

No. 18-16981

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRISTA RAMOS, *et al.*,

Plaintiffs-Appellees,

v.

**KIRSTJEN NIELSEN, in her capacity as
Secretary of Homeland Security, *et al.*,**

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 3:18-CV-1554-EMC
The Honorable Edward M. Chen, District Judge

**BRIEF OF *AMICI CURIAE* THE ANTI-DEFAMATION LEAGUE,
BET TZEDEK, LATINOJUSTICE PRLDEF, NATIONAL COUNCIL OF
JEWISH WOMEN, ONEJUSTICE, PUBLIC COUNSEL, SERVICE
EMPLOYEES INTERNATIONAL UNION, UNIDOSUS (FORMERLY THE
NATIONAL COUNCIL OF LA RAZA), ESPERANZA IMMIGRANT
RIGHTS PROJECT, THE UNION FOR REFORM JUDAISM, CENTRAL
CONFERENCE OF AMERICAN RABBIS, WOMEN OF REFORM
JUDAISM, AND MEN OF REFORM JUDAISM, UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL UNION, T'RUAH: THE
RABBINIC CALL FOR HUMAN RIGHTS, UNITED FARM WORKERS OF
AMERICA, JAPANESE AMERICAN CITIZENS LEAGUE, THE
AMERICAN FEDERATION OF TEACHERS, AND THE JEWISH
COUNCIL FOR PUBLIC AFFAIRS IN SUPPORT OF PLAINTIFFS-
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CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a)(4)(A), *amici curae* certify that *amici* are not publicly held corporations, do not have any parent corporations, and have not issued any shares of stock.

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IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Pursuant to Federal Rule of Appellate Procedure 29, *Amici Curiae* Anti-Defamation League (“ADL”), Bet Tzedek, LatinoJustice PRLDEF, National Council of Jewish Women, OneJustice, Public Counsel, Service Employees International Union, UnidosUS (formerly the National Council of La Raza), Esperanza Immigrant Rights Project, the Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, and Men of Reform Judaism, United Food and Commercial Workers International Union, T’ruah: The Rabbinic Call for Human Rights, United Farm Workers of America, Japanese American Citizens League, the American Federation of Teachers, and the Jewish Council for Public Affairs respectfully submit this brief in support of Respondents.

Founded in 1913, ADL is an anti-hate organization that seeks to stop the defamation of the Jewish people, and fights to secure justice and fair treatment for all people. Its 25 regional offices throughout the United States provide materials, programs and services to promote civil rights and combat anti-Semitism and all forms of bigotry. Because of its history fighting discrimination, including prejudice toward immigrants and religious minorities, ADL can provide unique and important

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), ADL states that no party’s counsel authored this brief in whole or in part, and no party, party’s counsel, or other individual contributed money intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

insights for the Court in addressing and analyzing the evidence of animus that the District Court found to have been a motivating factor underlying the termination of Temporary Protected Status for individuals from Haiti, Sudan, Nicaragua, and El Salvador. ADL has played an active role in responding to anti-immigrant fervor, including highlighting and critiquing the normalization of hate. ADL has a stake in this case, since fighting all forms of hate and discrimination is central to its mission.

For nearly 45 years, Bet Tzedek, Hebrew for “House of Justice,” has provided free legal services and counsel in a comprehensive range of practice areas including elder law, guardianships, conservatorships, employment rights, consumer rights and protection, low-income tax advocacy, government benefits, housing, community outreach and education, and impact litigation. Among the agency’s first clients were Holocaust survivors in need of assistance applying for reparations payments from the German government. Today, Bet Tzedek represents unaccompanied immigrant children who qualify for asylum, special immigrant juvenile status, and other forms of relief to ensure history does not repeat itself.

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Its continuing mission is to protect the civil and constitutional rights of all Latinos and to promote justice for the pan-Latino community. It has used advocacy and impact litigation in areas

of criminal justice reform, civil rights, immigrants' rights, economic and workplace justice, civic engagement, and voting rights.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Comprehensive, humane, and equitable immigration, refugee, asylum, and naturalization laws, policies, and practices that facilitate and expedite legal status and a path to citizenship for more individuals." Consistent with its Principles and Resolutions, NCJW joins this brief.

OneJustice works side-by-side with a statewide network of nonprofits, firms, law schools, businesses, and individuals to strengthen and improve the civil legal aid delivery system to better serve low-income clients. OneJustice created the Immigration Pro Bono Network 2013 in collaboration with the Immigration Legal Resource Center to educate, train, and mobilize volunteer lawyers and law students to help expand legal services to immigrant communities in California. OneJustice is devoted to supporting refugees and immigrant communities impacted by federal government policies that violate due process and equal access to justice.

Public Counsel, based in Los Angeles, California, is the nation’s largest not-for-profit law firm specializing in delivering pro bono legal services. Public Counsel’s Immigrants’ Rights Project provides legal representation to individuals seeking immigration benefits—including Temporary Protected Status (“TPS”)—before the U.S. Citizenship and Immigration Services, the Los Angeles Immigration Court, the Board of Immigration Appeals, and the United States Court of Appeals for the Ninth Circuit. Public Counsel’s clients come from all over the world, including Sudan, Nicaragua, Haiti, and El Salvador. Public Counsel has a strong interest in ensuring that immigrants receive the full and fair process and benefits to which they are entitled.

The Service Employees International Union (“SEIU”) is a labor organization of approximately two million working men and women in the United States and Canada. SEIU’s members include foreign-born U.S. citizens, lawful permanent residents, and immigrants authorized to work in the United States, including as recipients of TPS granted to nationals at issue in this case. Many of SEIU’s members have mixed-status families. SEIU’s commitment to racial and immigrant justice, reflected in our policies and programs, is deep and long-standing. Its mission statement embedded in its Constitution states: “We believe our strength comes from our unity, and that we must not be divided by forces of discrimination based on gender, race, ethnicity, religion, age, physical ability, sexual orientation, or

immigration status.” SEIU represents diverse immigrant communities across North America and, consistent with its core mission statement and Constitution, work to enforce equality and non-discrimination in the workplace and in our country’s institutions.

UnidosUS, formerly the National Council of La Raza, is the nation’s largest Latino civil rights and advocacy organization. Through its unique combination of research, advocacy, programs, and a national network of nearly 300 community-based affiliate organizations across the country, UnidosUS simultaneously challenges the social, economic, and political barriers that affect Latinos in the United States. Since its founding in 1968, UnidosUS has contributed to a stronger America by elevating the voice of Latinos, and defending and advancing its community’s concerns. Today, it remains steadfast in its mission to realize a day where all Latinos thrive and their contributions are fully recognized. Every day throughout the nation the UnidosUS affiliate network engages with individuals with TPS in their day to day lives. Like some of the named plaintiffs in this matter, the family of UnidosUS affiliates provides a range of services and resources to TPS holders, including in states like California, Texas, Maryland, Florida, and New York, where significant numbers of TPS holders reside. TPS holders are a core constituency for many of them. As advocates for the Latino community, UnidosUS has a key interest in this matter in its own right. The issue of TPS is of particular

importance to hundreds of thousands of Latinos across the nation, including those from El Salvador and Nicaragua who are implicated in this litigation. Many of these individuals have resided lawfully in the United States for nearly 20 years, have established deep family and community ties, and in many cases are essential workers in key sectors of the economy. Similarly, UnidosUS also has a vested interest in the welfare and advancement of children of TPS holders. The Center for Migration Study finds that TPS holders from the three largest nations comprising about 94% of all TPS holders (to include El Salvador) had an estimated 273,000 U.S.-citizen children. UnidosUS submits that this litigation has possible implications for the long-term education, healthcare, and economic advancement of these American youth, who are at risk of being separated from a parent. UnidosUS supports the plaintiffs' position in submitting this amicus brief.

Esperanza Immigrant Rights Project ("EIRP") is a public interest legal organization serving some of the most vulnerable immigrants in the Los Angeles area. Over the past 15 years, EIPR has become one of the leading immigration-focused public interest organizations in the country. EIRP believes that all immigrants deserve access to education and representation and works tirelessly to teach, defend, and empower children and adults by giving them the tools they need to navigate the complex immigration system. EIPR believes immigrant rights are human rights and therefore has a substantial interest in this case.

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews; the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis; Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world; and Men of Reform Judaism come to this issue out of their longstanding and deep commitment to just, compassionate, and humane immigration policy that reflects the basic principles of human dignity and human rights. The Union for Reform Judaism, the Central Conference of American Rabbis, Women of Reform Judaism, and Men of Reform Judaism represent Jewish people who have known the experience of both fleeing persecution and being "strangers in strange lands," making them especially sensitive to the plight of those seeking refuge today.

United Food and Commercial Workers International Union ("UFCW") is a labor organization that represents working men and women across the United States. UFCW's 1.3 million members work in a range of industries, with the majority working in retail food, meatpacking and poultry, food processing and manufacturing, and non-food retail. UFCW members and their families include TPS holders from Haiti, Sudan, Nicaragua, and El Salvador. TPS families have fled natural disasters, violence, instability, and ethnic, religious, and ideological persecution. They also have raised children in the United States, regularly undergo

background checks, pay renewal fees on top of taxes, and are truly making America a better nation even as they work hard to build a better life for their families. UFCW opposes the Trump Administration's unlawful and discriminatory rescission of TPS status for these families.

T'ruah: The Rabbinic Call for Human Rights believes that Jewish history demands that it stand with those fleeing violence and persecution. The Jewish community today would look very different if its neighbors had acted in solidarity with the community in times of oppression. Many of the community's own families are alive today because of the relatively open immigration policies of the late 19th and early 20th centuries, and too many Jews died after being trapped in Europe when the borders closed in 1924. T'ruah well understands the cruelty of forcing TPS recipients back to countries where their lives will be in danger. Furthermore, T'ruah believes that every human being is created b'tzelem elohim, in the image of God. It is therefore incumbent on T'ruah to act in a way that affirms the fundamental dignity of every human being; respect for each human being is the foundation of Jewish ethics.

The United Farm Workers of America ("UFW") is a labor organization that represents thousands of migrant and seasonal farm workers in various agricultural occupations throughout the country, and has members of diverse racial, ethnic, and immigration backgrounds throughout the United States. The UFW seeks to improve

the lives, wages, and working conditions of agricultural workers and their families through collective bargaining, worker education, state and federal legislation, and through public campaigns. Since its founding in 1962 by Cesar Chavez, the UFW has been dedicated to the cause of eliminating discrimination against farmworkers, Latinos, and against any other groups that have been the target of unfair or unlawful treatment. The UFW believes that the workers who harvest the food that this nation enjoys should be entitled to protection from unjust deportation and costly family separations. Consequently, the UFW has a substantial interest in this case because farmworkers through the jurisdiction of the Ninth Circuit and elsewhere lack “legal” status, directly benefit from TPS, and will therefore be affected by the panel’s decision in this case.

The Japanese American Citizens League (“JACL”) is the nation’s oldest and largest Asian American civil rights organization whose mission is to secure and maintain the civil rights of Japanese Americans and all others who are victimized by injustice and bigotry. JACL was founded in 1929 when Japanese immigrants and Japanese Americans were subject to racist anti-immigrant rhetoric and discrimination which led to the mass incarceration of nearly 120,000 people of Japanese heritage during World War II.

The American Federation of Teachers (“AFT”), AFL-CIO represents approximately 1.7 million members employed in K-12 and higher education, public

employment, and healthcare. AFT has a long history of civil rights advocacy. AFT has members throughout the country who have received TPS. These members have utilized TPS to obtain employment in institutions that provide essential public services. AFT members also teach students with TPS. These students are integral members of their educational institutions. They contribute to the diversity of experience and viewpoint in classrooms, engage in valuable research projects, and play leadership roles in student life.

The Jewish Council for Public Affairs (“JCPA”) is an umbrella body that represents 125 local community relations councils and 17 national Jewish agencies, including civil and human rights organizations and the four major streams of religious Judaism in the United States (Orthodox, Conservative, Reform, and Reconstructionist). Together JCPA’s network promotes a just and pluralistic American society, human rights around the world, and Israel’s quest for peace and security. JCPA is celebrating the 75th anniversary of its founding this year.

JCPA was formed, in large measure, to oppose anti-Semitism and all other forms of bigotry. The organization has consistently articulated and advocated for positions opposing hate. JCPA has also advocated for generous and humane immigration policies that uphold civil and human rights, consistent with its religious teachings and obligations.

I. INTRODUCTION

While there is no constitutional protection requiring the United States to afford Temporary Protected Status (“TPS”) to those deemed worthy of our nation’s protection, there is a clear constitutional prohibition on discrimination in the implementation of government policies based on race, national origin, and other protected characteristics.² *Amici* submit that ample evidence of racial animus exists to support the District Court’s decision that the terminations of TPS at issue in this case were discriminatory and therefore contrary to fundamental equal protection principles.

According to *amicus* ADL’s report, *Mainstreaming Hate: The Anti-Immigrant Movement in the U.S.*, “[a]nti-immigrant fervor, once relegated to more extreme quarters, has been increasingly mainstreamed over the last ten years.”³ Anti-immigrant groups such as the Federation for American Immigration Reform and the Center for Immigration Studies have shifted the boundaries of what is “acceptable within political action and public discourse.”⁴ Individuals with close ties to these groups and other advocates for anti-immigrant policies have attained positions of influence in the current Administration of President Donald J. Trump, distorting the

² U.S. Const. Am. V. This is the case even in the immigration context. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001).

³ Anti-Defamation League, *Mainstreaming Hate: The Anti-Immigrant Movement in the U.S.* (Nov. 2018), <https://www.adl.org/media/12249/download>.

⁴ *Id.*

historical understanding of conservatism in the political debate.⁵ The result of this, combined with the current Administration’s rhetoric, has been an acceptance and normalization of racist, xenophobic, and anti-immigrant sentiment, which is pervasive and has impacted government policy.

It is in this context that the Court must examine the Defendant’s decision to terminate TPS for individuals from El Salvador, Haiti, Nicaragua, and Sudan (“the Affected Countries”). The evidence here shows that President Trump has repeatedly made overtly prejudiced statements, as well as numerous coded invocations of racial animus, some of which are eerily reminiscent of dehumanizing language used in the darkest times of modern history. The evidence also shows that the President is well-aware of the true meaning of the language he has used, and in particular his use of the “America First” slogan, which was used by the Ku Klux Klan (“KKK”) and others to advance a racist, anti-Semitic agenda. The evidence further shows that the coded invocations of racial animus have been echoed and implemented by key members of this Administration responsible for TPS programs, including both the former-Acting Department of Homeland Security (“DHS”) Secretary Elaine Duke and current DHS Secretary Kirstjen Nielsen, indicating they are indeed the motivating principles underlying these government actions.

⁵ *Id.*

Given this disturbing evidence, the District Court correctly recognized that racial animus was a motivating factor behind the terminations of TPS for the Affected Countries, in violation of the equal protection component of the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

II. ARGUMENT

A. The Administration's Decision to Terminate TPS For the Affected Countries Was Unlawfully Motivated by a Discriminatory Purpose.

The record in this case is replete with evidence from this Administration that race and nationality were motivating factors in the decision to terminate TPS for individuals from the Affected Countries. The Administration has clearly communicated a preference to exclude non-white and non-European Immigrants.

At the now infamous January 2018 immigration-focused meeting with lawmakers in the Oval Office, President Trump reportedly asked, “[w]hy are we having all these people from shithole countries come here?”⁶ referring to Haiti, El Salvador, and African countries. He went on to ask “[w]hy do we need more Haitians?” and announced that “immigrants from that country must be left out of any

⁶ Josh Dawsey, *Trump Derides Protections for Immigrants from ‘shithole’ countries*, THE WASHINGTON POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?noredirect=on&utm_term=.17eae1fb0eb5.

deal.”⁷ The President then suggested that the United States should instead focus on bringing more people “from countries such as Norway,”⁸ exhibiting a clear preference for white-European immigrants over non-white and non-European immigrants such as individuals from the Affected Countries.

While President Trump denied using the term “shithole,” he has not expressed any desire to welcome or attract immigrants from Haiti, El Salvador, and the other Affected Countries, or other predominantly non-white and non-European countries. To the contrary, the opposite message is frequently conveyed. DHS Secretary Nielsen denied hearing any specific slurs at the meeting in question, but nevertheless admitted that the President used “tough language” while discussing the topic.⁹ DHS Secretary Nielsen was considered “complicit” by some commentators based on her response.¹⁰ More broadly, world leaders condemned President Trump’s comment and interpreted it as a preference for white-European immigrants over non-white and non-European immigrants. For example, United Nations human rights spokesperson Rupert Colville reasoned, “[y]ou cannot dismiss entire countries and continents as

⁷ *Id.*

⁸ *Id.*

⁹ In contrast, Senators Lindsay Graham and Richard Durbin confirmed that the President used the specific phrase “shithole countries.” Tal Kopan and Veronica Stracqualursi, *DHS Secretary says Trump used ‘tough’ language on immigration but denies hearing specific slurs*, CNN (Jan. 16, 2018), <https://www.cnn.com/2018/01/16/politics/kirstjen-nielsen-dhs-secretary-hearing/index.html>.

¹⁰ *Id.*

‘shitholes,’ whose entire populations, who are not white, are therefore not welcome.”¹¹ This is exactly what happened—the termination of TPS for El Salvador was announced within a week.

The “shithole” comment was widely understood to be an expression of racial animus, an expression consistent with the Administration’s comments reflecting a racially discriminatory preference for white-European immigrants.¹² In addition, President Trump disparaged immigrants from the Affected Countries when he announced his preference for immigrants from places like Norway and questioned the need for others, such as Haiti.¹³

¹¹ Ed. O’Keefe and Anne Gearan, *Trump Condemned for ‘Shithole’ Countries Remark, Denies Comment but Acknowledges ‘Tough’ Language*, THE WASHINGTON POST (Jan. 13, 2018), https://www.washingtonpost.com/politics/trump-acknowledges-tough-language-but-appears-to-deny-shithole-remark/2018/01/12/c7131dae-f796-11e7-beb6-c8d48830c54d_story.html.

¹² President Trump has stated, in a joint preference conference with Theresa May, the Prime Minister of the United Kingdom, that he views immigration as “bad for Europe,” and that it “is very negative for Europe.” See, *Full Text: Donald Trump-Teresa May Press Conference*, POLITICO (July 13, 2018), <https://www.politico.com/story/2018/07/13/full-text-theresa-may-trump-visit-transcript-718569>. President Trump has also stated that “[a]llowing the immigration to take place in Europe is a shame,” and that it has “changed the fabric of Europe and, unless you act very quickly, it’s never going to be what it was and I don’t mean that in a positive way.” See Tom Newton Dunn, *Migrants ‘Harm UK’ Donald Trump Says Britain is ‘Losing its Culture’ Because of Immigration*, THE SUN (July 12, 2018), <https://www.thesun.co.uk/news/6766947/donald-trump-britain-losing-culture-immigration/>.

¹³ Dawsey, *supra* n. 6.

The President’s “shithole countries” comment was also consistent with numerous other statements he has made disparaging immigrants other than white-Europeans. For example, he has characterized Mexican immigrants as “rapists,” accusing them of “bringing crime” to the United States,¹⁴ even though various studies have shown that “immigrants—regardless of where they are from, what immigration status they hold, and how much education they have completed—are less likely than native-born citizens to commit crimes or become incarcerated.”¹⁵ The President also compared immigrants and refugees to snakes who “fatally bite[]” those who take them in and give them care,¹⁶ and referred to particular categories of

¹⁴ Michelle Ye Hee Lee, *Donald Trump’s false comments connecting Mexican immigrants and crime*, THE WASHINGTON POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/>.

¹⁵ Anti-Defamation League, *Myths and Facts About Immigrants and Immigration*, 1 <https://www.adl.org/resources/fact-sheets/myths-and-facts-about-immigrants-and-immigration>. In fact, “there is no evidence immigrants commit more crime than native-born Americans.” See Michelle Ye Hee Lee, *supra* n. 14.

¹⁶ Eli Rosenberg, *‘The Snake’: How Trump appropriated a radical black singer’s lyrics for immigration fearmongering*, THE WASHINGTON POST (Feb. 24, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/02/24/the-snake-how-trump-appropriated-a-radical-black-singers-lyrics-for-refugee-fearmongering/>.

immigrants as “animals”¹⁷ and an infestation.¹⁸ This language is reminiscent of Nazi descriptions of Jews as rats and vermin prior to the Holocaust¹⁹ and Hutu extremists’ description of Tutsis as snakes and cockroaches in the lead-up to the Rwandan genocide.²⁰ Dehumanizing language “grants legitimacy to those who do believe that certain others are inherently threatening, dangerous and ought to be eliminated from the community.”²¹

The demonization and degradation of non-white and non-European immigrants cloaked with the legitimacy of the Office of the President is disconcerting, and only worsened by the evidence that this rhetoric has influenced actual policy,²² as discussed in greater detail below.

¹⁷ Aliza Luft and Daniel Solomon, *How Dangerous is it When Trump Calls Some Immigrants ‘animals’?*, THE WASHINGTON POST (May 25, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/25/how-dangerous-is-it-when-trump-calls-some-immigrants-animals/?utm_term=.ee0ae5cf2a1d.

¹⁸ Abigail Simon, *People Are Angry President Trump Used This Word to Describe Undocumented Immigrants*, TIME (June 19, 2018), <http://time.com/5316087/donald-trump-immigration-infest/>.

¹⁹ Defining the Enemy, Holocaust Encyclopedia, <https://encyclopedia.ushmm.org/content/en/article/defining-the-enemy> (last visited February 5, 2019).

²⁰ Propaganda and Practice, Human Rights Watch, <https://www.hrw.org/legacy/reports/1999/rwanda/Geno1-3-10.htm> (last visited February 5, 2019).

²¹ Luft, *supra* 17.

²² For example, in February 2018, U.S. Citizenship and Immigration Services (“USCIS”), the agency responsible for writing recommendations on TPS decisions, removed the reference to the United States as a “nation of immigrants” from its mission statement. L. Francis Cissna, *USCIS Francis Cissna on New Agency Mission*

B. The Administration’s Pervasive Coded and Symbolic Invocations of Racial Animus Demonstrate the TPS Terminations For the Affected Countries Were Unlawfully Motivated.

Both parties in this case have focused on the President’s description of his immigration policy as an “America First” policy, and on former-Acting DHS Secretary Duke’s statement that her TPS decisions were consistent with an “America First” approach to TPS policy. However, as discussed below, they differ on how to interpret that phrase.²³ *Amici* believe it is important to provide context that will help the Court understand the term and the significance of its use by the Administration in the current immigration debate. The “America First” slogan invokes a long and troubling history of racial animus, which was known to the President when he and other senior officials in the Administration employed the phrase.

Statement, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Feb. 22, 2018), <https://www.uscis.gov/news/news-releases/uscis-director-l-francis-cissna-new-agency-mission-statement>; *see also* Carol Kuruvilla, *U.S. Immigration Agency Changes Mission Statement to Reflect ‘America First’ Agenda*, HUFFPOST (Feb. 27, 2018), https://www.huffingtonpost.com/entry/immigration-uscis-mission-statement_us_5a8f4884e4b03b55731a411c. The change occurred under the leadership of President Trump-appointee, L. Francis Cissna, who also played a key role in the TPS termination decisions. *See generally* Resp. Br. at 27–28. Former USCIS director Leon Rodriguez described the change to the USCIS mission as a “particularly sad turn of history.” Miriam Jordan, *Is America a ‘Nation of Immigrants’? Immigration Agency Says No*, THE NEW YORK TIMES (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/us/uscis-nation-of-immigrants.html>.

²³ *See* Pet’r Br. at 54–55; Resp. Br. at 28–29, 66–68.

1. The “America First” Slogan Used By the Administration Has a Deep History of Racism and Anti-Semitism.

The policy ideals that fall within “America First” harken back to a dangerous past. Since at least the early 1900s, “America First” has been used to propagate anti-immigrant sentiment and racial animus. In the 1920s, it was used prominently by the KKK. Binghamton, New York was the site of a KKK “America First” Parade where banners reading “America First | One God | One Country | One Flag” were openly displayed.²⁴ In January 1922, a KKK parade in Alexandria, Louisiana bore two flaming crosses and banners with the slogans “America First” and “White Supremacy.”²⁵ Another variation of the slogan appeared in an “Imperial Proclamation” submitted to Congress as evidence during a 1921 hearing on the KKK’s activities.²⁶ The phrase was also used in KKK literature and speeches to foment anti-immigrant sentiment. For example, in 1923 a KKK speaker proclaimed,

²⁴ Binghamton, NY: Ku Klux Klan stages an ‘America First’ parade in Binghamton, NY. Photograph, Getty Images. (1920s), <https://www.gettyimages.com/detail/news-photo/ku-klux-klan-stages-an-america-first-parade-in-binghamton-news-photo/514702614>.

²⁵ Sarah Churchwell, *End of the American Dream? The dark History of ‘America First’*, THE GUARDIAN (Apr. 21, 2018), <https://www.theguardian.com/books/2018/apr/21/end-of-the-american-dream-the-dark-history-of-america-first>.

²⁶ David Emery, *Fact Check: Was ‘America First’ a Slogan of the Ku Klux Klan?*, SNOPE (Feb. 9, 2018), <https://www.snopes.com/fact-check/america-first-ku-klux-klan-slogan/>.

“I stand for America first, last and always.... I am opposed to any organization which tries to bring in foreign and alien ideals.”²⁷

The “American First” slogan was revived during the World-War II era in support of right-wing groups that backed Nazi Germany or otherwise opposed U.S. intervention in the war.²⁸ The most prominent figure to invoke the “America First” ideology at that time was aviator Charles Lindbergh. Lindbergh was among the leadership of the America First Committee, an organization whose chief mission was opposing U.S. intervention in World War II.²⁹ Lindbergh was also a notorious anti-Semite and defender of the Nazi party. In an infamous speech at an America First Rally in Des Moines Iowa in September 1941, he declared that “the British and the Jewish races ... for reasons which are not American, wish to involve us in the war.”³⁰

After the attack on Pearl Harbor and the United States’ entry into World War II, the “America First” phrase faded from mainstream use. In the decades that ensued the ideology and phrase were “kept alive by underground fascist movements”³¹—until President Trump adopted the slogan and made it the cornerstone of his presidential campaign and this Administration.

²⁷ *Id.*

²⁸ Susan Dunn, *Trump’s ‘America First’ has ugly echoes from U.S. history*, CNN (Apr. 28, 2016), <https://www.cnn.com/2016/04/27/opinions/trump-america-first-ugly-echoes-dunn/>.

²⁹ *Id.*

³⁰ *Id.*

³¹ Churchwell, *supra* n. 25.

Indeed, the President elevated the phrase in his inaugural address in 2017 when he promised that “[f]rom this day forward, a new vision will govern our land. From this day forward, it’s going to be—always—America First.”³² In his first State of the Union Address in 2018, President Trump reiterated a commitment to this principle, both as a legislative philosophy and as the actual policy of his new Administration, promising to “fulfill[] [his] ironclad pledge to only sign a bill that puts America first.”³³ Later that year, in March 2018, “in her personal notes to herself, anticipating the impending cancellation of TPS for over 250,000 people from El Salvador, Honduras and Nicaragua,”³⁴ then-Acting DHS Secretary Duke wrote: “[t]he TPS program must end . . . [t]his conclusion is the result of an America first view of the TPS decision.”³⁵ In sum, while the Government claims that the phrase “America First” refers to “merit-based entry” into the United States and

³² David Von Drehle, *Donald ‘Trump’s Unprecedented, Divisive Speech*, TIME (Jan. 20, 2017), <http://time.com/4641547/inauguration-2017-donald-trump-america-first/>.

³³ President Donald J. Trump, State of the Union Address (Jan. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>.

³⁴ *Documents Reveal How Trump’s Racist ‘America First’ Agenda Pressured DHS to End Humanitarian Program*, NATIONAL TPS ALLIANCE, <https://www.nationaltpsalliance.org/tps-lawsuit/government-documents-tell-all-about-trump-administration-and-tps>.

³⁵ A. Degen Ex. 29, *Ramos, et al. v. Nielsen, et al.*, 3:18-cv-01554-EMC (N.D. Cal. Aug. 23, 2018), Dkt 96-29, <https://www.nationaltpsalliance.org/wp-content/uploads/2018/08/DPP-3582-EX-29.pdf>.

“focuses on America’s interests foremost,”³⁶ its pernicious and well-documented history as an expression of racial animus show, quite clearly, otherwise.

2. President Trump Has Demonstrated An Understanding of the History and Meaning of the Phrase “America First.”

During the presidential campaign for the 2000 election, then-Mr. Trump decried the use of “America First” as the slogan of Reform Party presidential candidate Patrick Buchanan, calling him a “Hitler lover” and “the choice of ‘the really staunch-right wacko vote.’”³⁷ However, he later adopted that same phrase as his own. During the 2016 presidential election, then-candidate Trump was asked directly if he was familiar with the history of the phrase “American First.” He responded, “I was familiar, but it wasn’t used for that reason. It was used as a brand-new, very modern term.”³⁸ President Trump’s claim to redefine a term that “ha[d]

³⁶ See Pet’r Br. at 55; Resp. Br. at 59–60.

³⁷ Ron Elving, *Trump Vows Policy Vision Of ‘America First,’ Recalling Phrase’s Controversial Past*, NPR (Jan. 21, 2017), <https://www.npr.org/2017/01/21/510877650/trump-vows-policy-vision-of-america-first-recalling-phrases-congtroversial-past>. See also Sean Illing, *How “America First” ruined the “American dream”*: Author Sarah Churchwell on the entangled history of America’s most loaded phrases, VOX (Oct. 22, 2018), <https://www.vox.com/2018/10/22/17940964/america-first-trump-sarah-churchwell-american-dream> (Churchwell noting that the Trump campaign “chose the phrase ‘America First’ pretty late in the campaign, and it seem[s] pretty deliberate,” noting Trump’s comments on Buchanan’s use of the phrase in the 1990’s to “curry favor with the right-wing wacko nut jobs...”).

³⁸ *Transcript: Donald Trump on NATO, Turkey’s Coup Attempt and the World*, THE NEW YORK TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/22/us/politics/donald-trump-foreign-policy-interview.html>.

been largely banished from respectable discourse”³⁹ rang hollow for many in the mainstream of society who saw it as a signal of the President’s world view and policy intentions.⁴⁰

In recent years, many interested stakeholders provided history and context about the phrase to the President, illuminating why its use is offensive.⁴¹ *Amicus* ADL wrote to the President explaining that, “for many Americans, the term ‘America First’ will always be associated with and tainted by this history... choosing a call to action historically associated with incivility and intolerance seems ill-advised.”⁴² The Administration’s ongoing use of the phrase “America First” does not appear brand new or modern. On the contrary it conveys the same troubling sentiment of its past, which is particularly disconcerting coming from the White House.

³⁹ Eli Lake, *Trump’s New Slogan Has Old Baggage From Nazi Era*, BLOOMBERG (Apr. 27, 2016), <https://www.bloomberg.com/opinion/articles/2016-04-27/trump-s-america-first-slogan-has-nazi-era-baggage>.

⁴⁰ See Peter Baker, *‘Use That Word!’: Trump Embraces the ‘Nationalist’ Label*, THE NEW YORK TIMES, (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/us/politics/nationalist-president-trump.html>.

⁴¹ Press Release, Anti-Defamation League, ADL Urges Donald Trump to Reconsider ‘America First’ in Foreign Policy Approach, (Apr. 28, 2016), <https://www.adl.org/news/press-releases/adl-urges-donald-trump-to-reconsider-america-first-in-foreign-policy-approach#.WIJ187YrKV4>; Dina Kraft, *In Trump’s push for ‘America First,’ troubling echoes of anti-Semitic chapter*, THE TIMES OF ISRAEL, (Jan. 29, 2017), <https://www.timesofisrael.com/trumps-push-for-america-first-takes-dark-page-from-anti-semitic-crusade/>.

⁴² Press Release, Anti-Defamation League, *supra* n. 41.

3. The President Has Been Unwilling to Forcefully and Timely Dissociate from White Supremacists.

The President's unwillingness to forcefully and timely reject white supremacists reinforces the bias at the heart of the TPS terminations. It is noteworthy that in 2017, President Trump failed to emphatically denounce the "Unite the Right" white supremacist rally in Charlottesville, Virginia. Instead of immediately condemning the displays of hatred, bigotry, and violence, he stayed silent on the matter for several days. He then proclaimed that "there is blame on both sides," adding, "[w]hat about the 'alt-left'?"⁴³ DHS Secretary Nielsen echoed the President's comments, stating that there were, in fact, "very fine people on both sides."⁴⁴ This is in stark contrast to the public comments of many other prominent political figures, including then-Speaker of the House of Representatives Paul Ryan, who called white supremacy "repulsive" and said "there can be no moral

⁴³ Dan Merica, *Trump says both sides to blame amid Charlottesville backlash*, CNN (Aug. 16, 2017), <https://www.cnn.com/2017/08/15/politics/trump-charlottesville-delay/index.html>; Glenn Thrush & Maggie Haberman, *Trump is Criticized for Not Calling Out White Supremacists*, THE NEW YORK TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/trump-charlottesville-protest-nationalist-riot.html>.

⁴⁴ DHS Secretary Nielsen's statement on this point stands in sharp contrast to Defendants' assertion that there is no evidence of racial animus on the part of the Secretary. DHS Secretary Nielsen issued the decision terminating TPS for El Salvador. Lydia O'Connor, *Kristjen Nielsen Doubles Down on Trump's Infamous 'both sides' comment*, HUFFPOST (July 19, 2018), https://www.huffingtonpost.com/entry/kirstjen-nielsen-both-sides-charlottesville_us_5b50c67ce4b0fd5c73c33f7e.

ambiguity.”⁴⁵ Republican Senator Marco Rubio commented that the “white nationalists in Charlottesville were ‘100% to blame,’” adding that “[t]he #WhiteSupremacy groups will see being assigned only 50% of blame as a win . . . We cannot allow this old evil to be resurrected.”⁴⁶

Even before the election, there were questions about then-candidate Trump’s hostility toward minorities. When prominent white supremacist David Duke, the former “Grand Wizard” of the KKK, endorsed him and told listeners on a radio show that a vote for anyone else would be “treason to your heritage,”⁴⁷ Trump’s reaction was troubling. In August 2016, asked whether he repudiates David Duke’s endorsement,⁴⁸ he responded “sure... if that would make you feel better, I would certainly repudiate.”⁴⁹ After considerable time and public pressure, President Trump did ultimately renounce Duke, but his message of tacit encouragement had already been conveyed. In fact, after President Trump’s extended silence regarding

⁴⁵ Michael D. Shear and Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames ‘Both Sides’*, THE NEW YORK TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html>.

⁴⁶ *Id.*

⁴⁷ Evan Osnos, *Donald Trump and the Ku Klux Klan: A History*, THE NEW YORKER, (Feb. 29, 2016), <https://www.newyorker.com/news/news-desk/donald-trump-and-the-ku-klux-klan-a-history>.

⁴⁸ *Id.*

⁴⁹ *Id.*

Charlottesville, Duke said of President Trump: “we are going to fulfill the promise of Donald Trump . . . because he said he’s going to take our country back.”⁵⁰

President Trump’s failure to denounce white supremacy carries particular significance because “scholarship suggests that how local leaders respond to dehumanizing propaganda has the power to either encourage or disrupt these narratives and their impact.”⁵¹ In light of the history and context described above, the Administration’s attempt to re-define the meaning of “America First” is simply not credible.

III. CONCLUSION

The Office of the President of the United States is a truly singular platform. Whether characterized in terms of President Roosevelt’s “bully pulpit” or as the leader of the free world, the Office of the President has long wielded exceptional moral and symbolic power. That power manifests in what presidents—and, by extension, administrations and presidential candidates—say and how they choose to say it. This Administration has consistently promoted discriminatory viewpoints, despite frequent admonitions from political opponents and would-be allies alike. The very real consequence is the normalizing of racially discriminatory, anti-American

⁵⁰ Libby Nelson, ‘*Why we voted for Donald Trump*’: David Duke explains the white supremacist Charlottesville protests, VOX (Aug. 12, 2017), [https://www.vox.com/2017/8/12/16138358/charlottesville-protests-david-duke-kkk](https://www.vox.com/2017/8/12/16138358/charlottesville-protests-david-duke-<u>kkk</u>).

⁵¹ Luft, *supra* n. 17.

political ideas. There is a distinct and disturbing correlation between anti-immigrant rhetoric and the Administration's immigration policy decisions, including the decision to terminate TPS protections for certain non-white and non-European immigrants.

The evidence described here leads inescapably to the conclusion that the TPS terminations at issue were motivated by racial animus, and therefore unconstitutional. The District Court rightfully halted them, and *Amici* respectfully request that this Court affirm the lower court's ruling.

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