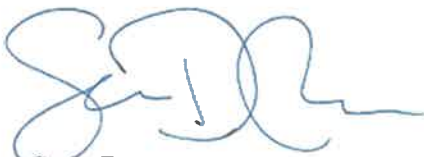
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