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Brief of 42 Historians and the Fred T. Korematsu Center for Law and Equality as Amici Curiae in Support of Plaintiffs-Appellees-Cross-Appellants

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Consolidated Case Nos. 18-15068, 18-15069, 18-15070,
18-15071, 18-15072, 18-15128, 18-15133, 18-15134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,

Plaintiffs-Appellees-Cross-Appellants,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF 42 HISTORIANS AND THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel for *amici* make the following disclosures. The Fred T. Korematsu Center for Law and Equality is a research and advocacy organization based at Seattle University, a non-profit educational institution under Section 501(c)(3) of the Internal Revenue Code. The Korematsu Center does not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10 percent or more of its stock.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE[1]

The 42 individual *amici* are academics trained in the field of history who study, teach, and write about United States history.[2] *Amici* are keenly aware of the role that discrimination on the basis of race, ethnicity, and nationality has played in this nation's history. *Amici* have a special interest in ensuring that the Court has the benefit of their expertise when it draws its conclusions with regard to the role that animus may have played in the decision to rescind the Deferred Action for Childhood Arrivals (DACA) program. In a parallel lawsuit challenging the rescission of DACA brought by New York and fourteen other states and the District of Columbia in the United States District Court for the Eastern District of New York, *New York et al. v. Donald Trump et al.*, No. 1:17-cv-5229, the plaintiffs submitted an expert report and declaration by Dr. Stephen Pitti with regard to the historical context and use of code words evidencing animus on the part of President Trump and other Trump officials in connection with the rescission of DACA, *id*., Dkt. 97-2, Ex. 38. After reviewing Dr. Pitti's Declaration, attached herein as Exhibit 1, *amici* agree that Dr. Pitti used research methods that are widely

[1] *Amici* certify that no party's counsel authored this brief in whole or in part, nor did any party or party's counsel contribute money intended to fund preparation or submission of this brief; and no person other than *amici curiae* and their counsel contributed money intended to fund preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] Their names, titles, and institutional affiliations are appended, Appendix at A-1.

accepted as valid in the field of history. These methods include a specific interpretive methodology that looks at public discourse to discern the use of racially coded expressions or code words by government officials, politicians, and members of the public to advance discriminatory political objectives. *Amici* agree with Dr. Pitti's summative opinion:

> When properly understood within the context of the history and contemporary discrimination directed against Mexicans, Mexican Americans, and Latinos, . . . President Trump and others who worked for his campaign and in his Administration have long expressed animus towards ethnic Mexicans and other Latinos. President Trump and others associated with his presidential campaign and Administration have drawn upon and used racial code words, and have benefitted from racism against Latinos. Racial animus against ethnic Mexicans shaped their decision to terminate DACA.

Pitti Decl. ¶ 17, Exhibit 1 at 5.

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a non-profit organization based at the Seattle University School of Law. The Korematsu Center works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. The Korematsu Center has a special interest in addressing government action targeted at classes of persons based on race, nationality, or religion. The Korematsu Center has developed an expertise with regard to the use of racial code

words in its role as co-counsel to high school students who successfully challenged a facially neutral Arizona statute that was enacted and enforced to terminate the Mexican American Studies Program in the Tucson Unified School District. *González v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017). In addition, the Korematsu Center is keenly aware of the use of direct and racially coded language used to justify the discriminatory treatment of Japanese Americans before, during, and after World War II. Drawing on its experience and expertise, the Korematsu Center seeks to ensure that courts understand the way that racially coded language is used to achieve discriminatory outcomes.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

History teaches us that the institution of slavery, the dispossession and removal of Native Americans, the exclusion of Asian immigrants, the incarceration of Japanese Americans during World War II, and the mass repatriation and deportation of persons of Mexican ancestry were not accidents but instead were the product of deliberate decisions made by government officials. The historical record demonstrates that these decisions were informed by an explicit racial ideology that defined groups along racial lines; that justified discriminatory treatment based on notions of group superiority/inferiority and group desirability/undesirability; and

[3] The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

that often posed the discriminatory treatment as necessary for the security of the nation and for the prosperity of its citizenry.

During earlier periods, government officials, politicians, and members of the public expressed, much more nakedly, this racial ideology used to justify and advance discrimination. As social norms changed and it became, increasingly, less acceptable to express publicly these same sentiments, racially coded language was used by politicians to garner public support and gain elected office and by government officials to justify and advance discriminatory political objectives. Historians and other academics have observed and documented this phenomenon, the shift from explicit racial language to coded racial expressions. Examination of public discourse for the use of code words has become a widely accepted interpretive methodology used by historians and other academics to discern the role that discrimination may have played with regard to particular events, as well as for the broader course of United States history.

History is replete with examples in which explicit and coded language has been used to justify and advance discrimination against a particular group. During severe economic downturns, populist leaders and politicians exploited racial nativism to scapegoat outsider immigrant groups who were blamed for taking away

the rightful opportunities of an anxious citizenry.[4] During the 1880s, the Chinese were blamed; during the 1920s, racialized white ethnic groups from southern and eastern Europe as well as immigrants from Asia were blamed; and during the height of the Great Depression in the 1930s, migrants from Mexico were blamed.[5] In each instance, targeted anti-immigrant sentiment led to the various Chinese Exclusion Acts, the 1924 Immigration and Nationality Act, which barred Asian immigration and put into place per country quotas for immigration based on the national origin composition of this country as reflected in the 1890 Census, and the 1930s mass deportation of Mexican migrants and U.S. citizens of Mexican ancestry.[6] Of the nearly 1.5 million deported during this period, upwards of 60% were U.S. citizens.[7] These various immigration measures were fostered by both explicit and coded racial nativist expressions that relied on themes of invasion and labeling Americans as victims with certain immigrant groups as undeserving and

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[4] *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (rev. ed. 2002).

[5] *See generally* ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1975); HIGHAM, *supra* note 4; FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (1995).

[6] *See* LUCY SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 6-23 (1995) (discussing anti-Chinese sentiment and the various Chinese Exclusion Acts); MAI NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND ALIEN CITIZENS 18-54 (discussing the impetus of the Immigration Act of 1924) and 71-75 (discussing anti-Mexican hostility and the 1930s mass deportations).

[7] BALDERRAMA & RODRÍGUEZ, *supra* note 5, at 216; NGAI, *supra* note 6, at 72.

as threats to this nation's security and prosperity.

This *amicus* brief will focus on the use of code words in one historic example—the 1954 mass deportation program called Operation Wetback—before turning to the use of code words associated with the rescission of DACA. Understanding how government officials, politicians, and members of the public used the word "wetback," along with notions of threat to national security and national prosperity, in the period leading up to Operation Wetback provides an instructive example for understanding how various code words operate today with regard to immigration enforcement, including the decision to rescind DACA.

Further, Operation Wetback is particularly relevant because in November 2015 then-candidate Donald Trump invoked the 1954 deportation program, without using its name, as a successful model that he would seek to emulate.[8] Though the rescission of DACA does not, at present, involve a mass deportation plan, the rescission of DACA is best understood as part of a set of immigration measures that is intended to accomplish then-candidate Trump's promises to his

[8] Philip Bump, *Donald Trump Endorsed "Operation Wetback" – But Not by Name*, WASH. POST, Nov. 11, 2015, https://www.washingtonpost.com/news/the-fix/wp/2015/11/11/donald-trump-endorsed-operation-wetback-but-not-by-name/?utm_term=.eb2b0a6f2955; Kate Linthicum, *The Dark, Complex History of Trump's Model for His Mass Deportation Plan*, L.A. TIMES, Nov. 13, 2015, http://www.latimes.com/nation/la-na-trump-deportation-20151113-story.html (discussing Trump's endorsement during the Nov. 11, 2015, Republican primary debate in which Trump described the "deportation force" he would deploy to emulate Operation Wetback).

electorate. Promising to emulate this mass deportation program while omitting its name is itself an example of a camouflaged expression—an example of how, during the campaign and after the election, President Trump employed racially coded expressions or "code words," language that evinces and appeals to racial animus and is intended to invoke racial fear but which permits plausible deniability that the speech is about race. His use of these code words while seeking elected office and after assuming the presidency presents strong evidence of animus.

To assist the Court in deciding whether to affirm the grant of provisional relief to Plaintiffs and to affirm the denial of Defendants' motion to dismiss Plaintiffs' equal protection claims, *amici* historians and the Fred T. Korematsu Center for Law and Equality submit this *amicus* brief to demonstrate that racial animus can be discerned by a code word analysis, and that such an analysis is a widely accepted methodology in the field of history. The conclusion that the use of code words evidences animus is bolstered by a separate quantitative and qualitative discourse analysis that systematically reviewed 347 speeches and 6,963 tweets drawn from the President's public discourse delivered between August 2015 and mid-September 2017 and concluded:

> Trump's public discourse, in which he repeatedly uses several related conceptual metaphors to describe immigrants, Mexicans, and U.S. Latinos as the enemy, as disease, as criminal, and as animalistic, is discriminatory and racist according to standard definitions of racism. Trump speaks as if U.S. citizens suffer each day at the hands of immigrants. This scapegoating of

> Latino immigrants reinforces and capitalizes on his core constituency's economic and cultural insecurities in order to advance Trump's political objectives.

Declaration of Dr. Otto Santa Ana, ¶ 54, Exhibit 2 at 64.[9]

Further, a survey of federal circuit courts, including this Circuit, demonstrates that code word analysis has been adopted into legal frameworks as providing important direct and circumstantial evidence of animus or discriminatory intent.

ARGUMENT

The court below, in granting provisional relief to Plaintiffs, found that the Plaintiffs were likely to succeed on their claims that the Department of Homeland Security violated the Administrative Procedure Act (APA) when it terminated DACA. Order Denying FRCP 12(b)(1) Dismissal and Granting Provisional Relief (Jan. 9, 2018), at ER 38, 43. Specifically, the court rejected the Department of Homeland Security's (DHS) offered reasons for its decision, finding that (1) the agency was operating under a "flawed legal premise," *id*., ER 38, and (2) the offered litigation risk explanation was either a post hoc rationalization or was arbitrary, capricious, and an abuse of discretion, *id*., ER 42. In addition, the court below denied Defendants' motion to dismiss Santa Clara's and Individual

[9] The complete analysis on which the declaration is based can be found at https://www.thepresidentsintent.com/ ("The President's Intent").

Plaintiffs' equal protection claims. Order Granting in Part Defendants' Motion to Dismiss Under FRCP 12(b)(6) (Jan. 12, 2018), ER 58-61. Defendants have challenged each of these rulings. Appellants' Op. Br. at 28-40 (arbitrary and capricious), 40-45 (equal protection), ECF No. 31.

Amici demonstrate that the evidence regarding racial animus supports each of these rulings. First, the strong evidence regarding animus as a motivating factor for the termination of DACA along with the district court's findings that the offered reasons did not provide legal justification for the termination of DACA strongly suggests that those offered reasons were pretextual. Thus, the animus evidence strongly supports the findings that the decision was arbitrary and capricious and constituted an abuse of discretion in violation of the APA. *Cf. González v. Douglas*, 269 F. Supp. 3d 948, 973 (D. Ariz. 2017) (animus, in addition to being relevant for an equal protection claim, also established violation of student-plaintiffs' right to be free from viewpoint discrimination when based on political and partisan reasons). Further, the animus evidence strongly supports the district court's denial of the Defendants' motion to dismiss Plaintiffs' equal protection claims. *Amici* demonstrate that code word analysis is an accepted historical methodology for discerning racial animus and an accepted category of evidence that both this Circuit and other circuits have used to discern animus in equal protection claims and in other contexts in which discriminatory intent must

be shown. *Amici* further demonstrate that discourse analysis supports the examination of public discourse to discern the use of code words.

Of special note is this Court's recent observation and acknowledgment that because "'officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority,' we look to whether they have 'camouflaged' their intent. *Arce v. Douglas*, 793 F.3d 968, 978 (9th Cir. 2015) (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064, 1066 (4th Cir. 1982). In determining the question of discriminatory intent, the "district court should make 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 538 (9th Cir. 1982) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). This sensitive inquiry examines the following non-exhaustive factors:

> (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision; (3) the specific sequence of events leading to the challenged actions; (4) the defendant's departures from normal procedures or substantive conclusions; and (5) the relevant legislative or administrative history.

Arce, 793 F.3d at 977 (citing *Arlington Heights*, 429 U.S. at 266-68).

It is indisputable that the rescission of DACA falls most heavily on persons

of Mexican ancestry, who make up 79.4% of DACA recipients.[10] Further, as the court below found with regard to Plaintiffs' APA claims, the decision to rescind DACA was plagued by a host of procedural and substantive departures. *See* Order Denying FRCP 12(b)(1) Dismissal and Granting Provisional Relief (Jan. 9, 2018), ER 29-42 (agency decision was arbitrary and capricious and constituted an abuse of discretion because based on flawed legal premise and post hoc rationalization). Added to this, a sensitive inquiry into the historical background of the decision to rescind DACA, especially the contemporaneous statements made by decisionmakers, makes code word analysis especially important when examining facially neutral governmental action under an *Arlington Heights* analysis to discern discriminatory intent. *See Arlington Heights*, 429 U.S. at 266-68. The existence of discriminatory intent is pertinent to the APA claims, including that the existence of animus strongly supports a finding of pretext or bad faith.

I. History Is Replete with Instances In Which Racially Coded Expressions Have Strongly Evidenced Animus, Such As "Wetback," Used During the Mass Repatriation and Deportation of Persons of Mexican Ancestry in 1954.

Operation Wetback. That was the official name given to the program undertaken in 1954 to forcibly repatriate hundreds of thousands of Mexican

[10] U.S. Citizenship and Immigration Servs., *Approximate Active DACA Recipients: Country of Birth (As of Sept. 4, 2017)* 1, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_population_data.pdf.

migrants.[11] The massive scope of the program and lack of procedural safeguards resulted in many American citizens of Mexican ancestry being swept up in its dragnet and removed to remote areas of Mexico.[12] In addition to those detained and deported, hundreds of thousands of Mexican migrants left voluntarily in order to avoid brutal conditions endured by those detained and forcibly removed. The decision to institute this mass deportation program was informed by the use of the racially coded expression, "wetback."

Viewed from today's perspective, many might say that "wetback" is not racially coded language, but rather an explicit expression of animus. While "wetback" may today be recognized as an epithet or slur, that was certainly not the case in the 1950s. The original mundaneness of the term "wetback" is evidenced in a 1950 Sunday edition of the New York Times, which included in its "Fifteen News Questions," the following question: "'Wetbacks' were reported last week to be entering California at a rate of 10,000 a month. What are 'wetbacks'?" The answer is supplied several pages later: "Mexican immigrants who cross the border by stealth to seek work. The term 'wetback' was originally applied to Mexicans

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[11] *See* JUAN RAMÓN GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954, at 228 (1980); *see also 150,000 "Wetbacks" Taken in Round-Up*, N.Y. TIMES, 1954, at 7 (reporting numbers apprehended approximately two months after the beginning of Operation Wetback),https://timesmachine.nytimes.com/timesmachine/1954/07/30/84128756.html?pageNumber=7.

[12] GARCÍA, *supra* note 11, at 228.

who entered the U.S. farther east by swimming the Rio Grande."[13] It is of note that the New York Times did not ask "*Who* are 'wetbacks'?" but instead, "*What* are 'wetbacks'?"

Further, "wetback," originally a term used to describe those who swam across the Rio Grande River, became a metonym for all unauthorized Mexican migrants. President Harry Truman used the term in precisely this way in his July 13, 1951, address to Congress that called for a more comprehensive solution to address "the steady stream of illegal immigrants from Mexico, the so-called 'wetbacks,' who cross the Rio Grande or the western stretches of our long border."[14] Likewise, General Dwight D. Eisenhower, getting ready to run for president in 1951, in private correspondence with Senator William Fulbright "quoted a report in the New York Times," and highlighted a paragraph that discussed "[t]he rise in illegal border-crossing by Mexican 'wetbacks.'"[15]

Though there is no record of President Eisenhower using the term in public,

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[13] *Fifteen News Questions*, N.Y. TIMES, Apr. 2, 1950, at E2 and E9, https://timesmachine.nytimes.com/timesmachine/1950/04/02/96214886.html?pageNumber=142; https://timesmachine.nytimes.com/timesmachine/1950/04/02/96214988.html?pageNumber=149.

[14] President Harry S. Truman, Special Message to the Congress on the Employment of Agricultural Workers from Mexico, July 13, 1951, https://www.trumanlibrary.org/publicpapers/index.php?pid=368.

[15] John Dillin, *How Eisenhower Solved Illegal Border Crossings from Mexico*, CHRISTIAN SCI. MONITOR, July 6, 2006, https://www.csmonitor.com/2006/0706/p09s01-coop.html.

he responded to questions from reporters who used the term and affirmed his support of legislation intended to address what the press characterized as the "wetback problem."[16] Further, he did use the term at least once in his personal diaries.[17] And members of his administration, including the two primary architects of Operation Wetback, General Joseph Swing who became the Commissioner of Immigration and Naturalization in 1954 and Attorney General Herbert Brownell, Jr., both used the term openly, including in statements to Congress.[18] Before Operation Wetback, Brownell announced that he "would go to California next

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[16] *See* The President's News Conference, July 14, 1954, http://www.presidency.ucsb.edu/ws/index.php?pid=9947&st=wetback&st1= (question by Sarah McClendon, El Paso Times, about two Senate bills "designed to curb the hundreds of thousands of wetbacks coming into this country"); The President's News Conference, July 21, 1954, http://www.presidency.ucsb.edu/ws/index.php?pid=9950&st=wetback&st1= (question by John Herling, Editors Syndicate, asking about "the wetback legislation prepared by Attorney General Brownell"). President Eisenhower's response to these questions expressed support for the legislation and other efforts to address the issue.

[17] DDE Personal Diary Jan.-Nov. 1954 (1)(2) ("notes on Bricker Amendment; school construction; wetbacks; Brazilian coffee"), Eisenhower, Dwight D.: Papers as President; DDE Diary Series, at 5, https://www.eisenhower.archives.gov/research/finding_aids/pdf/Eisenhower_Dwight_Papers_as_President/DDE_Diary_Series.pdf.

[18] *See, e.g.*, *Drive on Wetbacks Termed a Success*, N.Y. TIMES, Mar. 10, 1955, at 28, https://timesmachine.nytimes.com/timesmachine/1955/03/10/93729836.html?pageNumber=28 (reporting on Swing's testimony to a House Government Operations subcommittee); Statement of Honorable Herbert Brownell, Jr., Attorney General of the United States, Testimony before Subcommittee on Immigration of the Committee on the Judiciary, April 13, 1956, https://www.justice.gov/sites/default/files/ag/legacy/2011/09/12/04-13-1956%20pro.pdf (discussing the "Mexican wetback problem" and Operation Wetback).

week to study the 'wetback' problem."[19] General Swing, upon taking charge as Commissioner, announced that he would "stop this horde of invaders."[20]

Though it may not have been apparent at the time to government officials, members of the mainstream press, or the public, "wetback" was a racially coded expression that has since come to be recognized as an epithet or slur.[21] Facially descriptive, it is pejorative and diminishing, reducing a person to a characteristic associated with a part of the body. Further, this term does not accurately describe those who crossed the land border, yet it stands in as a metonym for all unauthorized border crossers from Mexico, and eventually became a term that is used by some for all Mexican migrants and Mexican Americans. Historians today,

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[19] *Brownell Maps Trip for "Wetback" Study*, N.Y. TIMES, Aug. 8, 1953, at 13, https://timesmachine.nytimes.com/timesmachine/1953/08/08/84417640.html?pageNumber=13.

[20] KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 51 (1992).

[21] Whether it was a slur expressing animus was contested among Supreme Court justices as late as 1981. Justice William Rehnquist used the term during the justices' private weekly conference when they were discussing *Plyler v. Doe*. Justice William Rehnquist referred to schoolchildren of Mexican ancestry as "wetbacks." When Justice Thurgood Marshall protested, likening the word to the n-word, Justice Rehnquist defended his use of the term, saying that the term still had "currency" in his part of the country. Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1547 (2011) (citing Justice William J. Brennan, Conference Notes, *Plyler v. Doe* (Nos. 80-1538, 80-1934) (Dec. 8 1981) (on file with the Library of Congress, Manuscript Division, William J. Brennan Papers, Part I: Box 572)). It is of note that Justice Rehnquist joined Chief Justice Burger's dissent in *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting).

employing code word analysis, would draw the conclusion that the direct use of the term by President Truman, the private use and public acquiescence to the term by President Eisenhower, and the repeated use by members of Eisenhower's administration is strong evidence of animus that may have affected government policies and immigration enforcement.

II. Code Word Analysis Is a Widely Accepted Methodology that Historians Employ to Discern Racial Animus and Give Context to Government Action.

While the use of "wetback" in the 1950s presents an easier case of discerning racially coded expressions, code word analysis becomes increasingly important when political strategists recognize the need to develop code words whose racial character is less obvious. The most explicit description is provided in a surprisingly candid confession by Republican political strategist Lee Atwater in 1981:

> You start out in 1954 by saying, "Nigger, nigger, nigger." By 1968 you can't say "nigger" – that hurts you. Backfires. So you say stuff like . . . forced busing, states' rights, and all that stuff, and you're getting abstract. Now, you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites . . . "We want to cut this," is much more abstract than even the busing thing . . . and a hell of a lot more abstract than "Nigger, nigger."[22]

[22] Rick Perlstein, *Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, THE NATION, Nov. 13, 2012, https://www.thenation.com/article/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy/.

As Dr. Stephen Pitti sets forth in his Declaration:

> Historians and other academic experts recognize that animus does not require explicit, public declarations of racial ideology that racism has persisted across the centuries. An attention to history and careful analysis of the use of coded racial appeals in contemporary political discourse provide the keys to understanding the links between racial animus and politics in the twenty-first century.

Pitti Decl. ¶ 20, Exhibit 1 at 6.

This understanding and appreciation of the operation of code words by historians is precisely the reason the analysis and expert opinions expressed by historians examining current events can be helpful to the Court, especially when they are able to demonstrate how careful study of certain past events may inform our understanding of current events.

III. Courts Routinely Recognize the Evidentiary Value of Coded Language in Discerning Racial Animus.

Courts have come to rely on code words as evidence in determining whether alleged discriminatory acts are racially motivated. Unlike times past, today people are rarely explicit about their intent or motivation in expressing or acting on racial bias. This Court has recognized that because "'officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority,'" it is necessary to determine "whether they have 'camouflaged' their

intent. *Arce v. Douglas*, 793 F.3d 968, 978 (9th Cir. 2015) (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064, 1066 (4th Cir. 1982)); *see also Avenue 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 505 (9th Cir. 2016) (though camouflaged, when "code words consisting of stereotypes of Hispanics that would be well-understood in [the relevant community]," plausible inference of racial animus may be drawn).

On remand in *Arce v. Douglas*, after a bench trial, Judge A. Wallace Tashima, sitting by designation, held that public officials used code words with regard to Mexican Americans, and that this constituted evidence of discriminatory intent in violation of the Equal Protection Clause. *González*, 269 F. Supp. 3d at 967-68. In that case, plaintiffs successfully claimed that a facially neutral Arizona statute used to eliminate a highly successful Mexican American Studies program was the product of racial animus. The court noted that the officials involved in the enactment and enforcement of the statute frequently used certain terms to stand in for Mexican Americans, such as "'Raza,' 'un-American,' 'radical,' 'communist,' 'Aztlán,' and 'M.E.Ch.A.'" *Id.* The court found these to be derogatory code words because they "[drew] on negative mischaracterizations that had little to no basis in fact," and found that "[t]hese particular words were effective codewords with Arizona voters because they drew on 'people's … concerns about illegal immigration' and the 'Mexicanization' of Arizona that were prominent" at the

time. *Id.* (internal quotations omitted). Based in part on the code word evidence, the court found that the statute had been enacted and enforced in violation of the First and Fourteenth Amendments. *Id*. at 972, 974.

Nearly every circuit court has recognized that code words or camouflaged expressions can be considered as evidence of discriminatory intent:[23]

First Circuit:	*Soto v. Flores*, 103 F.3d 1056, 1067 n.12 (1st Cir. 1997) ("It is rare that discrimination wears its garb openly and it more often comes 'masked in subtle forms.' Triers of fact may recognize those more subtle forms for what they are and coded comments may raise inferences of discrimination.") (quoting *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3rd Cir. 1996));
Second Circuit:	*MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 608-12 (upholding district court's finding that opponents used racially charged code words to communicate animus and that city officials acquiesced to this animus in its shift in zoning);
Third Circuit:	*Aman*, 85 F.3d at 1082-83 (holding that use of "inherently racist" code words can constitute evidence of a hostile work environment and an intent to discriminate);

[23] The only circuit that appears not to have directly addressed this issue is the Federal Circuit, though that court does recognize that "because direct evidence of deceptive intent is rarely available, such intent can be inferred from indirect and circumstantial evidence." *Star Sci., Inc. v. R.J. Reynolds Tobacco, Co.*, 537 F.3d 1357, 1366 (Fed. Cir. 2008) (citation omitted). At least two Supreme Court justices have referenced the concept of code words as a mask for racial discrimination. *See City of Memphis v. Greene*, 451 U.S. 100, 135 (1981) (Marshall, J., dissenting) (recognizing the use of "code phrases" for racial discrimination in city's explanation for closure of road from predominately white area of the city to predominately black area); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 243 n.23 (1973) (Powell, J., concurring in part, dissenting in part) (noting argument that "neighborhood education is now but a code word for racial segregation").

Fourth Circuit: *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1066 (4th Cir. 1982) (concern evinced about the influx of "undesirables" and dilution of public schools and threat to public safety constituted "evidence … which in a different context might not illustrate racial bigotry, but, against the background of the housing project in Clarkton and the considerable opposition to it, were interpreted by the trial court as 'camouflaged' racial expressions");

Fifth Circuit: *Jenkins v. Methodist Hosps. of Dallas, Inc.*, 478 F.3d 255, 265 (5th Cir. 2007) (recognizing that code words may provide basis of discriminatory intent);

Sixth Circuit: *United States v. City of Birmingham, Mich*., 727 F.2d 560, 563 (6th Cir. 1984) (affirming injunctive relief on a Fair Housing Act claim based in part on statements that proposed housing would introduce "harmful elements" and bring "those people" to Birmingham, which led trial court to specifically conclude the language was in reference to "[B]lack people");

Seventh Circuit: *E.E.O.C. v. Bd. of Regents of U. of Wis. Sys.,* 288 F.3d 296, 303 (7th Cir. 2002) (finding that a reasonable jury could find use of code words such as "'pre-electronic' era and that he would have to be brought 'up to speed' on 'new trends of advertising via electronic means'" a reflection of age bias in ADEA case);

Eighth Circuit: *Smith v. Fairview Ridges Hosp.,* 625 F.3d 1076, 1085-86 (8th Cir. 2010), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) (finding that "[t]he picture of Buckwheat, the comment about fried chicken, and the reference to the ghetto … carry some inferences that they were racially motivated" and discussing variety of instances in which code words may serve as evidence of racial animus);

Ninth Circuit: *Avenue 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 506-07 (9th Cir. 2016) (finding that use of code words consisting of stereotypes of Latinos, along with other evidence, "provide plausible circumstantial evidence that community opposition to Developers' proposed development was motivated in part by animus, and that the City Council was

fully aware of these concerns" when it voted against the zoning commission's recommendations);

Tenth Circuit: *Villanueva v. Carere*, 85 F.3d 481, 488 (10th Cir. 1996) (sharing concern over use of "culture" in response to argument that use of term is a code word for "ethnic minority");

Eleventh Circuit: *Underwood v. Hunter*, 730 F.2d 614, 621 (11th Cir. 1984), *aff'd*, *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding that a provision of the Alabama constitution disenfranchised voters in violation of the Fourteenth Amendment, noting that "the avowed objective of the suffrage committee was to deny the vote to *the corrupt and the ignorant*," which the defendant's expert admitted "referred specifically to blacks and lower-class whites") (emphasis added); and

D.C. Circuit *Arnold v. U.S. Postal Serv.*, 863 F.2d 994, 1000 (D.C. Cir. 1988) (recognizing that "[t]here may well be cases in which seniority is simply a code word or age discrimination" in an ADEA case).

A recent case under the Voting Rights Act is particularly instructive, especially with regard to the role that an expert can play in assisting a court to discern "that neutral reasons can and do mask racial intent, a fact we have recognized in other contexts that allow for circumstantial evidence." *Veasey v. Abbott*, 830 F.3d 216, 236 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017). As the court reviewed the evidence "that could support a finding of discriminatory intent," 830 F.3d at 235, it contrasted the stated purpose of SB 14—deterring "voter fraud"—with evidence that the drafters and proponents likely knew of the law's disproportionate effect on minorities, *id.* at 236. The Deputy General

Counsel to the Lieutenant Governor testified that he sent an email "urg[ing] senators to emphasize the detection and deterrence of fraud and protect[ing] public confidence in elections" as "the goal" of SB 14, "to remind people what the point of the bill was" for their speeches on the floor of the Texas Senate. *Id.* at 236 n.19; *see also id.* at 288 n.17 (Jones, J., dissenting) (cataloguing statements of proponents of SB 14 about the purpose of the bill being to deter "voter fraud" and "protect the integrity of the ballot box").

In examining the stated purpose of deterring "voter fraud," the court gave special attention to the testimony from plaintiffs' expert on race relations, a history professor, which placed the "voter fraud" language in historical context. *Id.* at 237 (noting the record showed that Texas has a history of justifying voter suppression efforts such as the poll tax and literacy tests with the race-neutral reason of promoting ballot integrity). The court quoted directly from the expert's testimony about the stated rationale for devices Texas had used to deny minorities the vote, including the all-White primary, the secret ballot, and the use of illiteracy, poll tax, re-registration, and purging. *Id.*

> Q What, in your opinion, was the stated rationale for the enactment of all [-]White primaries in Texas?
>
> A The stated rationale was voter fraud.
>
> Q What was the stated rationale, in your opinion, for the use of secret ballot provisions in Texas?
>
> A The stated rationale was to prevent voter fraud.

Q And what was the stated rationale, in your opinion, for the use of the poll tax in Texas?

A The stated rationale by the State was to prevent voter fraud.

Q And how about the stated rationale for the use in Texas of re-registration requirements and voter purges?

A The stated rationale was voter fraud.

Q Dr. Burton, in your expert opinion, did these devices actually respond to sincere concerns or incidents—incidences of voter fraud?

A No.

Id. The court remanded the discriminatory intent issue, instructing the trial court to reweigh the *Arlington Heights* factors, noting "there is evidence that could support a finding that the Legislature's race-neutral reason of ballot integrity offered by the State is pretextual," *id.*, and that "there remains evidence to support a finding that the cloak of ballot integrity could be hiding a more invidious purpose," *id.* at 241; *id.* at 242 (remand).

IV. A Sensitive Inquiry into the Historical Background of the Decision to Rescind DACA, with Particular Attention Paid to Contemporaneous Statements Made by Decisionmakers, Reveals the Use of Code Words Reflecting Animus Against Persons of Mexican Ancestry and Latinos.

Dr. Stephen Pitti's Declaration, Exhibit 1, based on his 96-page Expert Report of Stephen J. Pitti, *New York et al. v. Donald Trump et al.*, No. 1:17-cv-05228, ECF No. 97-2 at 76-174 ("Pitti Report"), provides comprehensive documentation and analysis of contemporaneous statements made by Donald Trump as candidate and as President as well as statements made by key advisers

and administration officials, including Senator and later Attorney General Jefferson Beauregard Sessions III and policy adviser Stephen Miller. *Id*. at 113-63. A comprehensive discourse analysis of 347 speeches and 6,963 tweets by then-candidate and now-President Donald Trump was conducted by a team of researchers. *See* Declaration of Dr. Otto Santa Ana, ¶ 14, Exhibit 2 at 4. Each scholar finds numerous, consistent, and persistent statements that are racially coded expressions and code words that provide strong evidence of animus. Pitti Decl. ¶¶ 18-148, Exhibit 1 at 18-46; Santa Ana Decl. ¶¶ 23-53, Exhibit 2 at 7-17.

Of special note is the manner in which Trump talks about DACA recipients and the way he contests and subverts the name by which they are commonly referred: "Dreamers." On November 13, 2015, in a forum called the Sunshine Summit hosted by the Republican Party of Florida intended to "electrify the Republican grassroots movement,"[24] then-candidate Donald Trump stated: "We are going to hire Americans first. We're going to take care of our workers. Did you ever hear of the Dream Act? It is not for our children. The Dream Act is for other children that come into the country. I want the Dream Act to be for our children."[25] Two days earlier at the fourth Republican presidential primary debate, Trump had

[24] Sunshine Summit, "Thank You," http://www.sunshinesummit.gop/thank-you (stating mission).
[25] Donald J. Trump, Remarks at 2015 Sunshine Summit (Nov. 13, 2015), https://www.c-span.org/video/?400325-10/donald-trump-remarks-2015-sunshine-summit.

promised a "deportation force" based on President Eisenhower's enforcement of the border that included deportation efforts such as the 1954 Operation Wetback. In particular, he lauded Eisenhower's program of deporting people deep into Mexico, saying, "Moved them way south. They never came back."[26] Rescinding DACA exposes DACA recipients to this "deportation force."

These relatively early primary campaign statements are repeated during the general election campaign after Trump garners the Republican party nomination. In a speech on August 24, 2016, Trump juxtaposes truly deserving American children against DACA recipients: "Where is the sanctuary city for American children? Where is that sanctuary? The dreamers we never talk about are the young Americans. Why aren't young Americans dreamers also? I want my dreamers to be young Americans."[27] In another general campaign speech, he implores, "Let our children be dreamers too."[28]

On September 1, 2017, when asked by reporters whether Dreamers should be worried, he responded, "We love the DREAMers . . . We think the DREAMers

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[26] *Transcript: Republican Presidential Debate*, N.Y. TIMES, Nov. 11, 2015, https://www.nytimes.com/2015/11/11/us/politics/transcript-republican-presidential-debate.html.

[27] Donald J. Trump, Remarks at the Mississippi Coliseum in Jackson, Mississippi (Aug. 24, 2016), http://www.presidency.ucsb.edu/ws/index.php?pid=123198.

[28] Donald J. Trump, Remarks at the Charlotte Convention Center in Charlotte, North Carolina (Aug. 18, 2016), http://www.presidency.ucsb.edu/ws/index.php?pid=119175.

are terrific."[29] Mere days later, on September 5, the Trump administration ended DACA. In doing so, President Trump repeated, "Above all else, we must remember that young Americans have dreams too. . . . Our first and highest priority must be to improve jobs, wages and security for American workers and their families."[30]

In this usage, Trump has co-opted "dreamer" and uses it instead to paint DACA recipients as interlopers whose unlawful presence threatens the rightful economic opportunities of "American" children. "Dreamer" itself becomes a code word that is intended to inflame and exploit negative sentiment based on people's economic and cultural anxieties. *See* Santa Ana Decl. ¶ 50, Exhibit 2 at 16.

The declarations of Drs. Pitti and Santa Ana, each of which is based on accepted methodologies in their respective fields and supported by comprehensive reports with detailed findings based on publicly available statements, provide ample evidence that Plaintiffs have a strong likelihood of proving animus and prevailing on their APA claims.

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[29] Donald J. Trump, Remarks on Signing a Proclamation on the National Day of Prayer for the Victims of Hurricane Harvey and for Our National Response and Recovery Efforts and an Exchange with Reporters (Sept. 1, 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=128160&st=dreamers&st1=.

[30] Statement from President Donald J. Trump (Sept. 5, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-7/.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's (1) grant of provisional relief to Plaintiffs and (2) denial of Defendants' motion to dismiss Plaintiffs' equal protection claims.

Dated: March 19, 2018

Respectfully submitted,

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

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APPENDIX

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Name	Title	Institutional affiliation
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Carlos Kevin Blanton	Professor of History	Texas A & M University, College Station
Laura Briggs	Chair and Professor, Women, Gender, Sexuality Studies; Affiliate Professor, Department of History	University of Massachusetts Amherst
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Glenda E. Gilmore	Peter V. and C. Vann Woodward Professor of History	Yale University

[31] None of the individual amici speak for or represent the official views of their respective institutions or departments.

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Matthew Pratt Guterl	Professor of Africana Studies and American Studies	Brown University
Leslie M. Harris	Professor, History and African American Studies	Northwestern University
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Daniel HoSang	Associate Professor of Ethnicity, Race & Migration and American Studies	Yale University
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Matthew Frye Jacobson	William Robertson Coe Professor of American Studies and History	Yale University

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of FRAP 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitations of FRAP 29(a)(5) and Circuit Rule 32-1 because it contains 6,523 words according to the word count feature of Microsoft Word, excluding the parts exempted by FRAP 32(a)(7)(B)(iii).

s/ *Robert S. Chang*
Robert S. Chang

CERTIFICATE OF SERVICE

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I hereby certify that on March 19, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Robert S. Chang*
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