Nos. 25-1083, 25-1084

In the Supreme Court of the United States

MARKWAYNE MULLIN, SECRETARY, DEPARTMENT OF HOMELAND SECURITY, ET AL., *Petitioners*,

v.

DAHLIA DOE, ET AL., *Respondents*.

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

v.

FRITZ EMMANUEL LESLY MIOT, ET AL., *Respondents*.

On Writs of Certiorari Before Judgment to the United States Courts of Appeals for the Second and District of Columbia Circuits

BRIEF OF *AMICI CURIAE* HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC AND 38 PROFESSORS IN SUPPORT OF RESPONDENTS

KRISTEN CLARKE
DARIELY RODRIGUEZ
2900 Van Ness Street NW
Howard University School of Law Civil Rights Clinic
2900 Van Ness St. NW
Washington, DC 20008

ANDREW H. SCHAPIRO
Counsel of Record
QUINN EMANUEL URQUHART & SULLIVAN, LLP
191 N. Wacker Dr.
Suite 2700
Chicago, IL 60606
(312) 705-7403
andrewschapiro@quinnemanuel.com

Counsel for Amici Curiae
(Additional counsel listed on inside cover)

April 13, 2026

Additional Counsel:

OWEN F. ROBERTS
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
295 5th Avenue
9th Floor
New York, NY 10016

CHARLES B. STRAUT II
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
50 California Street
San Francisco, CA 94111

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INTEREST OF *AMICI CURIAE*[*]

Amici Curiae, the Civil Rights Clinic at Howard University School of Law and 38 individual scholars, submit this brief to urge the Court to invalidate the termination of Temporary Protected Status (TPS) for Haitians.

Since its founding more than 150 years ago, Howard University School of Law has trained lawyers to be public servants and social engineers, placing the defense of human dignity at the heart of its educational practice.

In pursuit of that mission, the Civil Rights Clinic engages in trial and appellate litigation in the service of ensuring equal justice under law for all. When Charles Hamilton Houston (a former Howard Law Professor and Dean), and Justice Thurgood Marshall (a Howard Law alumnus) developed the winning legal strategy challenging the pernicious "separate but equal" racial segregation doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), they fought not only against racial subordination, but against all forms of injustice that would deny human beings the full due process and equal protection promise of the United States Constitution.

The individual *amici* who join this brief are law professors, historians, political scientists, and social and organizational psychologists who have studied

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[*] Pursuant to Supreme Court Rule 37, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no one other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

and written about coded language, "dog whistles," and related modes of political or social messaging that use seemingly neutral language to spread prejudiced ideas while maintaining plausible deniability. Drawing on their collective expertise, *amici* seek to ensure that this Court understands how the use of coded language and dog whistles has shaped and influenced government action, particularly in the context of race and immigration. This case raises issues that lie squarely at that intersection.

The individual *amici* joining this brief are listed in the attached Appendix. Institutional affiliations of *amici* are listed for identification purposes only.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are gravely concerned by this Administration's attempts to avoid judicial scrutiny of and accountability for its discriminatory decision to terminate Temporary Protected Status for Haitians. The Administration has sought to cloak its discriminatory motive in coded, ostensibly-non-race-related language. And it has attempted to insulate the termination decision from the long history of discriminatory statements by members of the Administration, including President Trump. These strategies are familiar to *amici*, who are well-positioned to assist the Court in recognizing the import of coded statements of discriminatory intent.

The district court correctly found Respondents likely to prevail on their equal protection claim given the extensive evidence that Secretary Noem's decision to terminate Haitians' TPS was motivated, at least in

part, by discriminatory intent. The Government's purported rationales for upending legal status for the roughly 350,000 Haitian TPS holders living in the United States do not even begin to justify the termination decision or the harm it causes. To the contrary, those rationales focus on non-TPS holders *who are not eligible for TPS*, such as individuals who are not in the United States or who are already subject to exclusions under the TPS statute. Definitionally, any harm non-TPS-holders could potentially cause the United States cannot explain the decision to terminate TPS status for hundreds of thousands of others. Hence the Court must examine these rationales critically. This brief seeks to aid the Court in ascertaining what truly motivated Secretary Noem's decision.

The district court found a serious mismatch in the record between the proffered and actual reasons for terminating Haitians' TPS. That record includes the President's persistent use of racial dog whistles when discussing Haitians, as well as evidence that the President's coded language influenced Secretary Noem in making the termination decision. *Amici* focus on these latter categories of evidence. This compelling evidence supports a finding that the articulated rationales for terminating Haitians' TPS are pretextual.

ARGUMENT

I. "Dog Whistles" Can and Do Influence Government Action Targeting Marginalized Communities

Scholars and courts have long recognized the importance of probing the seemingly neutral rationales government actors put forward to justify policy. This

brief focuses on the President's use of facially race-neutral, coded language and "dog whistles" to probe the purported rationales the Administration has advanced to justify terminating TPS for Haitians. The President's dog whistles are a distinct body of evidence that powerfully supports an inference of pretext here.

"Dog whistles" are coded messages communicated through words or phrases commonly understood by a particular group of people, but not by others. *What's the political meaning of 'dog whistle'?*, Merriam-Webster Dictionary, https://www.merriam-webster.com/wordplay/dog-whistle-political-meaning. They are "speech act[s] designed, with intent, to allow two plausible interpretations, with one interpretation being a private, coded message targeted for a subset of the general audience, and concealed in such a way that this general audience is unaware of the existence of the second, coded interpretation." Jennifer Saul, *Dog Whistles, Political Manipulation, and Philosophy of Language*, in New Work on Speech Acts 1, 3-4 (Daniel Fogal, Daniel W. Harris, Matt Moss eds., Oxford Univ. Press 2018), https://www.researchgate.net/publication/330345210_Dogwhistles_political_manipulation_and_philosophy_of_language [hereinafter Saul, *Dog Whistles*].

Hence using dog whistles is like speaking in code. Just as one can command the attention of a dog by blowing a whistle that is inaudible to human ears, political dog whistles target a specific audience with an expectation that only those meant to understand and respond to the message (the "dogs") will do so, while the broader public remains unaware. *See, e.g.*, Ian Haney López, *Dog Whistle Politics: How Coded Racial*

Appeals Have Reinvented Racism and Wrecked the Middle Class 3 (Oxford Univ. Press 2014); Brian P. Tilley, *"I am the Law and Order Candidate": A Content Analysis of Donald Trump's Race-Baiting Dog Whistles in the 2016 Presidential Campaign*, 11 Psychology 1941, 1942 (2020), https://www.researchgate.net/publication/347969908.

Ian Haney López, a leading legal scholar on the use of dog whistles in our national politics, explains that dog whistles function as a "metaphor that pushes us to recognize that modern racial pandering always operates on two levels: inaudible and easily denied in one range, yet stimulating strong reactions in another." Haney López, *supra* at 3. Those strong reactions can and do inform and shape policy outcomes.

Indeed, dog whistles are a powerful tool—a way for officials and policymakers to harness the power of racist attitudes to steer politics and policy while seeming not to mention race. Saul, *Dog Whistles* at 2.[1]

The dog whistles and coded language that shape policy today did not emerge in a vacuum; they have a long lineage in American history.

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[1] *See also* Rachel Wetts & Robb Willer, *Who Is Called by the Dog Whistle? Experimental Evidence That Racial Resentment and Political Ideology Condition Responses to Racially Encoded Messages*, 5 Socius (2019) https://doi.org/10.1177/2378023119866268; Michael Kraus, Xanni Brown, & Hannah Swoboda, *Dog whistle mascots: Native American mascots as normative expressions of prejudice*, 84 J. Experimental Soc. Psychol. (2019) https://doi.org/10.1016/j.jesp.2019.04.008.

Dog whistles were a hallmark of the civil rights era. As explicitly racist political rhetoric became increasingly unacceptable, politicians turned to racially charged—but facially race-neutral—language without resorting to explicit slurs. With slogans like "forced busing" in the North, for instance, or "states' rights" in the South, politicians could activate, channel, and leverage anti-Black sentiment in voters without openly mentioning race. Haney López, *supra* at 23. This rhetoric had real consequences—conflict over busing, for instance, contributed to the "white flight" to the suburbs that has effectively resegregated much of the country. Paul D. Mageli, *Busing for school desegregation*, EBSCO (2022), https://www.ebsco.com/research-starters/education/busing-school-desegregation.

Similarly, "law and order" rhetoric arose in resistance to the civil rights movement. Haney López, *supra* at 23. Southern politicians had long disparaged civil-rights activists as "lawbreakers," and by the mid-1960s, "law and order" served as a dog whistle for opposing the civil rights movement. *Id.* at 23-24. These dog whistles contributed to the rise of mass incarceration of Black Americans following the civil rights movement. Destiny Fullwood & Cecilia Bruni, *Unwinding "Law and Order": How Second Look Mechanisms Resist Mass Incarceration and Increase Justice*, 26 Human Rights Brief 56, 56-57 (2023), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2029&context=hrbrief.

In the 1970s and 1980s, public officials used dog whistles like "welfare queen" and "strapping young buck" to cast Black Americans who relied on social and economic safety nets as lazy or dishonest. Haney

López, *supra* at 58-59. This narrative was then used to promote cuts to social safety net programs that disproportionately benefited lower-income Black communities. Jane Berger, *A New Working Class: The Legacies of Public-Sector Employment in the Civil Rights Movement* 5 (Univ. of Pa. Press 2021).

After the 9/11 attacks in 2001, dog whistles about brown immigrants proliferated. Haney López, *supra* at 115. Terms like "illegals" and "illegal aliens" seeded racial fears without directly referencing race. *Id.* at 121-23. These code words nonetheless influenced government policy, contributing to unprecedented increases in detentions, deportations, and scrutiny of individuals of Muslim, Arab, and South Asian descent. Jayesh Rathod, *9/11 and the Transformation of U.S. Immigration Law and Policy*, 38 Am. U. Hum. Rts. 10, 10 (2011), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2062&context=facsch_lawrev.

Federal courts have recognized the probative value of coded language in many contexts, from insider trading, *e.g.*, *Salman v. United States*, 580 U.S. 39, 41 (2016), to drug dealing, *e.g.*, *Roberts v. United States*, 445 U.S. 552, 554 (1980). So, too, in the law of discrimination, given the "elusive" nature of discriminatory intent. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981); *see 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) ("[R]acially charged 'code words' may provide evidence of discriminatory intent by 'send[ing] a clear message and carry[ing] the distinct tone of racial motivations and implications.'").

Hence federal courts have often analyzed coded language when determining whether governmental action was motivated or influenced by discriminatory intent. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

In the affordable housing context, courts have given weight to constituent statements in finding that discriminatory intent may have influenced governmental action. For instance, in *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 641 F. Supp. 2d 563, 567-68 (E.D. La. 2009), the court concluded that a moratorium on multi-unit development discriminated against Black people. Its analysis found that dog whistles—"ghetto, crime, drugs, violence"—in a local newspaper editorial opposing mixed-income housing developments were "clearly . . . an appeal to racial . . . prejudice"—though they did not mention race. *Id.* at 572; *see also Mhany Mgmt., Inc. v. Cty. of Nassau,* 819 F.3d 581, 608-10 (2d Cir. 2016) (upholding finding that references to maintaining city's "character" and "flavor" were "code words for racial animus"); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982) (affirming finding that mayor's statements about "undesirables," and concerns about personal safety due to "new" people, in opposition to new public housing were "'camouflaged' racial expressions").

Moreover, government officials can be held liable for acting upon the discriminatory motives of their

constituents, regardless of whether the officials explicitly support or endorse these motives. *See, e.g.*, *Hallmark Devs., Inc. v. Fulton Cty.*, 466 F.3d 1276, 1284 (11th Cir. 2006) ("[A] plaintiff may demonstrate intentional discrimination if 'the decision-making body acted for the sole purpose of effectuating the desires of private citizens, . . . racial considerations were a motivating factor behind those desires, and . . . members of the decision-making body were aware of the motivations of the private citizens.'") (quoting *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1225 (2d Cir. 1987)); *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016) ("[C]ommunity animus can support a finding of discriminatory motives by government officials, even if the officials do not personally hold such views."); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997), *superseded on other grounds by Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163 (2d Cir. 2001) (affirming discrimination finding where "little evidence . . . support[ed] [zoning board's] decision on any other ground other than the need to alleviate the intense political pressure from the surrounding community"); *Yonkers*, 837 F.2d at 1224 ("The Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability . . . merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens."); *Town of Clarkton*, 682 F.2d at 1066-67 (affirming finding that town halted public housing in response to residents' racially-motivated opposition).

A similar examination of motives and pretext is illuminating here.

II. The District Court Properly Considered All Of The Evidence In Determining That The Termination Of TPS For Haitians Was Motivated By Discriminatory Intent

The district court laid out in painstaking detail how the decision to terminate Haitians' TPS was motivated by the Administration's discriminatory intent—both its general desire to push nonwhite immigrants out of the United States and its specific "anti-black and anti-Haitian animus." *Miot v. Trump*, No. 1:25-cv-02471-ACR, Slip Op. at 67 (D.D.C. Feb. 2, 2026) [hereinafter *Miot,* Mem. Op.]. It found that statements the President made both before and after the termination decision supported a finding of discriminatory motive. *Id.* at 67-70. And in canvassing those statements, it appropriately assigned significance to the President's use of facially race-neutral—but racially charged—dog-whistles.

For example, President Trump has stated that Haitian immigrants are undesirable because they come from a "shithole" country and "probably have AIDS"; he has further stated that Haitian immigration is "like a death wish for our country." *Id.* at 67. He also infamously amplified baseless claims that Haitian immigrants in Springfield, Ohio were eating domestic pets, implying that Haitians are uncivilized. *Id.* After the TPS termination, he again referred to Haiti as a "filthy, dirty, [and] disgusting" "shithole country," and as a "hellhole," and asked, "[w]hy cannot we have some people from Norway, Sweden, just a few, let us have a few, from Denmark." *Id.* at 67-68 (citing § 705 Mot. at 47-48). The President's use of

these dog whistles to describe a majority-Black country supported the district court's conclusion that discriminatory intent at least partly motivated the decision to strip TPS from Haitians. *Id.* at 70.[2]

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[2] Notably, several courts similarly found the first Trump Administration's termination of the Haitian TPS program in 2017 had an impermissible motive. Acting Secretary Elaine Duke Announcement on Temporary Protected Status For Haiti, Dep't of Homeland Sec. (Nov. 20, 2017), https://www.dhs.gov/archive/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti. They noted that the proposed termination followed a series of derogatory statements by the President—specifically, reported claims that "all [Haitians] have AIDS" and his characterization of Haiti (among others) as a "shithole country" whose people were not desired in the United States. *Saget v. Trump*, 375 F. Supp. 3d 280, 370-71 (E.D.N.Y. 2019); *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 401 (D. Mass. 2018); *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1099-1100 (N.D. Cal. 2018). *Saget* found the plaintiffs likely to prevail on the merits because the termination decision was "preordained and pretextual" and "made in part due to political influence." 375 F. Supp. 3d at 346. *Ramos* made similar findings and held that even if the Acting Secretary or Secretary of DHS did not personally harbor animus, "their actions may violate the equal protection guarantee if President Trump's alleged animus influenced or manipulated their decision-making process." 321 F. Supp. 3d at 1123. *Centro Presente* found that, taken together, disproportionate negative impact on certain racial groups, statements of animus by the decision-makers, and unreasoned policy shifts sufficed to allege discriminatory animus. 332 F. Supp. 3d at 415.

Indeed, this evidence of impermissible motive rebuts the presumption of regularity administrative actions generally receive. The district court was right to keep its ears open to the President's dog whistles—agency actions cannot be viewed in isolation and courts are not required to exhibit a "naiveté from which ordinary citizens are free." *United States v. Stanchich,* 550 F.2d 1294, 1300 (2d Cir. 1977). This is one of the unfortunate cases in which it is clear that government actions are being driven by explicit biases or a "'bare . . . desire to harm a politically unpopular group.'" *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (citation omitted). *See also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) ("Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom."); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

The Government claims that the termination decision could not have been motivated by discriminatory intent because "the President and the Secretary's statements nowhere invoke race; they simply advocate for curbing illegal immigration, including from particular countries." Brief for Petitioners at 49, *Trump v. Miot*, No. ___ (U.S. 2026) (Nos. 25-1083 & 25-1084). That contention is not credible, for the reasons given in Part I, *supra*. As the district court found, the President's consistent, racially charged—if facially race-neutral—invocations of filth, disease, and threat when discussing Haiti served as dog whistles signaling "anti-Black and anti-Haitian animus." *Miot,*

Mem. Op. at 67. The district court was right: these "coded" statements were "appeals to racial prejudice." *Bennett v. Stirling*, 842 F.3d 319, 321, 324 (4th Cir. 2016) (Wilkinson, J.).

These dog whistles do not lose their relevance just because they came from the President, rather than from Secretary Noem. When a President repeatedly uses racial dog whistles across multiple different contexts, he sets a clear—if implicit—policy directive that he expects Executive branch agencies to execute.

The facts here illustrate how top-down dog-whistle policy directives filter through the Executive Branch. In January 2025, Secretary Noem stated that the Department of Homeland Security would follow the President's directives. *Miot*, Mem. Op. at 71. On February 22, 2025, President Trump took credit for terminating TPS for Haitians, though no such policy had (officially) been put in place. *Id.* Two days later, Secretary Noem officially terminated the program. *Id.*

There is no doubt—indeed, given the President's choice to take credit for the termination decision, there is not even a genuine dispute—that "extraneous pressure intruded into the calculus of considerations on which the Secretary's decision was based." *D.C. Fed'n of Civic Ass'n v. Volpe*, 459 F.2d 1231, 1245-46 (D.C. Cir. 1971). To say nothing of the fact that the proffered rationales fly in the face of State Department reports that Haiti is undergoing a profound humanitarian crisis—which makes the inference of pretext all the more glaring.

If government officials can be liable for acting on the discriminatory objectives of their constituents,

then certainly a cabinet secretary can be liable for acting on the discriminatory objectives of the President—objectives made clear both overtly and covertly.

CONCLUSION

Amici urge the Court to look not only to the direct evidence of impermissible motive underlying the Haitian TPS termination decision, but also to the President's coded language and dog whistles that set a policy directive Secretary Noem and others then implemented. Examination of that evidence compels affirmance.

Respectfully submitted,

KRISTEN CLARKE
DARIELY RODRIGUEZ
2900 Van Ness Street NW
Howard University School of
Law Civil Rights Clinic
2900 Van Ness St. NW
Washington, DC 20008

OWEN F. ROBERTS
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
295 5th Avenue
9th Floor
New York, NY 10016

ANDREW H. SCHAPIRO
Counsel of Record
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
191 N. Wacker Dr.
Suite 2700
Chicago, IL 60606
(312) 705-7403
andrewschapiro@quinneman-
uel.com

CHARLES B. STRAUT II
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
50 California Street
San Francisco, CA 94111

Counsel for Amici Curiae

April 13, 2026

APPENDIX

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Aziz Rana
J. Donald Monan, S.J., University of Law and Government
Boston College

Catherine E. Lhamon
Executive Director, Edley Center on Law & Democracy
UC Berkeley School of Law

Cécile Accilien
Professor of French & Francophone Studies
University of Maryland, College Park

Christina M. Greer
Associate Professor of Political Science
Fordham University

Courtney M. Bonam
Associate Professor of Psychology & Critical Race and Ethnic Studies
University of California Santa Cruz

David Roediger
Foundation Distinguished Professor of American Studies
University of Kansas

Elizabeth Page-Gould
Professor of Psychology
University of Toronto

Ian Haney López
Chief Justice Earl Warren Professor of Public Law and Distinguished Professor, Emeritus
University of California, Berkeley

Jane Berger
Associate Professor of History and Department Chair
Moravian University

---

* Institutional affiliations for purposes of identification only.

Jonathan F. Harris
Associate Professor of Law
Temple University Beasley School of Law

Judith E. Tucker
Professor Emerita
Georgetown University

Karl Jacoby
Allan Nevis Professor of American History
Columbia University

Kendall Thomas
Nash Professor of Law
Columbia University

Kevin R. Johnson
Mabie/Apallas Professor of Public Interest Law and Chicanx Studies
University of California, Davis School of Law

Laura Briggs
Professor, Department of Women, Gender, Sexuality Studies, and History
University of Massachusetts Amherst

Leslie M. Harris
Professor of History
Northwestern University

Lori A. Flores
Associate Professor of History
Columbia University

Madeline Hsu
Professor of History
University of Maryland, College Park

Manisha Sinha
Draper Chair in American History
University of Connecticut

Marilyn J. Ward Ford
Professor of Law
Quinnipiac University

Michael Higginbotham
Laurence M. Katz Professor of Law
University of Baltimore School of Law

Michael W. Kraus
Professor of Psychology
Morton O. Schapiro Faculty Fellow
Northwestern University

Nellie Tran
Professor of Counseling & School Psychology
San Diego State University

Penny Von Eschen
William R. Kenan, Jr. Professor of History and American Studies
University of Virginia

Rachel Godsil
Distinguished Professor of Law & Chancellor's Scholar
Rutgers Law School

Dr. Rachel Wetts
Assistant Professor of Environment and Society and Sociology

Regine O. Jackson
Professor of Sociology
Morehouse College

Rick Baldoz
Associate Professor, Department of American Studies
Brown University

Ronald L. Mize, Ph.D.
Professor and Coordinator, Ethnic Studies
Oregon State University

Sekou Franklin, Ph.D.
Executive Director of the John Lewis Center
Fisk University

Shelley Lee
Professor of American Studies, History, and Humanities Affiliate of Urban Studies
Brown University

Steven Hahn
Professor of History
New York University

Tera W. Hunter, Ph.D.
Edwards Professor of American History,
Chair, Department of African American Studies
Princeton University

Thomas A. Guglielmo
Professor of American Studies & History
George Washington University

Vicki L. Ruiz
Distinguished Professor Emerita
University of California, Irvine

Zamir Ben-Dan
Associate Professor of Law
Temple University Beasley School of Law

Hilary B. Bergsieker
Associate Professor of Psychology
University of Waterloo

Catherine Powell
Eunice Carter Distinguished Research Scholar Professor of Law
Fordham Law School