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1 **INTRODUCTION**

2 After adopting a metering policy<sup>2</sup> that forces destitute asylum seekers to wait  
3 for protracted periods in dangerous Mexican border towns, the Government has  
4 taken yet another step to deny them access to the U.S. asylum process. Specifically,  
5 Defendants have attempted to pull the rug out from underneath law-abiding asylum  
6 seekers at the southern border by promulgating a new interim final rule (the “Asylum  
7 Ban,” defined below), through which the Government effectively denies access to  
8 the U.S. asylum process to virtually all metered asylum seekers from countries other

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1 7, 54, 65, 67–69, 79, 83, 85, 226, 258, 272, 273.<sup>3</sup> This policy has led to a massive  
2 increase of migrants in Mexican border towns seeking to access the U.S. asylum  
3 process but prevented from doing so *by the U.S. government itself*. Ex. 3 ¶¶ 6-7.

4       Instead of inspecting and processing asylum seekers when they present  
5 themselves at POEs, as the law requires, Second Mot. to Dismiss Order, Dkt. No.  
6 280, at 38-40, 42, 44-47 (explaining that the INA, 8 U.S.C. §§ 1158, 1225, requires  
7 that individuals “in the process of arriving in the United States” be inspected and  
8 processed and have the right to apply for asylum), un-b-,lTf

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1 reach safety and cannot wait—CBP officers routinely turn her back to Mexico. *See,*  
2 *e.g.*

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1 legal status there.

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1 “arrives in” is significant and “plainly covers an alien who may not yet be in the  
2 United States, but who is in the process of arriving in the United States through a  
3 POE.” Second Mot. to Dismiss Order, Dkt. No. 280, at 38 (discussing 8 U.S.C.  
4 § 1158(a)(1)). Applying the Court’s logic to the text of the Asylum Ban, the  
5 provisional class members who were metered at POEs prior to July 16, 2019 were  
6 in the process of “arriv[ing] in the United States” when they were turned back. The  
7 Asylum Ban should not apply to them, as they met the cut-off date for “arriv[ing].”

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1 go to a port of entry. You do not need to break the law of the United States to seek  
2 asylum.”); *see also* Ex. 17 ¶ 16 (“I decided to keep waiting for our turn to cross  
3 because I wanted to do things the right way and follow the law.”); Ex. 22 ¶ 9 (“We  
4 put our names on the list because we believed in the process.”). But at the same time,  
5 and as Plaintiffs have alleged in detail, Defendants have been choking off access to  
6 POEs and illegally preventing asylum seekers from entering the United States to  
7 access the asylum process, as explained above. *See* Ex. 2 at 5-7.

8         The Asylum Ban applies to any noncitizen who “enters, attempts to enter, or  
9 arrives in the United States . . . on or after July 16, 2019.” 8 C.F.R. § 208.13(c)(4).  
10 Thus, if an asylum seeker had presented herself at a POE before July 16, 2019, and  
11 CBP had complied with its mandatory duty to inspect and process her pursuant to 8  
12 U.S.C. § 1225, the Asylum Ban would not apply to her today because she would  
13 have “enter[ed]” before the cut-off date.

14         Based on Defendants’ acknowledgement that they engage in metering on a  
15 border-wide basis, Dkt. 283 at ¶¶ 3, 7, 54, 65, 67–69, 79, 83, 85, 226, 258, 272, 273;  
16 Ex. 1; Ex. 2 at 5-7, it is clear that a subset of non-Mexican class members—who are  
17 now ineligible for asylum under the Asylum Ban—were subjected to the metering  
18 policy *before* the Asylum Ban went into effect on July 16, 2019, and but for the  
19 metering policy, would have entered the United States before that date. These  
20 individuals are the members of the provisional class the Individual Plaintiffs seek to  
21 represent for purposes of this motion.<sup>6</sup> If the Asylum Ban is applied to this subset of  
22 class members before the Court’s ultimate decision in this case, then those class  
23 members will be denied any chance to obtain effective relief. This motion seeks

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1 injunctive relief to preserve those class members’ eligibility for asylum, given that  
2 the Asylum Ban would not have affected them but for Defendants’ illegal use of  
3 metering, which forced them to stay in Mexico longer than they otherwise would  
4 have.

5 **LEGAL STANDARD**

6 By this motion, Plaintiffs seek a preliminary injunction to preserve the status  
7 quo and prevent the “irreparable loss of rights” before a final judgment on the merits.  
8 *Textile Unlimited, Inc. v. A. BMH and Co.*, 240 F.3d 781, 786 (9th Cir. 2001).  
9 Specifically, they seek an order preventing the government from applying the  
10 categorical Asylum Ban to provisional class members, who would have arrived in  
11 the United States prior to July 16, 2019, but for Defendants’ illegal metering policy.

12 When moving for a preliminary injunction, a plaintiff “must establish that he  
13 is likely to succeed on the merits, that he is likely to suffer irreparable harm in the  
14 absence of preliminary relief, that the balance of equities tips in his favor, and that  
15 an injunction is in the public interest.” *Saravia for A.H. v. Sessions*, 905 F.3d 1137,  
16 1142 (9th Cir. 2018) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20  
17 (2008)). “When the government is a party, these last two factors merge.” *Drakes Bay*  
18 *Oyster Co. v. Jewell*

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1 claims. *See Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179  
2 F.3d 725, 732 (9th Cir. 1999) (“The function of a preliminary injunction is to

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1 satisfy the irreparable harm prong.

2           To begin, absent the judicial relief requested, provisional class members will  
3 be deprived of their present entitlement to challenge the legality of the metering

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1 irreparable harm, *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 864  
2 (N.D. Cal. 2018), as do persecution, torture and death. *Hernandez v. Sessions*, 872  
3 F.3d 976, 994 (9th Cir. 2017) (“any deprivation of constitutional rights  
4 ‘unquestionably constitutes irreparable injury’”) (citation omitted); *Leiva-Perez v.*  
5 *Holder*

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If this Court finds for the provisional class members on the merits of their claims, appropriate injunctive relief would include an order directing that those class

1 gathering the evidence necessary to prove their claims, and they are likely to succeed  
2 on the merits. At the very least, under the *Cottrell* standard, Plaintiffs have raised  
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1 statistics demonstrate that they have been limiting the number of “inadmissibles,” or  
2 noncitizens “presenting themselves to seek humanitarian protection under our laws,”  
3 to around 10,000 per month for at least the past year. *See* Ex. 34 (illustrating that the  
4 number of “inadmissibles” has fluctuated around 10,000 per month since October

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1 by shirking their statutory duties to inspect and process asylum seekers at POEs.

2           Second, publicly available data and the limited discovery produced strongly  
3 support Plaintiffs' claim that Defendants' explanation of metering is pretextual.

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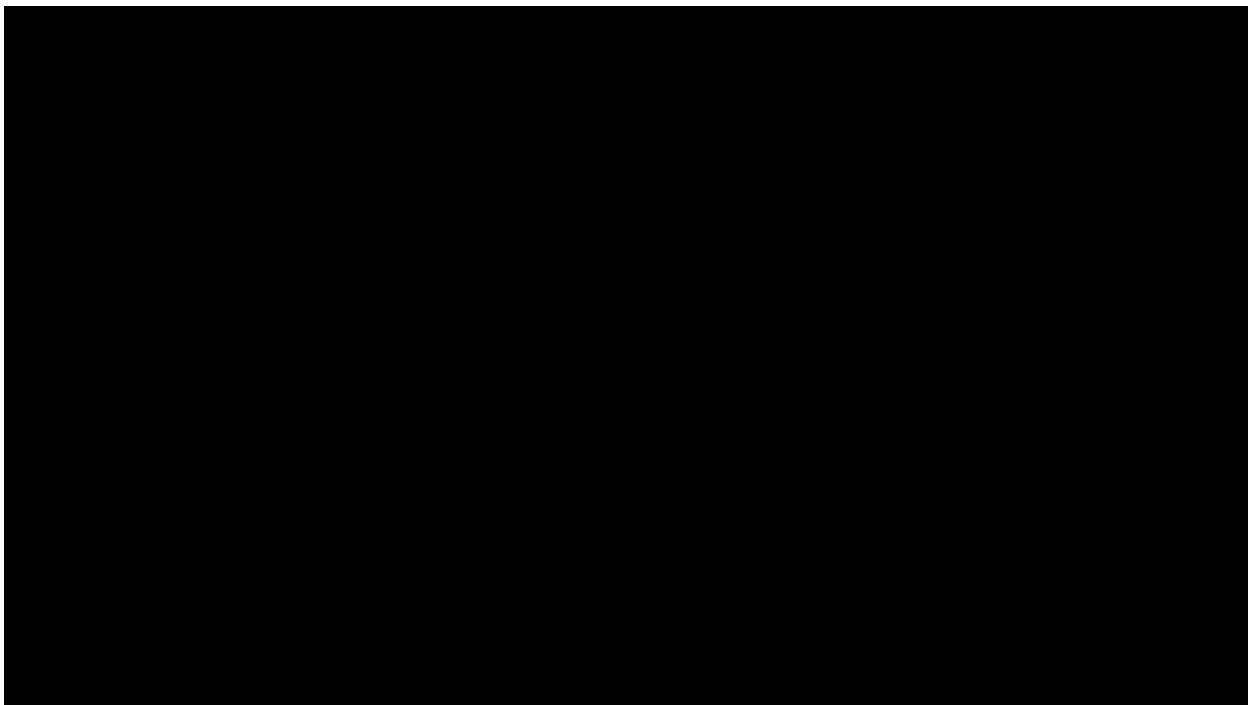
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As shown above, [redacted]



Even when accounting for such factors as the need to house vulnerable migrant populations (such as juveniles) separately from other migrants, the Government has offered no valid justification for its decision to [redacted].

The same trend can be seen border-wide. CBP’s own statistics show that the Government has far more capacity to process asylum seekers than it is currently using. Between July 2015 and January 2017, before the Government implemented its border-wide metering policy, CBP processed 12,651 undocumented migrants per month. Ex. 23 at ¶ 6(a). Between June 2018 and July 2019, CBP processed only 9,904 undocumented migrants per month, a 28% decrease. Ex. 23 at ¶ 6(b)-(c). This reduction in migrant processing cannot be explained by other factors. From 2015 to 2019 CBP’s budget increased from \$12.8 billion to \$14.7 billion. Ex. 44 at fig. 2. In 2017 and 2018, the number of “frontline” CBP officers increased. Ex. 45 at 6.



1 Moreover, in 2019, CBP is scheduled to complete a \$741 million expansion of the  
2 San Ysidro POE, which includes an expansion of the secondary inspection and  
3 detention capabilities of the POE. Ex. 46 at 2.

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15 Third, circumstantial evidence, including the observations of human rights  
16 advocates and DHS monitors, further bolsters Plaintiffs’ claim of pretext. Ex. 23 at  
17 5; Ex. 24 at 15 (Amnesty International report of an interview with high-level CBP  
18 officials in California, in which they stated that “CBP has only actually reached its  
19 detention capacity a couple times per year and during ‘a very short period’ in 2017”);  
20 *id.* at 23 (noting that in a conversation with Amnesty International, an INM [the  
21 Mexican immigration agency] delegate in Baja California expressed doubt about  
22 CBP’s claims of capacity constraints); Ex. 2 at 8 (“[T]he OIG team did not observe  
23 severe overcrowding at the ports of entry it visited.”). Under Defendants’ illegal  
24 metering policy, only asylum seekers are screened out of the line of noncitizens  
25 awaiting inspection at ports of entry. Thus, by design, metering targets only asylum  
26 seekers and deprives them—and no other “applicants for admission”—of the  
27 statutorily-required inspection process. Ex. 2 at 6; Ex. 4 ¶¶ 5-8; Ex. 15 ¶ 9; Ex. 22  
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1 ¶ 8; *see also* Dkt. 280 at 61.

2 Every individual who was metered over the past year and a half—*i.e.*, denied  
3 the inspection and processing the INA requires—experienced an individual  
4 “turnback” in violation of CBP’s mandatory inspection and processing duties under  
5 the INA, which is actionable under the APA § 706(1). Given Defendants’  
6 acknowledgement that they are metering at POEs along the southern border, and the  
7 likelihood that Plaintiffs will ultimately prove that Defendants’ capacity excuse is  
8 pretextual, Plaintiffs easily meet the standandaCBP e purnback”9oz3ch 57.9(u)- Tm

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1 the metering policy. As detailed above, Defendants concede that they have a border-  
2 wide practice called “metering” that is memorialized in guidance distributed to all  
3 ports. *See supra* section A. They have implemented this guidance and they are in  
4 fact metering on a border-wide basis. Ex. 3 ¶ 6; Ex. 4 ¶¶ 6-8; Ex. 5 ¶ 4 (Hidalgo);  
5 Ex. 7 ¶ 14 (El Paso); Ex. 8 ¶ 5 (San Diego); Ex. 14 ¶ 10 (Brownsville); Ex. 22 ¶ 7  
6 (Laredo); Ex. 23 at 2-5; Ex. 24 at 11, 15-22; Ex. 47 ¶ 8 (Calexico). Moreover,  
7 Defendants’ guidance is written proof of a policy that, at a minimum, encompasses  
8 metering, and that satisfies the statutory definition of a “final agency action.” *Bennett*  
9 *v. Spear*, 520 U.S. 154, 177-78 (1997) (defining “final agency action.”) And lastly,  
10 as described in detail above, *supra* section A, Plaintiffs are likely to succeed in  
11 demonstrating that Defendants’ claims of lack of capacity are pretextual and that the  
12 metering policy is based on the unlawful goal of deterring and restricting the number  
13 of asylum seekers who present themselves at POEs.

### 14 **3. The Metering Policy Violates the Due Process Clause.**

15 Because Plaintiffs have statutory rights under the INA and Sections 706(1)  
16 and 706(2) of the APA, Dkt. 280 at 76, they cannot be deprived of those rights  
17 without due process, which this Court has already held protects them. As with the  
18 statutory claims, the Court has made clear that it agrees with Plaintiffs’  
19 understanding of the law underlying their constitutional claims. *Id.* at 69-77. If  
20 Plaintiffs show that Defendants “failed to discharge their mandatory duties under the  
21 relevant [statutory] provisions,” Plaintiffs simultaneously prove a due process  
22 violation. *Id.* at 77. Plaintiffs have already established a likelihood of success on the  
23 merits of their statutory claims, thereby also establishing a likelihood of success on  
24 the merits of their due process claim.

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**C. The Balance of Equities Tips Sharply in Provisional Class Members' Favor and an Injunction Is in the Public Interest.**

In evaluating the final preliminary injunction factors—the balance of the equities and the public interest—a court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the request for relief,” and “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 376-77.

The effect on Defendants of granting this injunction is minimal. It would require the government simply to ensure that provisional class members remain eligible for asylum, which would have been the case had they not been subject to Defendants’ illegal metering policy. It is hard to envision how requiring the Government to apply decades-old law to an identified group of people who relied on

1 15 ¶¶ 2-3, 11; Ex. 16 ¶¶ 2-6, 10, 13; Ex. 17 ¶¶ 2, 4-6, 15; Ex. 18 ¶¶ 2, 4, 10, 13; Ex.  
2 19 ¶¶ 2, 4-5; Ex. 20 ¶¶ 2, 4-7; Ex. 21 ¶¶ 2, 5-8; Ex. 22 ¶¶ 2, 4, 11-12; Ex. 48 ¶ 12.

3           Moreover, it is in the public interest to “ensur[e] that ‘statutes enacted by  
4 [their] representatives’ are not imperiled by executive fiat,” or a combination of fiats,  
5 as in this case.

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1 **II. The All Writs Act Independently Authorizes the Court to Prevent the**  
2 **Government from Prematurely Extinguishing Provisional Class**  
3 **Members' Claims Through the Asylum Ban.**

4 The All Writs Act (“AWA”) separately authorizes the limited relief Plaintiffs  
5 seek, in order to preserve the court’s jurisdiction to adjudicate the claims before it  
6 despite the government’s attempt to extinguish them. See 28 U.S.C. § 1651(a)  
7 (authorizing courts to “issue all writs necessary or appropriate in aid of their  
8 respective jurisdictions and agreeable to the usages and principles of law”). The Act  
9 encompasses a federal court’s power “to preserve [its] jurisdiction or maintain the  
10 status quo by injunction pending review of an agency’s action through the prescribed  
11 statutory channels,” *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966), and it  
12 “should be broadly construed,” *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1972)  
13 to “achieve all rational ends of law,” *California v. M&P Investments*, 46 F. App’x  
14 876, 878 (9th Cir. 2002) (quoting *Adams v. United States*, 317 U.S. 269, 273 (1942)).

15 Whereas a “traditional” injunction requires a party to state a claim, an AWA  
16 injunction requires only that a party point to ai2y t W4(at)-4.f -720 r92 3(m)7. integrity of s  
17 or prospective proceeding, or of some past order of judgment. *Klay v. United*  
18 *Health Group, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004) (a court may enjoin almost  
19 any conduct “which, left unchecked, would have . . . the practical effect of  
20 diminishingi2yhe court's powe4 to bring 2yhe litigation to a natural conclusion.”). Thus,

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1 adequate judicial review. *See Securities and Exch. Comm'n v. G.C. George Sec.,*  
2 *Inc.* 637 F.2d 685, 687–88 (9th Cir. 1981) (AWA authorized district court to stay  
3 administrative proceeding involving issues related to a settlement over which the  
4 district court retained jurisdiction). The AWA is so broad as to authorize a district  
5 court to enjoin parties from bringing parallel litigation if it would disrupt the proper  
6 adjudication of pending cases before the court. *See In re Baldwin-United Corp.*  
7 *(Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328 , 333 (2d Cir. 1985)<sup>10</sup>  
8 And, it unambiguously applies in the immigration context. The Second Circuit has  
9 used the All Writs Act to stay an order of deportation “in order to safeguard the  
10 court’s appellate jurisdiction,” in order to preserve its ability to hear subsequent  
11 appeals by the Petitioner. *Michael v. INS*, 48 F.3d 657, 664 (2d Cir. 1995).

12           Thus, the Court is authorized under the AWA to issue the limited injunction  
13 Plaintiffs seek merely to preserve its jurisdiction over the claims that have been  
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**CERTIFICATE OF SERVICE**

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