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14 **UNITED STATES DISTRICT COURT**
 15 **SOUTHERN DISTRICT OF CALIFORNIA**

17 AL OTRO LADO, INC, *et al.*,

18 Plaintiffs,

19 v.

21 CHAD F. WOLF, *et al.*,

22 Defendants.

Case No.: 3:17-cv-02366-BAS-KSC

**BRIEF OF HAITIAN BRIDGE
 ALLIANCE, INSTITUTE FOR
 JUSTICE & DEMOCRACY IN HAITI,
 IRA KURZBAN, AND IRWIN
 STOTZKY AS AMICI CURIAE IN
 SUPPORT OF PLAINTIFFS' MOTION
 FOR SUMMARY JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1 and CivLR 40.2. proposed *Amici curiae* Haitian Bridge Alliance (“HBA”), Institute for Justice & Democracy in Haiti (“IJDH”), Ira Kurzban, and Irwin Stotzky (together, the “*Amici*”), by their undersigned counsel, hereby certify that *Amici* have no parent corporation and that no publicly held corporation owns 10% or more of their stock, if any.

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TABLE OF AUTHORITIES

Cases

East Bay Sanctuary Covenant v. Trump,
950 F.3d 1242 (9th Cir. 2020) 19

Haitian Ctrs. Council v. Sale,
823 F. Supp. 1028 (E.D.N.Y. 1993) 10

Haitian Refugee Ctr. v. Smith,
676 F.2d 1023 (5th Cir. 1982) 5, 6

Haitian Refugee Ctr. v. Civiletti,
503 F. Supp. 442 (S.D. Fla. 1980) 5, 6

Jean v. Nelson,
472 U.S. 846 (1985) 8

Louis v. Nelson,
544 F. Supp. 973 (S.D. Fla. 1982) 7, 8

Munyua v. U.S.,
2005 U.S. Dist. LEXIS 11499 (N.D. Cal. 2005) 14

Saget v. Trump,
375 F. Supp. 3d 280 (E.D.N.Y. 2019) 12

Sale v. Haitian Ctrs. Council,
509 U.S. 155 (1993) 10

Federal Authorities

Alien Tort Statute, 28 U.S.C. § 1350 15

Administrative Procedure Act, 5 U.S.C. § 704 15

CivLR 40.2 i

Cuban Adjustment Act, Pub. L. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (1988)) 7

Federal Rule of Civil Procedure 7.1 i

Haitian Refugee Immigration Fairness Act of 1998 (“HRIFA”) 11, 12

1 Immigration and Nationality Act (“INA”) 8 U.S.C. §§ 1225, 1229..... 2, 14

2 Implementation of Haitian Family Reunification Parole Program ,

3 79 Fed. Reg. 75,581 (Dec. 18. 2014)..... 12

4 Naturalization Act of 1790, 1 Stat. 103 3

5 Naturalization Act of 1870, Pub. L. 41-254, § 7, 16 Stat. 254 3

6 Nicaraguan Adjustment and Central American Relief Act

7 (“NACARA”), Pub. L. No. 105-100, 111 Stat. 2160 (1997) (as

8 amended, Pub. L. No. 105-139, 111 Stat. 2644 (1997) 11

9 U.S. Const. amend. V 15

10 **Other Authorities**

11 A.G. Mariam, *International Law and the Preemptive Use of State*

12 *Interdiction Authority on the High Seas: The Case of Suspected*

13 *Illegal Haitian Immigrants Seeking Entry Into the U.S.*, 12 Md. J.

14 *Int’l L. & Trade* 211 (1988) 9, 10

15 Alex Stepick, *Haitian Boat People: A Study in the Conflicting Forces*

16 *Shaping U.S. Immigration Policy*, 45 U.S. Immigr. Pol’y 163

17 (1982) 5, 6

18 Ariane Francisco & Josefina Salomon, *Mexican Officials Extort*

19 *Asylum Seekers on Way to USA*, InSight Crime (Mar. 25, 2019),

20 [https://www.insightcrime.org/news/analysis/mexican-officials-](https://www.insightcrime.org/news/analysis/mexican-officials-extort-asylum-seekers/)

21 [extort-asylum-seekers/](https://www.insightcrime.org/news/analysis/mexican-officials-extort-asylum-seekers/) 16

22 *Black Immigrants Lives Are Under Attack*, The Refugee and

23 *Immigrant Center for Education and Legal Services* (2020),

24 [https://www.raicestexas.org/2020/07/22/black-immigrant-lives-](https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/)

25 [are-under-attack/](https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/) 18

26 C. Nicholas Cuneo and Hannah Janeway, *From Icebox to Tinderbox—*

27 *A View from the Southern Border*, N. Engl. J. Med. 2020, 383:

28 e81(2) (Sept. 24, 2020),

<https://www.nejm.org/doi/pdf/10.1056/NEJMp2009985?articleToo>

[ls=true](https://www.nejm.org/doi/pdf/10.1056/NEJMp2009985?articleToo) 17

1 Carl Lindskoog, *How the Haitian refugee crisis led to the detention of*
 2 *immigrants*, Washington Post (Apr. 9, 2018), <https://www.washing>
 3 [tonpost.com/news/made-by-history/wp/2018/04/09/how-the-](https://www.washingtonpost.com/news/made-by-history/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-indefinite-detention-of-immigrants/)
 4 [haitian-refugee-crisis-led-to-the-indefinite-](https://www.washingtonpost.com/news/made-by-history/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-indefinite-detention-of-immigrants/)
 5 [immigrants/](https://www.washingtonpost.com/news/made-by-history/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-indefinite-detention-of-immigrants/) 9, 13

6 Carlos Ortiz Miranda, *Haiti and the U.S. in the 1980s and 1990s: Refugees, Immigration, and Foreign Policy*, 32 San Diego L. Rev. 673 (1995) 10

7 Dan Sperling, *In 1825, Haiti Paid France \$21 Billion To Preserve Its Independence—Time for France To Pay It Back*, Forbes (Dec. 6, 2017), [https://www.forbes.com/sites/realspin/2017/12/06/in-1825-](https://www.forbes.com/sites/realspin/2017/12/06/in-1825-haiti-gained-independence-from-france-for-21-billion-its-time-for-france-to-pay-it-back/#2a3d48e7312b)
 8 [haiti-gained-independence-from-france-for-21-billion-its-time-for-](https://www.forbes.com/sites/realspin/2017/12/06/in-1825-haiti-gained-independence-from-france-for-21-billion-its-time-for-france-to-pay-it-back/#2a3d48e7312b)
 9 [france-to-pay-it-back/#2a3d48e7312b](https://www.forbes.com/sites/realspin/2017/12/06/in-1825-haiti-gained-independence-from-france-for-21-billion-its-time-for-france-to-pay-it-back/#2a3d48e7312b)..... 4

10 Deborah E. Anker, *Determining Asylum Claims in the U.S.: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. Rev. L. & Soc. Change 433, 455 (1992) 6, 7

11 DHS, Off. of Inspector General, *Special Review-Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018) 18

12 Elizabeth M. Iglesias, *Foreword: Identity, Democracy, Communicate Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. Miami L. Rev. 575, 601 (1999) 11

13 Embassy of Haiti in Washington D.C., [http://www.haiti.org/haiti-at-a-](http://www.haiti.org/haiti-at-a-glance)
 14 [glance](http://www.haiti.org/haiti-at-a-glance). (last visited Oct. 26, 2020) 18

15 Geneva Sands, *Trump admin ends family-based reunification programs for Haitians and Filipino World War II vets* (Aug. 2, 2019), [https://www.cnn.com/2019/08/02/politics/trump-end-two-](https://www.cnn.com/2019/08/02/politics/trump-end-two-family-reunification-programs/index.html)
 16 [family-reunification-programs/index.html](https://www.cnn.com/2019/08/02/politics/trump-end-two-family-reunification-programs/index.html) 12

17 Harold Koh *et al.*, *The Haiti Paradigm in United States Human Rights Policy*, 103 Yale L.J. 2391 (1994) 9

18 Hillel R. Smith, *The Department of Homeland Security’s Reported “Metering” Policy: Legal Issues* (Aug. 13 2019) <https://fas.org/sgp/crs/homesecc/LSB10295.pdf> 15

19

20

21

22

23

24

25

26

27

28

1 Ibram X. Kendi, *The Day Shithole Entered the Presidential Lexicon*
 2 (Jan. 13, 2019),
 3 <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/>..... 13

4 Joe Penney, *Despite closed borders, the US is still deporting Africans*
 5 *during the pandemic* (July 27, 2020),
 6 <https://qz.com/africa/1885398/us-ice-deporting-africans-even-with-closed-borders-due-to-covid/> 13, 17

7 Jordan E. Dollar and Allison D. Kent, *In Times of Famine, Sweet*
 8 *Potatoes Have No Skin: A Historical Overview and Discussion of*
 9 *Post-Earthquake U.S. Immigration Policy Towards the Haitian*
 10 *People* 12

11 Julian Borger, *U.S. Ice officers ‘used torture to make Africans sign*
 12 *own deportation orders’* (Oct. 22, 2020),
 13 <https://www.theguardian.com/us-news/2020/oct/22/us-ice-officers-allegedly-used-torture-to-make-africans-sign-own-deportation-orders>..... 14

14 Karla McKanders, *Immigration and Blackness: What’s Race Got to*
 15 *Do With It*, 44 Human Rights Magazine No. 1 (May 16, 2019),
 16 https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/immigration-and-blackness/ 13, 18

17 Kira Olsen-Medina & Jeanne Batalova, *Haitian Immigrants in the*
 18 *U.S.*, Migration Policy Institute (Aug. 12, 2020),
 19 <https://www.migrationpolicy.org/article/haitian-immigrants-united-states-2018> 15

20 Kirk Simple, *‘There is No Hope’: Crisis Pushes Haiti to Brink of*
 21 *Collapse*, N.Y. Times (Oct. 21, 2019)..... 16

22 Laura Ley, *The American dream of Haitians ends at the border*
 23 *between Tijuana and San Diego*, Univision Noticias (Sept. 28,
 24 2016), <https://www.univision.com/noticias/amexica/el-sueno-americano-de-los-haitianos-acaba-en-la-frontera-entre-tijuana-y-san-diego> 16

25 Letter to Biden (Oct. 13, 2020), <http://www.ijdh.org/wp-content/uploads/2020/10/Biden-Harris-Letter-10-2020-k-grouped-FINAL-full-letter-2.pdf>..... 13

26
 27
 28

1 Mae M. Ngai, *The Architecture of Race in American Immigration*
 2 *Law: A Reexamination of the Immigration Act of 1924*,
 3 86 J. Am. Hist. 67 (1999)..... 4

4 Malissia Lennox, Note, *Refugees, Racism, and Reparations: A*
 5 *Critique of the U.S.’ Haitian Immigration Policy*, 45 Stan. L. Rev.
 6 687 (1993)..... 4, 5, 7

7 Maya Srikrishnan, *Border Report: Surviving in Tijuana Has Gotten*
 8 *Even Harder for Haitian Migrants*, Voice of San Diego (July 20,
 9 2020), [https://www.voiceofsandiego.org/topics/news/border-](https://www.voiceofsandiego.org/topics/news/border-report-surviving-in-tijuana-has-gotten-even-harder-for-haitian-migrants/)
 10 [report-surviving-in-tijuana-has-gotten-even-harder-for-haitian-](https://www.voiceofsandiego.org/topics/news/border-report-surviving-in-tijuana-has-gotten-even-harder-for-haitian-migrants/)
 11 [migrants/](https://www.voiceofsandiego.org/topics/news/border-report-surviving-in-tijuana-has-gotten-even-harder-for-haitian-migrants/) 16

12 Nancy Adossi, et al., *Black Lives at the Border*, Black Alliance for
 13 Just Immigration (Jan. 2018), [http://baji.org/wp-](http://baji.org/wp-content/uploads/2020/03/black-lives-at-the-borderfinal-2.pdf)
 14 [content/uploads/2020/03/black-lives-at-the-borderfinal-2.pdf](http://baji.org/wp-content/uploads/2020/03/black-lives-at-the-borderfinal-2.pdf)..... 18

15 National Immigrant Justice Center, *A Better Way: Community-Based*
 16 *Programming As An Alternative to Immigrant Incarceration* (Apr.
 17 2019), [https://immigrantjustice.org/research-items/report-better-](https://immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration)
 18 [way-community-based-programming-alternative-immigrant-](https://immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration)
 19 [incarceration](https://immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration)..... 7

20 Maya Averbuch, *Stranded in Tijuana: A Forgotten Community of*
 21 *Haitians with No Place to Go*, The Progressive (Apr. 1,
 22 2018), [https://progressive.org/magazine/stranded-in-tijuana-](https://progressive.org/magazine/stranded-in-tijuana-immigration-haiti/)
 23 [immigration-haiti/](https://progressive.org/magazine/stranded-in-tijuana-immigration-haiti/) 16

24 Rachel Ida Buff, *How President Trump is dismantling*
 25 *the world’s refugee regime*, Washington Post (Feb. 11, 2019), [https](https://www.washingtonpost.com/outlook/2019/02/11/why-president-trump-has-won-immigration-standoff-even-if-he-doesnt-get-wall-funding/)
 26 [://www.washingtonpost.com/outlook/2019/02/11/why-president-](https://www.washingtonpost.com/outlook/2019/02/11/why-president-trump-has-won-immigration-standoff-even-if-he-doesnt-get-wall-funding/)
 27 [trump-has-won-immigration-standoff-even-if-he-doesnt-get-wall-](https://www.washingtonpost.com/outlook/2019/02/11/why-president-trump-has-won-immigration-standoff-even-if-he-doesnt-get-wall-funding/)
 28 [funding/](https://www.washingtonpost.com/outlook/2019/02/11/why-president-trump-has-won-immigration-standoff-even-if-he-doesnt-get-wall-funding/) 8

29 Rick Jervis, *At US-Mexico border, migrants from Africa, Haiti wait to*
 30 *seek asylum*, USA Today (June 4, 2019),
 31 <https://amp.usatoday.com/amp/1319996001>. 18

32 Robbie Whelan, *Violence Plagues Migrants Under U.S. ‘Remain in*
 33 *Mexico’ Program*, Wall Street Journal (Dec. 28, 2019)..... 24

1 Shayna S. Cook, *The Exclusion of HIV-Positive Immigrants Under the*
 2 *Nicaraguan Adjustment and Central American Relief Act and the*
 3 *Haitian Refugee Immigration Fairness Act*, 99 Mich L. Rev. 452
 (2000) 11

4 Southern Poverty Law Center, *The Attorney General’s Judges: How the*
 5 *U.S. Immigration Courts Became a Deportation Tool*
 6 (June 2019), [https://www.splcenter.org/20190625/attorney-generals-](https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool)
[judges-how-us-immigration-courts-became-deportation-tool](https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool)..... 6

7 Thomas Reinhardt, *200 Years of Forgetting: Hushing up the Haitian*
 8 *Revolution*, 35 J. Black Stud. 246 (2005) 4

9 Tom Jawetz & Scott Shuchart, *Language Access Has Life-or-Death*
 10 *Consequences for Migrants*, Center
 11 for American Progress (Feb. 20, 2019), [https://www.americanprogr](https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/)
 12 [ess.org/issues/immigration/reports/2019/02/20/466144/language-](https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/)
[access-life-death-consequences-migrants/](https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/)..... 18

13 *U.S. Immigration Policy on Haitian Migrants* (2011),
 14 [https://www.everycrsreport.com/files/20110517_RS21349_c6a8bc](https://www.everycrsreport.com/files/20110517_RS21349_c6a8bc391c450f3244b0151c20deab7110d31290.pdf)
 15 [391c450f3244b0151c20deab7110d31290.pdf](https://www.everycrsreport.com/files/20110517_RS21349_c6a8bc391c450f3244b0151c20deab7110d31290.pdf) 9, 11

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1 **INTRODUCTION AND STATEMENT OF INTEREST**

2 *Amici* HBA, IJDH, Ira Kurzban and Irwin Stotzky respectfully submit this
3 brief in support of the Motion for Summary Judgment filed by Plaintiffs *Al Otro*
4 *Lado, Inc., et al.* (Dkt. #535).¹

5 HBA is a non-profit community organization based in San Diego that
6 provides direct services to asylum seekers and other detained immigrants in
7 California, and across the U.S., from Haiti and Africa. The organization responds
8 to the ongoing Haitian immigration crisis that has affected Southern California and
9 the U.S. more broadly as Haitians attempt to seek refuge from the tumultuous
10 political and economic conditions in Haiti, and/or acclimate to new lives in
11 America.

12 Similarly, IJDH is a U.S.-based, non-profit human rights organization that
13 joins human rights practitioners in the U.S. and Haiti to advance justice for Haitian
14 communities in Haiti and abroad through pursuit of legal claims, dissemination of
15 information about human rights abuses, advocacy, and partnership with grassroots
16 organizations.

17 Messrs. Kurzban and Stotzky are experts in the field of immigration,
18 particularly as it pertains to Haitian migrants. Mr. Kurzban is a founding partner in
19 the law firm of Kurzban, Kurzban, Tetzeli, & Pratt P.A. in Miami and chair of the
20 firm’s immigration department. Mr. Stotzky is Professor of Law at the University
21 of Miami School of Law. For over thirty years, Mr. Kurzban and Professor
22 Stotzky have advocated for Haitian refugees in constitutional and human rights
23 cases, including several before the U.S. Supreme Court.

24 _____
25 ¹ The parties to this action have consented to the filing of this brief. No party’s
26 counsel authored this brief in whole or in part. No party or counsel to any party
27 contributed money intended to fund preparing or submitting this brief. No person
28 other than *Amici*, their members, or their counsel contributed money that was
intended to fund preparing or submitting the brief. “Dkt. #” refers to documents
filed in the instant action.

1 *Amici* have a direct and deep-seated interest in this litigation, as Haitian
2 migrants account for a significant number of those being unlawfully turned back
3 from multiple ports of entry (“POE”) under Defendants’ present metering policy.
4 *Amici*’s unique experience and perspective concerning the plight of Haitian
5 migrants is directly relevant to the substantive issues to be decided in this case.
6 *Amici* therefore respectfully ask that this Court consider this brief in connection
7 with Plaintiffs’ Motion for Summary Judgment.

8 **SUMMARY OF ARGUMENT**

9 “Metering” constitutes an unprecedented infringement on the rights of
10 foreign migrants trying to enter America. In contradiction to the clear processes
11 established by the Immigration and Nationality Act (“INA”), 8 U.S.C. §§ 1225,
12 1229, Defendants’ metering policy mandates summarily turning back asylum
13 seekers and refugees at the border before they are ever given a meaningful
14 opportunity to plead their legal case for entry. With no safe home country to return
15 to, migrants wait, in squalid and dangerous conditions, for their opportunity to seek
16 asylum. Haitians are disproportionately impacted by metering due to longstanding
17 racial and ethnic animus. Haitians have historically been denied access to the U.S.,
18 and continue to be disproportionately denied such access, despite conditions that
19 clearly entitle them to refuge under the law.

20 Looking back on the history of relations between Haiti and the U.S., it is
21 clear that anti-Haitian sentiment drives U.S. immigration policy. This
22 discrimination and disparate treatment continue to this day, as Haitians struggle to
23 recover from the 2010 earthquake, Hurricane Matthew in 2016, and the largest
24 cholera outbreak in modern times, all of which have led to increased economic and
25 political turmoil. Haitians validly seek asylum in America, only to be
26 systematically denied access due to Defendants’ illegal metering policy. This
27 policy reflects yet another discriminatory measure designed to make it more
28 difficult for Haitian immigrants to apply for asylum. It should be struck down to

1 ensure that domestic and international laws are respected, and that all migrants are
2 treated equally under U.S. immigration policy.

3 **ARGUMENT**

4 An examination of the history of U.S. discrimination against Haitians and
5 Haitian migration to the U.S. underscores that Defendants’ present metering policy
6 constitutes yet the latest of a long series of illegal and discriminatory policies
7 designed to keep Haitian and other Black migrants out of the U.S. The history of
8 U.S. anti-Haitian animus and disparate treatment is long and sordid, and
9 Defendants will continue that tradition unless they are forced by the Court to
10 follow the law as it was enacted. This is a matter of utmost urgency because Haiti
11 is currently experiencing a profound economic and political crisis. Accordingly,
12 the metering policy should be struck down.

13 **I. U.S. IMMIGRATION POLICY HAS LONG DISCRIMINATED**
14 **AGAINST HAITIAN MIGRANTS.**

15 To understand the full implications of Defendants’ metering policy, it is
16 crucial to understand the plight of Haitian migrants and the legacy of injustices that
17 have been perpetrated against Haitians and other Black migrants.

18 The U.S. has a long history of discrimination in the application of its
19 immigration laws. In the first codification of U.S. naturalization law, the
20 Naturalization Act of 1790, Congress specified that “any alien, *being a free white*
21 *person*” could apply for citizenship. Naturalization Act of 1790, § 1, 1 Stat. 103,
22 (emphasis added). It was not until 1870, after the passage of the Fourteenth
23 Amendment, that the naturalization laws were extended to persons of “African
24 nativity and . . . descent.” Naturalization Act of 1870, Pub. L. 41-254, § 7, 16 Stat.
25 254, 256.

1 A. **American Influence Led to the Destruction of Haiti’s Economy**
2 **and the Rise of Authoritarianism, Forcing Haitians to Flee.**

3 America’s history has long been intertwined with Haiti’s. While the U.S.
4 was enacting discriminatory immigration laws, the enslaved people of Haiti were
5 fighting to overthrow the richest colony in the Americas, the French colony of
6 Saint Domingue. *See generally*, Thomas Reinhardt, *200 Years of Forgetting:*
7 *Hushing up the Haitian Revolution*, 35 J. Black Stud. 246 (2005). In 1804, Haiti
8 declared its independence and became the first country to abolish slavery,
9 threatening the U.S. racial hierarchy and driving fears in the U.S. that news of the
10 Haitian Revolution could lead to violent uprisings by enslaved people at home. *Id.*
11 at 247, 249-51. In response, the U.S. refused to recognize the new Haitian state
12 and helped France impose “reparations” with high interest rates on Haiti—paid to
13 former French slaveholders for their lost slaves—that crippled the young country’s
14 economy for decades. *See* Dan Sperling, *In 1825, Haiti Paid France \$21 Billion*
15 *To Preserve Its Independence—Time for France To Pay It Back*, Forbes (Dec. 6,
16 2017), [https://www.forbes.com/sites/realspin/2017/12/06/in-1825-haiti-gained-](https://www.forbes.com/sites/realspin/2017/12/06/in-1825-haiti-gained-independence-from-france-for-21-billion-its-time-for-france-to-pay-it-back/#2a3d48e7312b)
17 [independence-from-france-for-21-billion-its-time-for-france-to-pay-it-](https://www.forbes.com/sites/realspin/2017/12/06/in-1825-haiti-gained-independence-from-france-for-21-billion-its-time-for-france-to-pay-it-back/#2a3d48e7312b)
18 [back/#2a3d48e7312b](https://www.forbes.com/sites/realspin/2017/12/06/in-1825-haiti-gained-independence-from-france-for-21-billion-its-time-for-france-to-pay-it-back/#2a3d48e7312b).

19 Following its independence, Haiti served as America’s military stronghold
20 in the Caribbean, and the U.S. military occupied Haiti from 1915 to 1934. *See*
21 Malissia Lennox, *Refugees, Racism, and Reparations: A Critique of the U.S.’*
22 *Haitian Immigration Policy*, 45 Stan. L. Rev. 687, 692 (1993) [hereinafter
23 “*Refugees, Racism and Reparation*”]. During that time, Congress passed the
24 Immigration Act of 1924, establishing new immigration laws under which the
25 whiteness of European immigrants was considered to “facilitate[] their
26 Americanization,” while non-European immigrants were racialized, rendering
27 them “unalterably foreign and unassimilable to the nation.” Mae M. Ngai, *The*
28

1 *Architecture of Race in American Immigration Law: A Reexamination of the*
2 *Immigration Act of 1924*, 86 J. Am. Hist. 67, 70 (1999).

3 By the time the U.S. exited Haiti, “twenty years of racism and exploitation
4 had created an economically crippled and politically bankrupt nation.” *Refugees,*
5 *Racism, and Reparations* at 695. Worse yet, the U.S.’s intervention left Haiti
6 vulnerable to authoritarianism, and the U.S. even supported Francois Duvalier’s
7 rise to the presidency in 1957. *Id.* at 696. The Duvalier regime has been called
8 “the most oppressive regime in the hemisphere,” and was responsible for the
9 deaths of over 30,000 people, leading hundreds of thousands of Haitians to flee for
10 safety. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 475-77 (S.D. Fla.
11 1980); *see also, Refugees, Racism, and Reparations*, at 696 n. 74. But America
12 turned them away.

13 **B. The Arrival of the Haitian “Boat People” and Accelerated**
14 **Processing To Remove Them.**

15 In 1972, Haitian migrants began arriving in Southern Florida at scale in
16 rickety and often unseaworthy boats. *See* Alex Stepick, *Haitian Boat People: A*
17 *Study in the Conflicting Forces Shaping U.S. Immigration Policy*, 45 U.S. Immigr.
18 Pol’y 163, 163 (1982). Upon arriving in Miami, migrants were typically met by
19 unsympathetic Immigration and Naturalization Service (“INS”) officials. *Id.* at
20 164. INS regularly contended that the Haitians were economic refugees merely
21 attracted to U.S. employment opportunities, rather than fleeing true political
22 persecution that would obligate the U.S. to protect Haitians under both domestic
23 and international law. *Id.* at 164-65.

24 In furtherance of this exclusionary practice, INS established a “Haitian
25 Program” in 1978. *See Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1029 (5th
26 Cir. 1982). Described (in Orwellian fashion) as “accelerated processing,” “[t]he
27 goal of the [Haitian] Program was to expel Haitian asylum applicants as rapidly as
28 possible.” *Civiletti*, 503 F. Supp. at 512-13, 519. As the court in *Civiletti*

1 observed, “[t]he existence of the program, and its impact, [were] uncontroverted.
2 All of the asylum claims were denied.” *Id.* at 510-11. A judicial determination
3 that the procedures used to process asylum claims were violations of due process
4 came too late for over 4,000 Haitians processed under the Haitian Program. *Smith*,
5 676 F.2d at 1039. Upon being returned to Haiti, persons who had fled and sought
6 asylum elsewhere were seen as opponents of the Duvalier regime and imprisoned,
7 persecuted, and in many cases, killed. *Civiletti*, 503 F. Supp. at 476-82.

8 **C. A Rise in the Use of Detention of Haitian Migrants as a Deterrent.**

9 In the early 1980s, immigration judges were removed from the purview of
10 INS. See Southern Poverty Law Center, *The Attorney General’s Judges: How the*
11 *U.S. Immigration Courts Became a Deportation Tool*
12 (June 2019), [https://www.splcenter.org/20190625/attorney-generals-judges-how-](https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool)
13 [us-immigration-courts-became-deportation-tool](https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool). The stated intent was “to increase
14 judicial independence and remove the appearance of prosecutorial bias.” *Id.* In
15 practice, however, “the newly formed immigration courts faced immediate critique
16 for their biased treatment of asylum seekers from Haiti and Central America.” *Id.*
17 at 11.

18 For example, an eighteen-month study that concluded in 1988 examined one
19 immigration court and reported that “although there existed extensive
20 documentation of human rights abuses and high levels of politically motivated
21 violence in Guatemala, Haiti, and El Salvador, the immigration court . . . granted
22 asylum to no Guatemalans or Haitians and granted asylum to only one Salvadoran
23 application.” Deborah E. Anker, *Determining Asylum Claims in the United States:*
24 *A Case Study on the Implementation of Legal Norms in an Unstructured*
25 *Adjudicatory Environment*, 19 N.Y.U. Rev. L. & Soc. Change 433, 455 (1992).
26 The study also found that immigration judges viewed asylum claims with
27 “presumptive skepticism” and “appeared to be reluctant to grant asylum claims
28 over the objections of the government’s attorney.” *Id.* at 450.

1 1. **Disparate Treatment of Haitian as Compared to Cuban**
2 **Migrants.**

3 The evident bias displayed by immigration courts and INS became even
4 more pronounced when Cuban refugees also began arriving to the U.S. in large
5 numbers. While Haitians were fleeing the U.S.-backed Duvalier regime, boats
6 began to leave South Florida for Cuba’s Mariel Harbor, kicking off the Mariel
7 Boatlift of 1980, during which some 125,000 Cuban migrants were brought to the
8 U.S. See *Louis v. Nelson*, 544 F. Supp. 973, 978 (S.D. Fla. 1982). By contrast to
9 Haitians, escaping Cubans were immediately greeted with preferential treatment.
10 See *Refugees, Racism, and Reparations* at 712-16. For example, under the Cuban
11 Adjustment Act, Pub. L. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. §
12 1255 (1988)), which remains in effect to this day, any native or citizen of Cuba or
13 their immediate relatives may apply for lawful permanent residence just one year
14 after inspection, admission, or parole in the U.S. *Refugees, Racism, and*
15 *Reparations*, at 716. Haitians, by contrast, were consistently portrayed as
16 economic refugees “lacking any political conviction.” *Louis*, 544 F. Supp. at 979.

17 Prior to the 1980s, the U.S. rarely jailed people for alleged immigration
18 violations. See National Immigrant Justice Center, *A Better Way: Community-*
19 *Based Programming As An Alternative to Immigrant Incarceration* (Apr. 2019),
20 [https://immigrantjustice.org/research-items/report-better-way-community-based-](https://immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration)
21 [programming-alternative-immigrant-incarceration](https://immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration). But as Haitian migrants
22 continued to arrive in the U.S., President Reagan convened a special task force to
23 address illegal immigration in 1981. *Louis*, 544 F. Supp. at 979. The task force
24 issued several recommendations, including that the U.S. return to a policy of
25 detaining migrants until they established a prima facie claim for admission, rather
26 than granting parole. *Id.* at 979-80. Thus, in 1983, the Mass Immigration
27 Emergency Plan was formed, requiring that 10,000 immigration detention beds be
28 located and ready for use at any given time. See Rachel Ida Buff, *How President*

1 *Trump* is dismantling
2 *the world's refugee regime*, Washington Post (Feb. 11, 2019), [https://www.washin](https://www.washingtonpost.com/outlook/2019/02/11/why-president-trump-has-won-immigration-standoff-even-if-he-doesnt-get-wall-funding/)
3 [gtonpost.com/outlook/2019/02/11/why-president-trump-has-won-immigration-](https://www.washingtonpost.com/outlook/2019/02/11/why-president-trump-has-won-immigration-standoff-even-if-he-doesnt-get-wall-funding/)
4 [standoff-even-if-he-doesnt-get-wall-funding/](https://www.washingtonpost.com/outlook/2019/02/11/why-president-trump-has-won-immigration-standoff-even-if-he-doesnt-get-wall-funding/).

5 Haitian petitioners who were incarcerated, rather than paroled, upon arrival
6 in the U.S. under this plan, challenged their parole denials in federal court as
7 discriminatory based on race or national origin. *Louis*, 544 F. Supp. at 984. The
8 district court acknowledged that INS' use of parole was racially inconsistent,
9 stating:

10 The evidence shows that both Haitians and non-Haitians
11 are being detained, but that more Haitians are being
12 detained and for longer periods of time than non-Haitians.
13 The evidence also demonstrates that a larger percentage of
14 non-Haitians are granted parole or deferred inspection
15 than the percentage of Haitians. The only conclusion that
16 can be drawn from this evidence is that Haitians are being
17 impacted by the detention policy to a greater degree than
18 aliens of any other nationality at the present time.

19 *Id.* at 982. On appeal to the Supreme Court, however, the Court avoided
20 addressing why Haitians were being detained more often and for longer periods
21 than other migrants. *See Jean v. Nelson*, 472 U.S. 846, 854-57 (1985). Instead, the
22 Court decided, based only on statutory grounds, that neither the parole statute at
23 issue, nor the INS regulations that implemented it, authorized race or national
24 origin based discrimination. *Id.*

25 2. Detention Gives Rise to Interdiction of Haitian Refugees.

26 In September 1981, Haiti and the U.S. entered into an unprecedented
27 agreement whereby the U.S. would interdict vessels in the high seas transporting
28 Haitian migrants and return them to Haiti.² Harold Koh *et al.*, *The Haiti Paradigm*

² Carl Lindscoog, *How the Haitian refugee crisis led to the detention of immigrants*, Washington Post (Apr. 9, 2018), [https://www.washingtonpost.com/ne](https://www.washingtonpost.com/news/immigration/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-detention-of-immigrants/)

1 *in United States Human Rights Policy*, 103 Yale L.J. 2391, 2392-93 (1994)
2 [hereinafter “*The Haiti Paradigm in United States Human Rights Policy*”].
3 Interdiction was never before used for immigration purposes. A.G. Mariam,
4 *International Law and the Preemptive Use of State Interdiction Authority on the*
5 *High Seas: The Case of Suspected Illegal Haitian Immigrants Seeking Entry Into*
6 *the U.S.*, 12 Md. J. Int’l L. & Trade 211, 213, 225 (1988) [hereinafter
7 “*International Law and the Preemptive Use of State Interdiction Authority on the*
8 *High Seas*”].

9 When interdiction began, the U.S. generally viewed Haitians as economic
10 migrants deserting one of the poorest countries in the world, rather than seeking
11 political asylum. Under the 1981 interdiction agreement, an inspector from INS
12 and a Coast Guard official would check the immigration status of the passengers
13 and return to Haiti those passengers deemed to be undocumented. Although
14 President Reagan tasked the Coast Guard with screening interdicted migrants and
15 allowing those with a credible fear of persecution to enter the U.S., in practice, an
16 alien must have *volunteered* information regarding her fear of persecution in order
17 to have been considered for asylum. *The Haiti Paradigm in United States Human*
18 *Rights Policy* at 2392-93; *see also U.S. Immigration Policy on Haitian Migrants*,
19 3-4 (2011),

20 https://www.everycrsreport.com/files/20110517_RS21349_c6a8bc391c450f3244b
21
22 [ws/made-by-history/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-](https://www.made-by-history.com/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-indefinite-detention-of-immigrants/)
23 [indefinite-detention-of-immigrants/](https://www.made-by-history.com/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-indefinite-detention-of-immigrants/) (explaining that, “[w]hile oppressive, the
24 Haitian regime was an anti-communist ally that the U.S. government did not want
25 to alienate. When state and local officials began to protest the arrival of these
26 overwhelmingly poor and black migrants, the U.S. government classified them as
27 economic migrants rather than as refugees, making them ineligible to receive
28 asylum and remain in the United States. And to deter future asylum seekers from
Haiti, the government placed the Haitians in a hastily-assembled network of
detention centers, jails and prisons.”) [hereinafter *How the Haitian refugee crisis*
led to the detention of immigrants].

1 0151c20deab7110d31290.pdf [hereinafter “*U.S. Immigration Policy on Haitian*
2 *Migrants*”]. In fact, there was “no indication that individual ‘interviews’ were
3 undertaken,” and it was unlikely that migrants were given a meaningful chance to
4 state a credible fear. *International Law and the Preemptive Use of State*
5 *Interdiction Authority on the High Seas*, at 239-40.

6 Between 1981 and 1991, the U.S. interdicted approximately 25,000 Haitians.
7 *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1034 (E.D.N.Y. 1993). Not
8 all vessels were bound for the U.S.; it is likely that many would have landed on the
9 shores of other countries. *See id.* at 1034-35. Nevertheless, the Coast Guard
10 interdicted these vessels, removed all passengers, and destroyed the vessels. *Id.* at
11 1035.

12 Because so many interdicted Haitians could not be safely processed by the
13 Coast Guard, the Department of Defense established temporary facilities at the
14 U.S. Naval Base in Guantanamo, Cuba, to hold Haitian migrants during the
15 screening process. INS began interviewing Haitians at Guantanamo Bay, where
16 the migrants were denied legal representation. *Sale v. Haitian Ctrs. Council, Inc.*,
17 509 U.S. 155, 163, 166-67 (1993) When Guantanamo Bay filled to capacity,
18 President George H. Bush signed the Kennebunkport Order, directing the Coast
19 Guard to turn around interdicted Haitian vessels without screening migrants for
20 asylum claims. Carlos Ortiz Miranda, *Haiti and the U.S. in the 1980s and 1990s:*
21 *Refugees, Immigration, and Foreign Policy*, 32 San Diego L. Rev. 673, 697
22 (1995).

23 **II. PRESENT DAY TREATMENT OF HAITIAN AND BLACK**
24 **MIGRANTS.**

25 **A. The U.S. Government Recognized the Discriminatory Treatment**
26 **of Haitians in the 1990s, But This Recognition was Short-Lived.**

27 In November 1997, Congress enacted the Nicaraguan Adjustment and
28 Central American Relief Act (“NACARA”), Pub. L. No. 105-100, 111 Stat. 2160

1 (1997) (as amended, Pub. L. No. 105-139, 111 Stat. 2644 (1997), which enabled
2 Nicaraguans and Cubans to become legal permanent residents and permitted
3 certain unsuccessful Central American and East European asylum applicants to
4 seek another form of immigration relief. However, Congress deliberately opted
5 not to include Haitian asylum seekers in that relief, concerned that including
6 Haitians would “kill the bill.” Elizabeth M. Iglesias, *Identity, Democracy,*
7 *Communicate Power, Inter/National Labor Rights and the Evolution of LatCrit*
8 *Theory and Community*, 53 U. Miami L. Rev. 575, 601 (1999) (noting that
9 “thousands of refugees and immigrants from Nicaragua, Cuba, El Salvador,
10 Guatemala, the former Soviet Union and Warsaw pact countries are enjoying the
11 benefits of NACARA, leaving Haitians to wonder whether their self-restraint and
12 self-sacrifice in this instance [would] be remembered and reciprocated in the
13 next.”).

14 The following year, Congress enacted the Haitian Refugee Immigration
15 Fairness Act of 1998 (“HRIFA”), which enabled Haitians who filed asylum claims
16 or were paroled into the U.S. before December 31, 1995 to adjust to legal
17 permanent residence. *See U.S. Immigration Policy on Haitian Migrants* at 5. The
18 bill was modeled on NACARA, and, in a major departure from historical U.S.
19 policy, was motivated by a desire to treat Haitian immigrants fairly and
20 consistently with other immigrant populations. Shayna S. Cook, *The Exclusion of*
21 *HIV-Positive Immigrants Under the Nicaraguan Adjustment and Central American*
22 *Relief Act and the Haitian Refugee Immigration Fairness Act, Statutory*
23 *Interpretation, Communicable Disease, Public Health, Legislative Intent*, 99 Mich
24 L. Rev. 452, 471-72 (2000). However, HRIFA nonetheless was more restrictive
25 than NACARA, as it excluded individuals who entered the U.S. with false or
26 fraudulent documents and Haitians who were not issued parole. *See Jordan E.*
27 *Dollar & Allison D. Kent, In Times of Famine, Sweet Potatoes Have No Skin: A*
28 *Historical Overview and Discussion of Post-Earthquake U.S. Immigration Policy*

1 *Towards the Haitian People*, 6 Intercultural Hum. Rts. L. Rev. 87, 102-03 (2011).
2 Unfortunately, Haitian migrants were often forced to use fraudulent or photo-
3 switched documents to protect themselves from government-sponsored violence,
4 and INS did not issue parole to all Haitians before 1995. *Id.* As such, HRIFA
5 failed to protect many vulnerable Haitians validly seeking asylum.

6 **B. Recent Government Actions Perpetuate Discrimination Against**
7 **Haitian Migrants.**

8 Although the Obama-Biden administration implemented the Haitian Family
9 Reunification Parole Program (“HFRP”) in 2014 (seven years after Cubans were
10 offered the same benefit), Implementation of HFRP, 79 Fed. Reg. 75,581 75,582
11 (Dec. 18, 2014), which allowed U.S. citizens and lawful permanent residents to
12 apply for parole for family members in Haiti, the current administration abruptly
13 discontinued that program. Geneva Sands, *Trump admin ends family-based*
14 *reunification programs for Haitians and Filipino World War II vets* (Aug. 2,
15 2019), [https://www.cnn.com/2019/08/02/politics/trump-end-two-family-](https://www.cnn.com/2019/08/02/politics/trump-end-two-family-reunification-programs/index.html)
16 [reunification-programs/index.html](https://www.cnn.com/2019/08/02/politics/trump-end-two-family-reunification-programs/index.html).

17 The Trump administration continues to erode lawful protections and treat
18 Haitians and other Black migrants discriminatorily. In November 2017, the
19 Department of Homeland Security (“DHS”) ended Temporary Protected Status
20 (“TPS”) for Haitians that were the victims of the 2010 earthquake that reportedly
21 killed more than 200,000 people and left over one million homeless. *See Saget v.*
22 *Trump*, 375 F. Supp. 3d 280, 323, 360, 379 (E.D.N.Y. 2019) (issuing preliminary
23 injunction and enjoining termination of TPS, citing “political motivations” and
24 “the White House’s grander ‘America First’ strategy” as reasons for the
25 government’s ending TPS). The current administration also abruptly, and without
26 justification, removed Haiti from the list of nations whose citizens may participate
27 in the H-2A and H-2B visa programs, meaning Haitians may no longer enter the
28 U.S. to do temporary work. *See Letter to Biden*, 2 (Oct. 13, 2020),

1 [http://www.ijdh.org/wp-content/uploads/2020/10/Biden-Harris-Letter-10-2020-k-](http://www.ijdh.org/wp-content/uploads/2020/10/Biden-Harris-Letter-10-2020-k-grouped-FINAL-full-letter-2.pdf)
2 [grouped-FINAL-full-letter-2.pdf](http://www.ijdh.org/wp-content/uploads/2020/10/Biden-Harris-Letter-10-2020-k-grouped-FINAL-full-letter-2.pdf).

3 That the present administration is motivated by racial animus is made
4 manifest by its own public statements. For example, the government’s disdain
5 towards Haitian and Black immigrants was on full display when President Trump
6 stated: “Why are we having all these people from shithole countries come here?”
7 and “Why do we need more Haitians? . . . Take them out.” Ibram X. Kendi, *The*
8 *Day Shithole Entered the Presidential Lexicon* (Jan. 13, 2019),
9 <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/>.

10 President Trump also expressed a preference for immigrants from European and
11 Asian countries, continuing the construction of a racial hierarchy in U.S.
12 immigration law. *Id.* Journalists have even commented that “[w]e are in a
13 moment that is strikingly reminiscent of the early 1980s, when fear and hatred of
14 Haitians was used to justify the reinstatement and expansion of immigration
15 detention.” *How the Haitian refugee crisis led to the detention of immigrants.*

16 Moreover, under the Trump administration, African migrants are being
17 deported at far higher rates than migrants from other countries. Joe Penney,
18 *Despite closed borders, the US is still deporting Africans during the pandemic*
19 (July 27, 2020), [https://qz.com/africa/1885398/us-ice-deporting-africans-even-](https://qz.com/africa/1885398/us-ice-deporting-africans-even-with-closed-borders-due-to-covid/)
20 [with-closed-borders-due-to-covid/](https://qz.com/africa/1885398/us-ice-deporting-africans-even-with-closed-borders-due-to-covid/) [hereinafter “*Despite closed borders, the US is*
21 *still deporting Africans during the pandemic*”]. In fact, although the overall
22 numbers of removals have declined, Immigration and Customs Enforcement
23 (“ICE”) removed African nationals at an increased rate in 2017. Karla
24 McKanders, *Immigration and Blackness: What’s Race Got to Do With It?*, 44
25 *Human Rights Magazine* No. 1 (May 16, 2019),
26 [https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_ho-](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/immigration-and-blackness/)
27 [me/black-to-the-future/immigration-and-blackness/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/immigration-and-blackness/) [hereinafter “*Immigration and*
28 *Blackness: What’s Race Got to Do With It?*”]. The removal of African nationals

1 appears to be on the rise again. For example, in 2020, Cameroonian and
2 Congolese asylum seekers experienced an increase in deportations, and have
3 reported being tortured and forced to sign their own deportation orders. Julian
4 Borger, *U.S. Ice officers ‘used torture to make Africans sign own deportation*
5 *orders’* (Oct. 22, 2020), [https://www.theguardian.com/us-news/2020/oct/22/us-ice-](https://www.theguardian.com/us-news/2020/oct/22/us-ice-officers-allegedly-used-torture-to-make-africans-sign-own-deportation-orders)
6 [officers-allegedly-used-torture-to-make-africans-sign-own-deportation-orders](https://www.theguardian.com/us-news/2020/oct/22/us-ice-officers-allegedly-used-torture-to-make-africans-sign-own-deportation-orders).

7 The indisputable common denominator for this disparate treatment of
8 Haitians and Africans is the color of their skin. President Trump has made very
9 clear that his policies are not based on capacity constraints, or even on the
10 legitimacy of migrants’ asylum claims. Instead, his administration has based its
11 immigration policies on race and exclusionism, perpetuating racist and xenophobic
12 opposition to Haitian and Black migrants.

13 **III. METERING DISPROPORTIONATELY AFFECTS HAITIANS.**

14 **A. Metering Is Illegal.**

15 Pursuant to the INA, asylum seekers fleeing their home countries out of fear
16 are supposed to be referred to an asylum officer for an interview, *see* 8 U.S.C. §§
17 1225(a)(1), (3), b(1)(A)(i)-(ii), or to be placed into removal proceedings, where
18 they may pursue their claim in immigration court, *see* 8 U.S.C. §§ 1225(b)(2),
19 1229(a). The metering policy, which began in 2016, contradicts these practices
20 without justification or process. *See Munyua v. United States*, 2005 U.S. Dist.
21 LEXIS 11499, at *16 (N.D. Cal. Jan. 10, 2005) (holding that inspection and
22 processing provisions of Section 1225 are “not discretionary”).

23 Under the current metering policy, asylum seekers passing through Mexico
24 to various POE along the Southern border of the U.S. are turned back to Mexico in
25 lieu of formal inspection and processing. Hillel R. Smith, *The Department of*
26 *Homeland Security’s Reported “Metering” Policy: Legal Issues*, 2-3 (Aug. 13
27 2019) <https://fas.org/sgp/crs/homesec/LSB10295.pdf>. The government seeks to
28 justify this practice by arguing that it is done only when POE are at operational

1 capacity. *See id.* However, as detailed by Plaintiffs in their briefing, the metering
2 policy specifically violates the INA because, *inter alia*, Defendants are defying the
3 asylum processing framework without following the procedure required by the
4 Administrative Procedure Act. *See* 5 U.S.C. § 704. This is in addition to the
5 separate and distinct violations of the Due Process Clause, *see* U.S. Const. amend.
6 V, and the Alien Tort Statute, *see* 28 U.S.C. § 1350. *See* Dkt. #535-1 at 18-36.

7 **B. Metering is Colored by Deep-Seated Racial and Ethnic Animus**
8 **and is Used to Deny Haitians Access to the Asylum Process.**

9 **1. Life at the Border under the Metering Policy.**

10 This illegal metering policy is especially relevant to Haitians as they
11 continue to grapple with the desperate political and other circumstances that have
12 required them to seek sanctuary in the U.S. Multiple environmental and health
13 crises, such as the 2010 Earthquake and Hurricane Matthew in 2016, coupled with
14 the Haitian government’s failure to adequately protect its citizens from harm, have
15 destabilized Haitian government infrastructure and undermined the rule of law.
16 Ensuing political and economic instability, as well as increased political violence,
17 forced Haitians to flee, causing them to arrive at the U.S. border in record numbers
18 in 2016 as metering went into effect. *See* Kira Olsen-Medina & Jeanne Batalova,
19 *Haitian Immigrants in the U.S.*, Migration Policy Institute (Aug. 12, 2020), [https://](https://www.migrationpolicy.org/article/haitian-immigrants-united-states-2018)
20 www.migrationpolicy.org/article/haitian-immigrants-united-states-2018. To this
21 day, Haitians continue to flee to the U.S.-Mexico border, despite the high risk of
22 deportation, because of the volatile political situation in Haiti, which includes daily
23 riots, civil unrest, and the targeting of disfavored groups. *See* Kirk Simple, *‘There*
24 *is No Hope’: Crisis Pushes Haiti to Brink of Collapse*, N.Y. Times (Oct. 21, 2019),
25 <https://www.nytimes.com/2019/10/20/world/americas/Haiti-crisis-violence.html>.

26 Life at the border for Haitians turned away because of metering is dangerous
27 and tragic. One Haitian woman, Nounoune Jules, says that living in Tijuana
28 requires being constantly vigilant. *See* Maya Averbuch, *Stranded in Tijuana: A*

1 *Forgotten Community of Haitians with No Place to Go*, *The Progressive* (Apr. 1,
2 2018), <https://progressive.org/magazine/stranded-in-tijuana-immigration-haiti/>.
3 Jules says that she must try to keep her children safe from warring drug cartels, sex
4 workers, and drug users. *Id.* Other Haitians are forced to live in shelters, which
5 face supply shortages, or otherwise set up tents in parking lots and city streets
6 throughout Mexico. *See* Laura Ley, *The American dream of Haitians ends at the*
7 *border between Tijuana and San Diego*, *Univision Noticias* (Sept. 28, 2016),
8 [https://www.univision.com/noticias/amexica/el-sueno-americano-de-los-haitianos-](https://www.univision.com/noticias/amexica/el-sueno-americano-de-los-haitianos-acaba-en-la-frontera-entre-tijuana-y-san-diego)
9 [acaba-en-la-frontera-entre-tijuana-y-san-diego](https://www.univision.com/noticias/amexica/el-sueno-americano-de-los-haitianos-acaba-en-la-frontera-entre-tijuana-y-san-diego). Living on the streets in Mexico
10 puts Haitians at risk of violent attack as “organized crime groups . . . prowl the
11 streets,” and kidnap, rape, and torture stranded migrants. Robbie Whelan, *Violence*
12 *Plagues Migrants Under U.S. ‘Remain in Mexico’ Program*, *Wall Street Journal*
13 (Dec. 28, 2019), [https://www.wsj.com/articles/violence-plagues-migrants-under-u-](https://www.wsj.com/articles/violence-plagues-migrants-under-u-s-remain-in-mexico-program-11577529000)
14 [s-remain-in-mexico-program-11577529000](https://www.wsj.com/articles/violence-plagues-migrants-under-u-s-remain-in-mexico-program-11577529000). Mexican officials have also begun
15 extorting vulnerable Haitian asylum seekers who face unexpected extended stays
16 in the country. Ariane Francisco & Josefina Salomon, *Mexican Officials Extort*
17 *Asylum Seekers on Way to USA*, *InSight Crime* (Mar. 25, 2019), [https://www.insig](https://www.insightcrime.org/news/analysis/mexican-officials-extort-asylum-seekers/)
18 [htcrime.org/news/analysis/mexican-officials-extort-asylum-seekers/](https://www.insightcrime.org/news/analysis/mexican-officials-extort-asylum-seekers/).

19 Border conditions also have worsened because of COVID-19. Haitians are
20 not only dealing with a devastating sickness, but they have been losing the few
21 menial jobs they managed to secure along the border and are being cut off from
22 outside aid due to the virus’ spread. *See* Maya Srikrishnan, *Border Report:*
23 *Surviving in Tijuana Has Gotten Even Harder for Haitian Migrants*, *Voice of San*
24 *Diego* (July 20, 2020), [https://www.voiceofsandiego.org/topics/news/border-](https://www.voiceofsandiego.org/topics/news/border-report-surviving-in-tijuana-has-gotten-even-harder-for-haitian-migrants/)
25 [report-surviving-in-tijuana-has-gotten-even-harder-for-haitian-migrants/](https://www.voiceofsandiego.org/topics/news/border-report-surviving-in-tijuana-has-gotten-even-harder-for-haitian-migrants/). Doctors
26 have described the conditions at border clinics as “tinderboxes for infectious
27 diseases such as varicella, mumps, and norovirus, and now COVID-19” and have
28 noted “[t]he situation on the border is a public health crisis of our country’s own

1 manufacturing.” C. Nicholas Cuneo & Hannah Janeway, *From Icebox to*
2 *Tinderbox—A View from the Southern Border*, N. Engl. J. Med. 2020; 383: e81(2)
3 (Sept. 24, 2020), <https://www.nejm.org/doi/pdf/10.1056/NEJMp2009985?articleTo>
4 [ols=true](https://www.nejm.org/doi/pdf/10.1056/NEJMp2009985?articleTo). The government has exacerbated the pandemic by deporting thousands
5 of detainees, some of whom have contracted COVID-19 in ICE detention facilities.
6 *See Despite closed borders, the US is still deporting Africans during the pandemic.*
7 For example, as of July 2020, ICE sent over 270 deportation flights to countries in
8 the Caribbean and Latin America. *Id.*

9 These desperate and degrading conditions, in and of themselves, warrant
10 reconsideration of the metering policy. Failure to directly address the metering
11 policy will only result in more death and devastation for the already disadvantaged
12 Haitian people.

13 2. **Haitians are Illegally Denied Asylum under the Metering**
14 **Policy.**

15 As Plaintiffs note, the current administration’s metering policy is unlawful
16 because agency determination cannot be pretextual, arbitrary and capricious, or an
17 abuse of discretion. *See* Dkt. #535-1 at 26-31 (citing 5 U.S.C. § 706(2)(A); *San*
18 *Luis & Delta-Mendota Walter Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014)).
19 In response, Defendants claim that POE are at operational capacity, and that
20 metering is necessary for effective border maintenance. *See id.* However, the
21 available evidence demonstrates that these capacity arguments are spurious, and
22 there also is clear evidence of Haitian and Black discrimination at POE, as well as
23 in immigration policy more generally. *See* DHS, Off. of Inspector General,
24 *Special Review-Initial Observations Regarding Family Separation Issues Under*
25 *the Zero Tolerance Policy*, 4-7 (Sept. 27, 2018),
26 <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

27 Given existing immigration law’s extensive protections for asylum-seekers,
28 these race-based barriers to entry make a mockery of our laws. As one Black

1 migrant at the border noted, “[w]e are suffering . . . [t]hey tell us to wait and write
2 down our names[,] but nothing happens.” Rick Jervis, *At US-Mexico border,*
3 *migrants from Africa, Haiti wait to seek asylum*, USA Today (June 4, 2019),
4 <https://amp.usatoday.com/amp/1319996001>. This sentiment tracks with the fact
5 that migrants of African descent, particularly Haitians, are detained and deported at
6 a greater rate, face higher bail rates, have higher percentages of family detention,
7 and have among the highest asylum denial rates, when compared to their non-
8 African peers. See *Immigration and Blackness: What’s Race Got to Do With It;*
9 *Black Immigrants Lives Are Under Attack*, The Refugee and Immigrant Center for
10 Education and Legal Services (2020), [https://www.raicetexas.org/2020/07/22/blac](https://www.raicetexas.org/2020/07/22/black-immigrant-lives-are-under-attack/)
11 [k-immigrant-lives-are-under-attack/](https://www.raicetexas.org/2020/07/22/black-immigrant-lives-are-under-attack/).

12 Haitians also face another barrier at the border in that they predominantly
13 speak Haitian Creole. See Embassy of Haiti in Washington D.C.,
14 <http://www.haiti.org/haiti-at-a-glance>. (last visited Oct. 26, 2020). English is the
15 primary language employed at the border, followed by Spanish. Limited French or
16 Haitian Creole interpreters or materials are available. See Tom Jawetz & Scott
17 Shuchart, *Language Access Has Life-or-Death Consequences for Migrants*, Center
18 for American Progress (Feb. 20, 2019), [https://www.americanprogress.org/issues/i](https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/)
19 [mmigration/reports/2019/02/20/466144/language-access-life-death-consequences-](https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/)
20 [migrants/](https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/). For example, one Haitian woman was deported in absentia due to a
21 communication gap, which caused her to miss her court appearance. Nancy
22 Adossi, *et al.*, *Black Lives at the Border*, Black Alliance for Just Immigration (Jan.
23 2018), [http://baji.org/wp-content/uploads/2020/03/black-lives-at-the-borderfinal-](http://baji.org/wp-content/uploads/2020/03/black-lives-at-the-borderfinal-2.pdf)
24 [2.pdf](http://baji.org/wp-content/uploads/2020/03/black-lives-at-the-borderfinal-2.pdf).

25 In sum, both the history of U.S. treatment of Haitian migrants and the
26 application of Defendants’ present metering policy reflect clear racial
27 discrimination and the uncontested abdication of the INA’s mandatory processing
28 and inspection requirements. Accordingly, the metering policy reflects the

1 arbitrary and capricious implementation of the INA and should be deemed
2 unlawful. *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1273-74
3 (9th Cir. 2020) (finding that interpretation of immigration statute to summarily
4 deny entry to certain types of people, in contradiction to Congressional intent, was
5 arbitrary and capricious).

6 **CONCLUSION**

7 For all of the reasons stated above, as well as those submitted to this Court
8 by Plaintiffs, Defendants’ metering policy should be found unlawful. *Amici*
9 respectfully request that summary judgment be granted to Plaintiffs affording them
10 both declaratory relief and a permanent injunction.

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