Nos. 18-587, 18-588, 18-589

In The
Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL., *Petitioners*,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
ET AL., *Respondents*,

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

AMICI CURIAE BRIEF OF AMERICAN HISTORICAL ASSOCIATION, ORGANIZATION OF AMERICAN HISTORIANS, 42 HISTORIANS, AND THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF RESPONDENTS

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Additional Captions Listed on Inside Cover

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET
AL., *Petitioners*,

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE, ET AL., *Respondents*,

———————

*ON WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

———————

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND
SECURITY, ET AL., *Petitioners*,

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL., *Respondents*,

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*ON WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

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INTEREST OF *AMICI CURIAE*[1]

The American Historical Association ("AHA") is the largest professional organization in the United States devoted to the study and promotion of history and historical thinking. It is a non-profit membership organization, founded in 1884 and incorporated by Congress in 1889 for the promotion of historical studies. The AHA provides leadership to the discipline on such issues as professional standards, academic freedom, access to archives, history education, and the centrality of history to public culture. In situations involving the rights and careers of individual historians, historical practice in diverse venues, or the role of history in public culture, the AHA has the responsibility to take public stands—including participation in relevant legal proceedings. Everything has a history; in this particular case, the AHA considers it imperative for the Court to be aware of the historical context of current efforts to vilify an entire racial group.

Founded in 1907, the Organization of American Historians ("OAH") is the largest professional society dedicated to the teaching and study of American history. Its distinguished *Journal of American History*, annual meetings, and public service activities aim to promote excellence in scholarship, teaching, and presentation of American history. The OAH is an

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief, in whole or in part, and no person or entity other than *amici* contributed monetarily to its preparation or submission. The parties consent to the filing of this brief.

international, non-profit membership organization, whose approximately 7,000 historian members include university and college professors in the United States and abroad, as well as individuals employed in a variety of scholarly and institutional settings, such as libraries, museums, and historical societies.

The late Kenneth M. Stampp, historian and past president of OAH, wrote: "With the historian it is an article of faith that knowledge of the past is a key to understanding the present."[2] The OAH adheres to this principle, and has an interest—not as an advocate of a particular legal standard, but as a steward of history—in ensuring that the Court is presented with an accurate description of the way that discrimination against immigrant groups initially relied upon racially explicit attacks, but has more recently relied upon coded language. The OAH occasionally submits *amicus* briefs that discuss the history of discrimination against certain groups. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (citing Br. for Org. of Am. Historians as *Amicus Curiae* 5-28).

The 42 individual *amici* are academics trained in the field of history who study, teach, and write about United States history.[3]

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a non-profit organization, based at the Seattle University School of

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[2] KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH vii (1956).

[3] Their names, titles, and institutional affiliations appear in the appendix, *infra*.

Law, that 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 has a special interest in addressing government action targeted at classes of persons based on race, nationality, or religion. The Korematsu Center has developed familiarity with code word analysis from its role as co-counsel to high school students who successfully challenged a facially neutral Arizona statute enacted and enforced to terminate a Mexican American Studies Program. *González v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017). In addition, the Korematsu Center is keenly aware of the use of racially coded (and more explicit) language to justify past discriminatory treatment of Japanese Americans.

In proceedings in the United States District Court for the Eastern District of New York, *New York v. Trump*, No. 1:17-cv-5228, an expert report and declaration by historian Dr. Stephen Pitti explained the historical context and use of racially coded expressions or "code words" on the part of President Trump and other Administration officials in connection with the rescission of the Deferred Action for Childhood Arrivals program ("DACA"). *Id*., ECF No. 97-2, Ex. 38 (Dec. 15, 2017) ("Pitti Decl."). All *amici* submit that Dr. Pitti's research methods are widely accepted as valid in the field of history, and agree with his 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.

Drawing on their collective experience and
expertise, *amici* seek to ensure that this Court
understands the ways in which racially coded
language has been used by government actors, both
past and present, to mask illicit discriminatory
motives—particularly in the immigration context,
including the rescission of DACA.

INTRODUCTION AND
SUMMARY OF ARGUMENT

Just last Term, this Court held the Department
of Commerce's addition of a citizenship question to the
decennial census lacked the sort of genuine reasoned
explanation that the Administrative Procedure Act
("APA") demands. *Department of Commerce v. New
York*, 139 S. Ct. 2551 (2019). The Court so held even
though (i) the reason the agency offered was facially
neutral; and (ii) the agency's decision was within the
substantive scope of its authority. The Court relied on
evidence showing that the agency's proffered
explanation was "incongruent with what the record

reveals about the agency's priorities and decision-making process." *Id.* at 2575.

The Department of Homeland Security's decision to rescind DACA suffers from a similar incongruity. The proffered reasons, largely *post hoc*, are likewise facially neutral. But as Respondents catalog, there is already evidence in the administrative record that those reasons were pretextual. *See* Br. of Univ. of Cal. Resp'ts 56-58 (citing Attorney General Sessions's statements, upon announcing rescission, that DACA denies Americans jobs and contributes to crime). *Amici* here seek to underscore that accepting the Administration's justifications for rescinding DACA requires turning a blind eye not only to that evidence, but also to the history and context of the rescission decision—including the repeated use of "code words" designed to advance political objectives by appealing to racist and nativist sentiment.

We ought not be surprised that proffered reasons for government actions sometimes mask improper discrimination. Race-neutral reasons have been offered throughout our country's history to justify all manner of discriminatory actions that were, in fact, the product of deliberate action and animus. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"). That has been particularly true with respect to anti-immigrant measures targeted at disfavored minority groups.

The practice of using race-neutral justifications has become more prevalent as overtly racist language has become less accepted over time. But racism has hardly disappeared. In place of overt expressions of animus, politicians have resorted to using code words to convey racial and political messages to appeal to their constituents. This phenomenon is well described in a surprisingly candid confession by Republican political strategist Lee Atwater in 1981:

> You start out in 1954 by saying, "N****r, n****r, n****r." By 1968 you can't say "n****r"—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 "N****r, n****r."[4]

To assist the Court in evaluating Respondents' claims that DACA rescission violates the APA and the Equal Protection Clause, *amici* explain that racial animus can be discerned by code word analysis, and that such analysis is a widely accepted methodology in the field of history and is increasingly relied upon by

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

courts. *Amici* then analyze the history, context, and contemporaneous statements by President Trump that reflect anti-Mexican and anti-Latino sentiment behind the decision to rescind DACA. Those statements are consistent with racially coded language he used throughout his campaign and presidency, and reveal that the Government's explanation for rescinding DACA is pretextual.

ARGUMENT

I. HISTORY SHOWS A TRANSITION FROM RACIALLY EXPLICIT ATTACKS TO CODED LANGUAGE FOR DISCRIMINATION AGAINST IMMIGRANT GROUPS

1. The use of race-based language to advance anti-immigration measures is nothing new. For most of this Nation's history, populist leaders, politicians, and others did not shy away from overt racial attacks to justify and advance discrimination against a particular immigrant group. The following describes a few notable historical examples that show how racial nativism was exploited explicitly to scapegoat outsider immigrant communities.

a. In the 1870s, a major depression in the United States caused widespread unemployment. Labor groups in the western United States blamed their problems on the growing Chinese immigrant population. Stereotypes about Chinese workers were used to justify anti-Chinese actions. A widespread belief that Chinese immigrants had been brought to the country involuntarily fueled the notion that they were willing to tolerate terrible working conditions because they had no choice. Newspapers such as the

San Francisco Chronicle propagated the claim that Chinese immigrants were "as rigidly under the control of the contractor who brought him as ever an African slave was under his master."[5]

Nativist politicians also raised alarms about Chinese immigrants' strong work ethic. Senator John F. Miller, a leading advocate of restricting Chinese immigration, alleged that due to overpopulation in China, Chinese laborers had become "by long training and *** heredity *** automatic engines of flesh and blood," and white laborers could not compete with such "machines."[6] White Americans thus had to be protected from admission of Chinese "servile labor."[7]

Opponents of Chinese immigration also seized on racial and cultural theories in support of their arguments against Chinese immigration. Chinese immigrants were supposedly biologically incapable of assimilation.[8] According to Senator Miller, Chinese immigrants could never become American because American and Asian civilizations were "of diverse elements and character, both the result of evolution under different conditions, radically antagonistic," and this meant that Americans and Chinese were like "oil and water" and would never mix.[9] Other restrictionists warned that Chinese immigrants were "utterly unfit for and incapable of free or self-

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[5] LUCY SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 9-10 (1995).

[6] *Id.* at 15 (ellipses in original).

[7] *Id.*

[8] *Id.* at 11.

[9] *Id.* at 15-16.

government" because Chinese immigrants had emigrated from a despotic government.[10]

The restrictionists' view eventually carried the day as Congress passed the Chinese Exclusion Act of 1882, and the United States adopted a policy of excluding immigrants on the basis of race and nationality for the first time in its history.[11]

b. Congress next drastically restricted immigration in the 1920s to preserve a supposedly past ideal of America from a perceived threat of mass immigration. Strains of anti-Semitism and racial animus were present from the beginning of these efforts.

The House Committee on Immigration appended to its 1921 report in favor of suspending immigration a blatantly anti-Semitic screed that America faced an inundation of "abnormally twisted" and "unassimilable" Jews—"filthy, un-American, and often dangerous in their habits."[12] The rise of eugenics in America aided this racial push to restrict immigration based on national origin.[13] The House Committee appointed an "expert eugenics agent," who testified on the bad breeding state of immigrants who were entering America and spoiling its inborn national qualities. [14] Future-President Coolidge similarly

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[10] *Id.* at 16.

[11] *Id.* at 17.

[12] JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 309 (rev. ed. 2002).

[13] *Id.* at 314.

[14] *Id.*

warned of deterioration when immigrants intermarried with white Americans.[15]

These sentiments prompted Congress to pass the Immigration Act of 1924, in order to preserve a "distinct American type" and prevent the "Nordic" race in America from being overrun by immigrants from other parts of the globe.[16]

c. Concerns about the emerging "Mexican problem" soon followed.[17] An editorial in the *Saturday Evening Post* in 1928 heralded these fears:

> Mexican laborers often have nine children, or even more. At the nine-child rate, any of these Mexicans who are coming in by the trainload might be expected to average 729 great grandchildren. *** No temporary considerations of expediency should carry the smallest weight in preventing the proper economic protection of our own flesh and blood.[18]

Anti-Mexican rhetoric often focused on allegations of ignorance, filth, indolence, and criminality.[19]

The Great Depression served only to increase this racial hostility.[20] Federal and local governments began to pressure Mexican immigrants to return to

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[15] *Id.* at 318.

[16] *Id.* at 321.

[17] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 52 (2004).

[18] *Id.* at 52-53.

[19] *Id.*

[20] *Id.* at 71.

Mexico. [21] The Immigration Service created an atmosphere of fear through public round-ups and deportation drives.[22] Local governments and private charitable organizations placed additional pressure on Mexicans and Mexican-Americans to repatriate voluntarily by denying or discriminating against them with regard to governmental relief.[23] Over 400,000 people from Mexico, including American citizens of Mexican descent, were repatriated from the United States to Mexico during the 1930s.[24] It is estimated that 60% were children or American citizens by native birth.[25]

d. Mexican migrants again became the target of nativist sentiment in the 1950s, when a program officially known as "Operation Wetback" began forcibly repatriating hundreds of thousands of them in 1954.[26] As a Sunday edition of the *New York Times* then explained, "[t]he term 'wetback' was originally applied to Mexicans who entered the U.S. farther east

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[21] *Id.* at 73.

[22] *Id*.

[23] GEORGE J. SÁNCHEZ, BECOMING MEXICAN AMERICAN: ETHNICITY, CULTURE AND IDENTITY IN CHICANO LOS ANGELES, 1900-1945, at 211-212 (1993).

[24] NGAI, *supra* note 17, at 72.

[25] *Id*.

[26] *See* JUAN RAMON 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, July 29, 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.

by swimming the Rio Grande,"[27] and dates back to the Great Depression.[28]

Over time, "wetback" became a metonym for all unauthorized Mexican migrants, and today there is little doubt of its status as an epithet or slur.[29] For present purposes, the historical record makes clear that, at least as far back as Operation Wetback, the term was used in connection with anti-immigration sentiment. President Eisenhower, for example, affirmed his support of legislation intended to address what was characterized as the "wetback problem."[30]

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[27] *Fifteen News Questions*, N.Y. TIMES, Apr. 2, 1950, at E2, E9, https://timesmachine.nytimes.com/timesmachine/1950/04/02/962 14886.html?pageNumber=142; https://timesmachine.nytimes.co m/timesmachine/1950/04/02/96214988.html?pageNumber=149.

[28] *Wetback*, 20 THE OXFORD ENGLISH DICTIONARY 173 (2d ed. 1989).

[29] *See, e.g.*, *Ortiz v. School Bd. of Broward Cty.*, No. 18-15305, 2019 U.S. App. LEXIS 20554, at *12 (11th Cir. July 11, 2019) ("ethnic slurs like 'spic' and 'wetback'" evidence "severe" harassment); *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 950-951 (7th Cir. 2005) (stating that it was "difficult to imagine epithets more offensive to someone of Hispanic descent" than "spic" and "wetback"); *Vigil v. City of Las Cruces*, 119 F.3d 871, 871-874 (10th Cir. 1997) (Lucero, J., dissenting) (comparing the term to other racial epithets).

[30] *See* The President's News Conference, July 14, 1954, https://www.presidency.ucsb.edu/documents/the-presidents-new s-conference-458 (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, https://www.presidency.ucsb.edu/documents/the-presidents-new s-conference-461 (question by John Herling, *Editors Syndicate*, asking about "the wetback legislation prepared by Attorney General Brownell").

Attorney General Herbert Brownell, Jr. similarly announced in the lead-up to Operation Wetback that he "would go to California next week to study the 'wetback' problem."[31] And most pointedly, General Joseph Swing, upon assuming the post of Commissioner of Immigration and Naturalization, announced that he would "stop this horde of invaders."[32]

As the architect of Operation Wetback, General Swing made good on his promise. The massive scope of the program and lack of procedural safeguards resulted in many American citizens of Mexican descent being swept up in its dragnet and removed to remote areas of Mexico.[33] One of the ships used to transport such persons was the subject of a congressional investigation, during which the vessel was "likened *** to an 'eighteenth century slave ship' and a 'penal hell ship.'"[34] Immigration officials also deployed calculated publicity campaigns meant to drum up fear and scare thousands of Mexican migrants into leaving the United States.[35]

2. Over time, the nature of the public discourse underlying measures enacted to further discrimination has changed. As the use of explicit racial epithets (like "wetback") has become less

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[31] *Brownell Maps Trip for "Wetback" Study*, N.Y. TIMES, Aug. 7, 1953, at 13, https://timesmachine.nytimes.com/timesmachine/1953/08/08/84417640.html?pageNumber=13.

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

[33] GARCÍA, *supra* note 26, at 228.

[34] NGAI, *supra* note 17, at 156.

[35] GARCÍA, *supra* note 26, at 227-229.

acceptable, racially coded expressions have taken their place.

The civil rights movement provides a lesson in how code words can replace overtly racist statements in political appeals. As reflected in the quotation from Lee Atwater noted above (p. 6, *supra*), common racial slurs used in and before the 1960s became politically toxic. In their stead, politicians began using code words that implicitly appealed to certain voters.

Beginning with the presidential campaigns of George Wallace and Barry Goldwater, opponents of integration discovered they could win the support of white middle class voters who resented gains by African-Americans.[36] They used terms like "States' rights," which were "code words for resistance to the federal government's efforts to desegregate schools and Civil Rights laws that protected the rights of African Americans."[37]

To fend off Wallace's third-party campaign, Richard Nixon's 1968 presidential campaign adopted similar code words. In addition to appeals to "states' rights," Nixon championed "law and order" and urged

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[36] IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 6-7, 13-22 (2014); TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY 7 (2001).

[37] Leland Ware & David C. Wilson, *Jim Crow on the "Down Low": Subtle Racial Appeals in Presidential Campaigns*, 24 ST. JOHN'S J.L. COMM. 299, 309 (2009); *see also* LÓPEZ, *supra* note 36, at 16; MENDELBERG, *supra* note 36, at 72-73.

"less government interference."[38] These terms played on targeted white voters' concerns about racial desegregation and urban civil unrest, and cast African-Americans as criminals.[39]

Ronald Reagan echoed the "states' rights" mantra in his first major public appearance after becoming the Republican Party presidential nominee. [40] Reagan announced, "I believe in states' rights," and promised to "restore to states and local governments the power that properly belongs to them."[41] The setting for the speech—a nearly all-white crowd of 10,000 at a county fair in Neshoba County, Mississippi, where no presidential candidate had previously spoken—itself had historical resonance that dovetailed with Reagan's message: Neshoba County is where three civil rights workers (James Cheney, Andrew Goodman, and Michael Schwerner) were murdered in 1964.[42]

Similarly, in attacking the welfare system throughout his campaign, President Reagan used code

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[38] Ware & Wilson, *supra* note 37, at 300; *see* LÓPEZ, *supra* note 36, at 23-24.

[39] LÓPEZ, *supra* note 36, at 23-24.

[40] Douglas E. Kneeland, *Reagan Campaigns at Mississippi Fair: Nominee Tells Crowd of 10,000 He Is Backing States' Rights—Attacks Inflation Policy*, N.Y. TIMES, Aug. 3, 1980, at 11, https://timesmachine.nytimes.com/timesmachine/1980/08/04/111 268554.html?pageNumber=11.

[41] *Id*.

[42] Ware & Wilson, *supra* note 37, at 310-311; Bob Herbert, *Righting Reagan's Wrongs?*, N.Y. TIMES, Nov. 13, 2007, at A29, https://www.nytimes.com/2007/11/13/opinion/13herbert.html?se archResultPosition=1.

words that relied on the public's impression that most welfare recipients were dishonest African-Americans.[43] He repeatedly invoked the image of a "Chicago welfare queen" with "eighty names, thirty addresses, [and] twelve Social Security cards [who] is collecting veteran's benefits on four non-existing deceased husbands. She's got Medicaid, getting food stamps, and she is collecting welfare under each of her names. Her tax-free cash income is over $150,000."[44] He similarly described a "strapping young buck" who used food stamps to buy steak while "you were waiting in line to buy hamburger."[45] These code words not only relied on stereotypes that African-Americans were lazy and cheating the system, but also cast whites as hard-working taxpayers—all without expressly saying so.

II. CODE WORD ANALYSIS IS A WIDELY ACCEPTED METHODOLOGY EMPLOYED BY HISTORIANS AND RELIED UPON BY COURTS

Code word analysis has become increasingly important as politicians and others have developed code words whose racial character is less overt but nonetheless perceptible to desired constituencies. The analysis employs a specific interpretive methodology that looks at public discourse to discern the use of racially coded expressions by government officials, politicians, and members of the public to advance political objectives targeting immigrant or other

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[43] Ware & Wilson, *supra* note 37, at 311-312.

[44] LÓPEZ, *supra* note 36, at 58.

[45] *Id.* at 59.

minority communities. As Dr. Pitti explains 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.

Courts rely on such code word analysis as evidence in determining whether alleged discriminatory acts are racially motivated. Unlike times past, people today are rarely explicit about their intent or motivation in expressing or acting on racial bias. 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); *see also Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-1082 (3d Cir. 1996) ("Anti-discrimination laws and lawsuits have 'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare," but "[d]iscrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms."). Coded language therefore makes it "easier to coat various

forms of discrimination with the appearance of propriety." *Aman*, 85 F.3d at 1082.

Today, every federal court of appeals has recognized, in a variety of contexts ranging from employment discrimination to legislative action, that code words or camouflaged expressions can evidence discriminatory intent:

> **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.");

> **Second Circuit**: *MHANY Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 608-612 (2d Cir. 2016) (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 1082-1083 (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*, 682 F.2d 1055, 1066 (4th Cir. 1982) (evincing concern 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 Dall., 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*, 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 "black people");

Seventh Circuit: *E.E.O.C. v. Board of Regents of Univ. of Wis. Sys.*, 288 F.3d 296, 303 (7th Cir. 2002) (holding that 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'" to be reflection of age bias);

Eighth Circuit: *Smith v. Fairview Ridges Hosp.,* 625 F.3d 1076, 1085-1086 (8th Cir. 2010) (finding reference to the "ghetto," among other things, to "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,* 818 F.3d 493, 506-507 (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) (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 defendant's expert admitted "referred specifically to blacks and lower-class whites") (emphasis added); and

D.C. Circuit: *Arnold v. United States Postal Serv.*, 863 F.2d 994, 1000 (D.C. Cir. 1988) ("There may well be cases in which seniority is simply a code word for age discrimination.").

Broad recognition of the role that code word analysis may play in ferreting out discriminatory intent in government decisionmaking is hardly surprising. Indeed, in light of its oft hidden nature, this Court has long recognized that courts must make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.* 429 U.S. 252, 266 (1977). Among the relevant factors

is "[t]he historical background of the decision." *Id.* at 267-268.

This established understanding of the operation of code words is precisely the reason that expert analysis of historians examining current events can be helpful to the Court.

III. THE HISTORY, CONTEXT, AND CONTEMPORANEOUS STATEMENTS ABOUT DACA REVEAL THE USE OF CODE WORDS THAT REFLECT ANTI-MEXICAN AND ANTI-LATINO SENTIMENT

Dr. Pitti's declaration, in conjunction with his 96-page expert report, comprehensively documents and analyzes President Trump's statements (as candidate and in office), as well as statements made by key advisers and administration officials (including Attorney General Sessions and policy adviser Stephen Miller). Pitti Decl., Ex. B 35-85. Dr. Pitti's findings—including that President Trump used code words that simultaneously convey and mask anti-immigrant sentiment—are independently corroborated by linguistics expert Dr. Otto Santa Ana, whose team of researchers analyzed 347 of President Trump's speeches and 6,963 tweets.[46]

In particular, the manner in which President Trump talks about DACA recipients and the way he subverts the name by which they are commonly

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[46] *See* OTTO SANTA ANA ET AL., DOCUMENTING THE PRESIDENT'S VERBAL ANIMUS AGAINST IMMIGRANTS TO DEFEND DACA GRANTEES: FINAL REPORT OF THE UCLA DACA DEFENSE GROUP 9-11 (Jan. 2019) https://www.thepresidentsintent.com/issue-final-report ("FINAL REPORT").

referred—"dreamers"—cannot be ignored. During a campaign forum called the Sunshine Summit, hosted by the Republican Party of Florida, 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? The Dream Act isn't 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.[47]

Later in the campaign, Trump juxtaposed American children and 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.[48]

In another general campaign speech, he implored, "[l]et our children be dreamers too."[49]

Once in office, when asked by reporters whether "dreamers" should be worried, President Trump responded: "We love the DREAMers. *** We think the

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[47] Donald J. Trump, Remarks at 2015 Sunshine Summit at 17:28-17:43 (Nov. 13, 2015), https://www.c-span.org/video/?400325-10/donald-trump-remarks-2015-sunshine-summit.

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

[49] 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.

DREAMers are terrific."[50] Mere days later, the Trump Administration ended DACA. In doing so, President Trump repeated, "[a]bove 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."[51]

As explained by Dr. Santa Ana's declaration, President Trump has co-opted the term "dreamer" and uses it 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 Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec.*, Nos. 18-15068 et al. (9th Cir. Mar. 19, 2018), ECF No. 56-3, Ex. 2 ¶ 50 ("Santa Ana Decl.").

That is consistent with President Trump's characterization of Latinos and immigrants generally, conveyed often through (among more explicit references) racially coded expressions and code words. *See* Pitti Decl. ¶¶ 18-148; Santa Ana Decl. ¶¶ 23-53.

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[50] 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), https://www.presidency.ucsb.edu/documents/remarks-signing-pr oclamation-the-national-day-prayer-for-the-victims-hurricane-h arvey-and.

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

Expert analysis demonstrates that President Trump's assertions about Latinos and immigrants employ a steady narrative, portraying a "calculating enemy who dispatches inhuman forces; colluding agents who have betrayed their country; vulnerable citizens who are preyed upon by the invaders; and the one stalwart leader who can defeat the invaders by deploying the nation's human and material resources."[52] The United States is depicted as a "besieged fortress" at war with an "enemy"—Mexico—that "'push[es]' [its] 'worst' people onto the United States; 'murderers, drug dealers, and gang members.'"[53] A wall is necessary to protect U.S. citizens from this "flood" of criminality.[54]

Similarly, President Trump's narrative casts Latino immigrants as invaders who drive down wages and steal "the few opportunities that remain[] for longtime residents." Pitti Decl. ¶ 72. He also has repeatedly suggested that immigrants are drains on the welfare state, abuse the system, and "put great burdens on local schools and hospitals." *Id.* ¶¶ 89-92. These statements are inextricably intertwined with his support for immigration reform that would "preven[t] new migrants and new immigrants from collecting welfare and protect[] U.S. workers from being displaced," *id.* (first alteration in original), by low-skilled immigrants from Mexico and Central America, *id.* ¶¶ 104-107. Significantly, during the presidential campaign, Trump promised a "deportation force" based on President Eisenhower's

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[52] SANTA ANA, FINAL REPORT, *supra* note 46, at 11.

[53] *Id.* at 12-13.

[54] *Id.* at 13-14.

enforcement of the border—hearkening back to Operation Wetback (*see* pp. 11-13, *supra*), which Trump lauded for "[m]ov[ing] them way south" so "[t]hey never came back."[55]

These narratives are reflected in President Trump's statement rescinding DACA. He described a "massive surge of accompanied minors" that "in some cases" would "become members of violent gangs throughout our country, such as MS-13."[56] He also described existing immigration policy as having "predictable and tragic consequences: lower wages and higher unemployment for American workers, substantial burdens on local schools and hospitals, the illicit entry of dangerous drugs and criminal cartels, and many billions of dollars a year in costs paid for by U.S. taxpayers."[57]

Attorney General Sessions, announcing the reasons, echoed those sentiments that same day. In particular, he stated that DACA "denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens," and the program's "wind down" would "strengthen[] *** the rule of law in America," "save[] lives, protect[] communities and taxpayers," and avoid "put[ting] our nation at risk of crime, violence and even terrorism." SER1354-1355, Nos. 18-15068 et al. (9th Cir. Mar. 13, 2018), ECF No. 45-6; *see also* Br. of Univ. of Cal. Resp'ts 56-58.

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

[56] DACA Statement, *supra* note 51.

[57] *Id.*

At bottom, the Trump Administration's coded statements—targeting both Latino migrants generally and DACA recipients specifically—amply connect anti-immigrant sentiment to the rescission of DACA.

IV. THE TRUMP ADMINISTRATION'S USE OF CODED LANGUAGE IN DISCUSSING DACA UNDERSCORES THE MISMATCH BETWEEN THE PROFFERED REASONS AND DACA'S RESCISSION

Pretext is a simple concept. If the reasons offered to justify a government action turn out not to square with the record or underlying facts, then a court need not accept those reasons and may set aside the action. Applying the code word analysis discussed in the prior sections reveals the pretextual nature of the reasons the Administration offered (mostly *post hoc*) for the rescission of DACA.

The Government contends that the President's narrative surrounding DACA is irrelevant in the absence of evidence that Secretaries Duke and Nielsen harbored similar views. But courts have long recognized that decisions made in response to coded expressions of racial animus "can support a finding of discriminatory motives by government officials, even if the officials do not personally hold such views." *Avenue 6E Invs.*, 818 F.3d at 504. Stated differently, courts recognize that discrimination can occur when government officials acquiesce to constituents motivated by animus. *See MHANY*, 819 F.3d at 610-611 & n.5 (city's decision to reject building permit "in the face of vocal citizen opposition to changing the character of Garden City represented acquiescence to race-based animus"). As the Second Circuit explained,

"[t]he notion of a code word implies that it will be understood by another" and permits courts to consider the "relevance of code words in the context of legislators acting responsively to citizen animus." *Id.* at 609 n.5.

If acquiescence *to constituents* is enough, then acquiescence *to superiors* must be too. Like the decisionmakers in *Avenue 6E Investments* and *MHANY*, it is not necessary for Secretaries Duke and Nielsen to have expressed or harbored racial animus for the DACA rescission to have been so tainted. Just as local officials may make discriminatory decisions in response to pressure from their constituents, the Secretaries serve at the pleasure of the President, whose statements naturally influence agency decisionmaking. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 496-497 (2010) (recognizing "basic principle" that Article II "makes a single President responsible for the actions of the Executive Branch"). This Court should not adhere to the fiction that the decision to rescind DACA was made in a vacuum, for courts "are not required to exhibit a naiveté from which ordinary citizens are free." *Department of Commerce*, 139 S. Ct. at 2575 (citation and internal quotation marks omitted).

The Government further contends that the (suspect) admiration expressed by the President for DACA recipients somehow forecloses the possibility that illicit motives played a part in the DACA decision. As discussed above, however, the President has co-opted language about "dreamers" to exploit anti-immigrant sentiment. President Trump's statements, as candidate and in office, reveal his overriding message—playing to his constituencies—that the

American Dream is not for the "dreamers" but for our "American children." *See* pp. 21-26, *supra.*

The Government also tries to dismiss the President's statements as suggesting "nothing more than the obvious fact that DACA has been an important part of legislative negotiations on immigration reform." Br. of Pet'rs 55. But DACA's use as a political bargaining chip appears nowhere in either Secretary Duke's or Secretary Nielson's explanations. And the Government's gloss is belied by the historical and other context from which those statements cannot be separated. *See Department of Commerce*, 139 S. Ct. at 2575-2576 (refusing to accept "contrived reasons" for an agency decision because the APA's "reasoned explanation requirement *** is meant to ensure that agencies offer genuine justifications for important decisions"). Ample record and public evidence, similar to the evidence that came to light in the census case and buttressed by code word analysis, shows that the Government's proffered reasons were pretextual.

CONCLUSION

This Court should affirm the decisions below.

Respectfully submitted.

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APPENDIX

APPENDIX

List of Individual *Amici Curiae* with Title and
Institutional Affiliation for Identification Purposes[1]

Name	Title	Institutional Affiliation
Lauren Araiza	Associate Professor and Chair, Department of History	Denison University
Rick Baldoz	Associate Professor and Chair of Sociology	Oberlin College
Carlos Kevin Blanton	Professor and Head, Department of History	Texas A&M University, College Station
Laura Briggs	Professor, Women, Gender, Sexuality Studies	University of Massachusetts Amherst
Geraldo L. Cadava	Associate Professor of History & Latina/o Studies	Northwestern University

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

Maria Raquel Casas	Associate Professor, Department of History	University of Nevada, Las Vegas
Lori Flores	Associate Professor, Department of History	Stony Brook University (SUNY)
Glenda Elizabeth Gilmore	Peter V. and C. Vann Woodward Professor of History Emeritus	Yale University
Ariela Gross	John B. & Alice R. Sharp Professor of Law & History	University of Southern California
Thomas Guglielmo	Associate Professor of American Studies	George Washington University
Joshua B. Guild	Associate Professor of History and African American Studies	Princeton University
Matthew Pratt Guterl	Professor of Africana Studies and American Studies	Brown University

Leslie M. Harris	Professor, History and African American Studies	Northwestern University
Kelly Lytle Hernandez	Professor, Departments of History and African-American Studies, The Thomas E. Lifka Endowed Chair of History, and Director, Ralph J. Bunche Center for African American Studies	University of California, Los Angeles
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Karl Jacoby	Allan Nevins Professor of History	Columbia University
Ari Kelman	Chancellor's Leadership Professor of History	The University of California, Davis
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David Roediger	Foundation Professor of American Studies	University of Kansas

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