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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

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18-485, 18-488

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Case Nos. 16-CV-4756 (NGG) (JO) (E.D.N.Y.), 17-CV-5228 (NGG) (JO) (E.D.N.Y.)

MARTIN JONATHAN BATALLA VIDAL, MAKE THE ROAD NEW YORK, on behalf of itself, its members, its clients, and all similarly situated individuals, ANTONIO ALARCON, ELIANA FERNANDEZ, CARLOS VARGAS, MARIANO MONDRAGON, CAROLINA FUNG FENG, on behalf of themselves and all other similarly situated individuals, STATE OF NEW YORK, STATE OF MASSACHUSETTS, STATE OF WASHINGTON, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF IOWA, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF VIRGINIA, STATE OF COLORADO,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, KIRSTJEN M. NIELSEN, Secretary of Homeland Security, JEFFERSON B. SESSIONS III, United States Attorney General,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

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

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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 CURIAE¹

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 the court below, New York and fourteen other states and the District of Columbia 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. *New York et al. v. Donald Trump et al.*, No. 1:17-cv-5229, ECF No. 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 accepted as valid in the field of history. These methods include a specific interpretive methodology that looks at public discourse to discern the use

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.

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.³ 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

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

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.

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 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 what were believed to be the rightful opportunities of an anxious citizenry.⁴ During the 1880s, the Chinese were blamed, which led to the various Chinese Exclusion

⁴ See generally John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (rev. ed. 2002).

Acts.⁵ During the 1920s, immigrants from Asia and racialized white ethnic groups from southern and eastern Europe were blamed, which led to the 1924 Immigration and Nationality Act that 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.⁶ And during the height of the Great Depression in the 1930s, migrants from Mexico were blamed, leading to the 1930s mass deportation of Mexican migrants and U.S. citizens of Mexican ancestry.⁷ Of the nearly 1.5 million deported during this period, upwards of 60% were U.S. citizens.⁸ 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 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

⁵ 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).

⁶ See generally Higham, *supra* n.4 (discussing nativism directed against immigrants from southern and eastern Europe during U.S. economic downturn); Mai Ngai, *Impossible Subjects: Illegal Aliens and Alien Citizens* 18-54 (2004) (discussing the impetus of the Immigration Act of 1924).

⁷ See generally Francisco E. Balderrama & Raymond Rodríguez, *Decade of Betrayal: Mexican Repatriation in the 1930s* (1975).

⁸ *Id.* at 216; Ngai, *supra* n.6, at 72.

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.⁹ 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 electoral base. Promising to emulate this mass deportation program while omitting its name is itself an example of a camouflaged expression—an example of how,

⁹ 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).

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, *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 2017.¹⁰ That analysis 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.

¹⁰ The complete analysis on which the declaration is based can be found at <https://www.thepresidentsintent.com/> (“The President’s Intent”).

Declaration of Dr. Otto Santa Ana, ¶ 54, Exhibit 2 at 17.

Further, a survey of federal circuit courts, including this Circuit, demonstrates that code word analysis is used to make findings regarding 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. Amended Memorandum & Order & Preliminary Injunction (Feb. 13, 2018), at SA23-47. Specifically, the court rejected the Department of Homeland Security's (DHS) offered reasons for its decision, finding that (1) the agency was operating under an "erroneous legal premise," *id.*, SA24-30, and (2) the offered litigation risk explanation was either a post hoc rationalization or was arbitrary and capricious, *id.*, SA41. Defendants have challenged these findings. Appellants' Op. Br. at 34-44, ECF No. 75.

Amici demonstrate that the evidence regarding racial animus supports the court's findings. 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 the 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). *Amici* demonstrate that code word analysis is an accepted historical methodology for discerning racial animus and is 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 admonition that “[b]ecause discriminatory intent is rarely susceptible to direct proof, a district court facing a question of discriminatory intent must make ‘a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.’” *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016) (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:

- whether “[t]he impact of the official action . . . bears more heavily on one

- race than another”;
- “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes”;
 - “[d]epartures from the normal procedural sequence”;
 - “[s]ubstantive departures”; and
 - “[t]he legislative or administrative history . . . especially where there are contemporary statements made by members of the decisionmaking body, minutes of its meetings, or reports.”

MHANY, 819 F.3d at 606 (quoting *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.¹¹ *See* Memorandum & Order [granting in part and denying in part Defendants’ Motion to Dismiss] (Mar. 29, 2018), 16-CV-4756, ECF No. 260, Supp. A. 13-15 (finding disparate impact based upon government’s data regarding demographic information about DACA recipients). 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* Amended Memorandum & Order & Preliminary Injunction (Feb. 13, 2018), at SA23-47 (finding agency decision was based on flawed legal and factual premises and post hoc rationalizations). Added to

¹¹ 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/AI%20Form%20Types/DACA/daca_population_data.pdf.

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 migrants.¹² 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.¹³ In addition to those detained and deported, hundreds of thousands of Mexican migrants left voluntarily in order to

¹² *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>.

¹³ García, *supra* n.12, at 228.

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 be recognized today 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 who entered the U.S. farther east by swimming the Rio Grande.”¹⁴ 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

¹⁴ *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>.

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.”¹⁵ 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.’”¹⁶

Though there is no record of President Eisenhower using the term in public, 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.”¹⁷ Further, he used the term at least once in his personal diaries.¹⁸ And members of his administration, including the two primary architects

¹⁵ 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>.

¹⁶ 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>.

¹⁷ See The President’s News Conference, July 14, 1954, <http://www.presidency.ucsb.edu/ws/index.php?pid=9947&st=wetback&st1> (question by reporter 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 reporter asking about “the wetback legislation prepared by Attorney General Brownell”).

¹⁸ DDE Personal Diary Jan.-Nov. 1954 (1)(2) (“notes on Bricker Amendment;

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.¹⁹ Before Operation Wetback, Brownell announced that he “would go to California next week to study the ‘wetback’ problem.”²⁰ General Swing, upon taking charge as Commissioner, announced that he would “stop this horde of invaders.”²¹

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.²² Facially

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.

¹⁹ 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).

²⁰ *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>.

²¹ Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the I.N.S.* 51 (1992).

²² Whether it was a slur expressing animus was contested among Supreme Court justices as late as 1981. During the justices’ private weekly conference when they discussed *Plyler v. Doe*, Justice William Rehnquist referred to schoolchildren of

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, 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

Mexican ancestry as “wetbacks.” When Justice Thurgood Marshall protested, likening the word to the n-word, Rehnquist defended his use of the term, saying 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).

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.”²³

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

²³ 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/>.

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 this evolution:

“Anti-discrimination laws and lawsuits have ‘educated’ would-be violators such that extreme manifestations of discrimination are thankfully rare... Regrettably, however, this in no way suggests that discrimination based upon an individual’s race, gender or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms.” . . . “[R]acially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications.”

MHANY, 819 F.3d at 609 (quoting, respectively, *Aman v. Cort. Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996) and *Smith v. Fairview Ridges Hosp.* 625 F.3d 1076, 1085 (8th Cir. 2010), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011)) (citations omitted).

In *MHANY*, plaintiffs alleged disparate treatment under the Fair Housing Act and Equal Protection Clause based, in part, on code word evidence. In that case, the local government reversed course on a plan to build multifamily housing in a

predominately white community after community members complained at a series of public meetings. *MHANY*, 819 F.3d at 596. The complaints began in earnest after one official suggested that the development might include some percentage of affordable housing. *Id.* at 592-95. Knowing that this was likely to increase the number of people of color in the community, the residents raised concerns about how the development would impact the “character” and “flavor” of the community. *Id.* at 593. Other neighbors wanted assurances that the development would be “upscale.” *Id.* at 592. They were also vocal about potential negative impacts on traffic and schools, despite studies showing that traffic would decrease from current levels and that multi-family housing was likely to result in fewer children than the single family housing the dissenters were advocating for. *Id.* at 590-95. Residents worried that this community would become similar to other nearby majority-minority communities, *id.* at 594, and one urged the officials to “just keep Garden City what it is,” *id.* at 596.

After the barrage of complaints, the officials abruptly changed course, capitulating to the demands of community members that the site be zoned for single family housing only. *Id.* at 596-97. The court upheld the trial court’s finding that “citizen opposition to [multi-family] zoning utilized code words to communicate their race-based animus to Garden City officials” and that “Garden City’s abrupt shift in zoning in the face of vocal citizen opposition to changing the

character of Garden City represented acquiescence to race-based animus.” *Id.* at 610-11.

Nearly every circuit court has recognized that code words or camouflaged expressions can be considered as evidence of discriminatory intent:²⁴

- 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 (3d Cir. 1996));
- Second Circuit: *MHANY*, 819 F.3d at 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);
- Fourth Circuit: *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1066 (4th Cir. 1982) (concern about influx of “undesirables,” dilution of public schools, and threat to public safety constituted “evidence

²⁴ The Federal Circuit appears not to have directly addressed this issue, though it 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”).

... which in a different context might not illustrate racial bigotry, but, against the background of the housing project ... 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*, 625 F.3d at 1085-86 (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 for age discrimination” in an ADEA case).

In a recent case where code word analysis was used to support a finding of racial animus, 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.

As set forth in the next section, code word analysis of statements by Trump and his officials provides strong support that the decision to rescind DACA was motivated by racial animus, which necessarily violates both the APA’s arbitrary and capricious and abuse of discretion standards. Of special note is the way, detailed in the next section, that Trump uses “DREAMers” as a code word in appealing to his electoral base, that DACA recipients are illegitimate claimants and that he will, instead, safeguard the American dream for “our children.”

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.

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,” has created a racially coded expression. The subversion and denigration of the “DREAMers” label is a conscious political strategy that is intended to solidify his electoral base’s opposition to DACA recipients and to garner political support for himself.

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,”²⁵ 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

²⁵ Sunshine Summit, “Thank You,” <http://www.sunshinesummit.gop/thank-you> (stating mission).

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.”²⁶ Two days earlier at the fourth Republican presidential primary debate, Trump had 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.”²⁷ Rescinding DACA exposes DACA recipients to this “deportation force.”

These relatively early primary campaign statements were repeated during the general election campaign after Trump garnered 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.”²⁸ In another general campaign speech, he implored, “Let our

²⁶ 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>.

²⁷ *Transcript: Republican Presidential Debate*, N.Y. TIMES, Nov. 11, 2015, <https://www.nytimes.com/2015/11/11/us/politics/transcript-republican-presidential-debate.html>.

²⁸ Donald J. Trump, Remarks at the Mississippi Coliseum in Jackson, Mississippi (Aug. 24, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=123198>.

children be dreamers too.”²⁹ The sentiments expressed in these campaign statements persisted to statements made while in office, and, most importantly, in relation to the decision to terminate DACA.

On September 1, 2017, when asked by reporters whether Dreamers should be worried, he responded, “We love the DREAMers . . . We think the DREAMers are terrific.”³⁰ 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.”³¹

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

²⁹ 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>.

³⁰ 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>.

³¹ Statement from President Donald J. Trump (Sept. 5, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-7/>.

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.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's grant of provisional relief to Plaintiffs.

Dated: April 11, 2018

Respectfully submitted,

s/ Robert S. Chang

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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 Local Rule 32.1(a)(4)(A) and Local Rule 29.1(c) because it contains 6,253 words according to the word count feature of Microsoft Word, excluding the parts exempted by FRAP 32(f).

s/ Robert S. Chang
Robert S. Chang

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I hereby certify that on April 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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