No. 24-3566

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCIANO ALEXANDRE, CHRISTINE LOUISE JOHNSON, ERIC NELSON, AND NAM BE ON BEHALF OF THEMSELVES, AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

AMAZON.COM, INC.,
Defendant-Appellee,

On Appeal from the United States District Court for the Southern District of California, Hon. Michael M. Anello
Case No. 3:22-cv-01459-MMA-VET

AMICI CURIAE BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, LATINOJUSTICE PRLDEF, PUBLIC COUNSEL, THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC., AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, SUPPORTING APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici Lawyers' Committee for Civil Rights Under Law, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, LatinoJustice PRLDEF, Public Counsel, the Minority Business Enterprise Legal Defense and Education Fund, Inc., and the National Association for the Advancement of Colored People state that each organization does not have parent organizations. Amici do not issue stock and therefore no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitution

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Formed in 1963, the Lawyers' Committee is a nonpartisan, nonprofit organization that uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. To this end, the Lawyers' Committee has participated in hundreds of cases involving issues related to voting rights, housing, employment, education, and public accommodations. *See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,* 600 U.S. 181 (2023); *Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC*, 103 F.4th 765 (11th Cir. 2024); *Am. All. for Equal Rights v. Zamanillo*, 24-cv-00509 (D.D.C.).

Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCRSF) is one of the oldest civil rights institutions on the West Coast. We work to dismantle systems of oppression and racism and build an equitable and just society. We work directly with our communities through our free legal services

[1] *Amici* requested consent from the parties to file this brief under Fed. R. App. P. 29(a)(2). Appellee gave consent, Appellants did not consent, therefore *Amici* have sought leave from the Court to file this brief. No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity other than the *amici* and their counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

clinics and partner with grassroots groups and community partners to identify and address patterns of abuse and inequality. In 2023, we provided 1,800 clients with direct legal service in pursuit of racial, economic, and immigrant justice. We train and support more than 1,000 attorneys, paralegals, law clerks, and interpreters who, in 2023, donated 29,000 hours to represent, advise, and counsel clients seeking meaningful and lasting change. Last year we engaged in more than 30 impact and advocacy matters, amplifying our communities' calls for justice through class action litigation, reports, and legislative and policy campaigns to prevent future harm and build antiracist, equitable systems. We are committed to challenging policies, institutions, and systems that are violent, unjust, and inequitable to historically marginalized communities.

The National Association for the Advancement of Colored People ("NAACP") was founded in 1909 and has more than 2,200 local chapters across the country. Its principal objectives are to ensure the political, educational, social, and economic equality of all citizens; to achieve equality of rights and eliminate racial prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state, and local laws securing civil rights; and to inform the public of continued adverse effects of racial discrimination while working toward its elimination. The NAACP is committed to preventing and eradicating systemic

discrimination in the marketplace. The NAACP is committed to advancing equity.

Founded in 1972, LatinoJustice PRLDEF's mission is to use and challenge laws to create a more just and equitable society, transform harmful systems, empower Latinx communities, fight for racial justice, and grow the next generation of leaders. For over fifty years, LatinoJustice has litigated landmark cases and advanced policy reforms in certain areas of practice, including economic justice, voting rights, and immigrants' rights. LatinoJustice has filed and participated in hundreds of briefs in support of equal opportunity and racial equity, including *Students for Fair Admissions, Inc.*, 600 U.S. 181; *Coalition for TJ v. Fairfax Cnty. Sch. Bd.,* 68 F.4th 864 (4th Cir. 2023).

Public Counsel is a nonprofit public interest law firm dedicated to advancing civil rights and racial and economic justice, as well as amplifying the power of our clients through comprehensive legal advocacy. Founded on and strengthened by a pro bono legal service model, our staff and volunteers seek justice through direct legal services, promote healthy and resilient communities through education and outreach, and support community-led efforts to transform unjust systems through litigation and policy advocacy in and beyond Los Angeles.

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland congressman Parren J. Mitchell. The primary purpose of MBELDEF is to end

ongoing discrimination against minority businesses and entrepreneurs by promoting and protecting policies that allow minority businesses to start up, grow and thrive. Through this work, MBELDEF seeks to eliminate the racial wealth gap and to contribute to our local communities and our national economy.

INTRODUCTION

Following centuries of enslavement, Black Americans faced daunting obstacles to participating economically in society on equal terms. In an effort to remove those obstacles, the United States Congress enacted the Civil Rights Act of 1866. Its intent was clear: combatting persistent racial discrimination post-slavery by ensuring, among other things, that all persons be given "full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens." 42 U.S.C. § 1981(a). But 158 years later, disparities in economic opportunity between white citizens and people of color still exist. And with significant barriers to equal economic opportunity continuing today, including economic disparities resulting from decades of discriminatory exclusion, some private companies have adopted programs and policies to provide support to Black, Latinx, Native American and other historically-disadvantaged Americans. Congress intended Section 1981 to remove economic barriers for Black people.The Appellants in this case are asking this Court to weaponize Section 1981 in order to eliminate a program with the same goal.

Appellee Amazon Inc. ("Amazon") is a retailer that sells all manner of goods to its customers which are then delivered directly to their customers' homes throughout the county. To assist it with its logistics operations, and reach customers in cities, towns, and rural communities, Amazon established the Amazon Delivery Service Partner ("DSP") program in 2018. 1-SER-9. Becoming a DSP involves a lengthy, multi-tiered, and competitive application process. Among other things, all applicants must provide information regarding their work experience, community involvement, and financial health, as well as complete a series of screening interviews. *Id.* All applicants must also demonstrate access to at least $30,000 in liquid assets given the start-up costs involved in establishing a DSP business. While Amazon imposes various eligibility criteria for the DSP program, membership in any particular racial group is not one of them. Indeed, Amazon does not consider an applicant's race, or any other protected classification, or provide preferential treatment based on race in determining who to accept into the DSP program. 1-SER-5.

Because of the strict requirements and limited number of openings, only roughly 3% of candidates who apply to be DSPs are accepted into the program. *Bolduc v. Amazon,* No. 4:22-CV-00615, 2024 WL 1808616, at *4 (E.D. Tex. Apr. 25, 2024) (notice of appeal filed Apr. 26, 2024). For those who make it through the strenuous DSP application process, DSP ownership is a full-time job but also a

unique opportunity to *create* jobs in the Service Partner's community. 1-SER-8-9.

In 2020, Amazon launched a diversity grant program under which Black, Latinx, or Native-American business owners who had been accepted to the DSP program could be considered for a $10,000 stipend (the "Diversity Grant Program"). 1-SER-5. It is undisputed that acceptance into the DSP program is a prerequisite to being considered for the grant program itself. 1-SER-5. The applicant must first independently qualify and be selected as a DSP. For example, the diversity grant stipend of $10,000 cannot be counted towards the applicant's $30,000 liquidity threshold. This type of stipend program is not unique at Amazon, which also has a Veterans' grant program, as well as a "Road to Ownership" program open to employees of current DSPs. 1-SER-5.

Luciano Alexandre, Christine Louise Johnson, and Eric Nelson (collectively, "Appellants")[2] are not business partners with Amazon, and they are not DSPs. Nor have they ever applied to become business partners or DSPs. Nevertheless, Appellants, each of whom is white, contend that they have been harmed by Amazon's Diversity Grant Program and that they have standing to sue Amazon under Section 1981. The district court, correctly, disagreed.

This Court should not restore Appellants' attempts to challenge Amazon's

[2] An individual named Nam Be decided not to continue on as a plaintiff as of the filing of Appellants' Second Amended Complaint. (3-ER-469, ¶ 35).

grant program created to assist certain minority-owned DSPs when it is undisputed that Appellants are *not* DSPs and *have never even applied to become* DSPs. Appellants' claims are predicated on the highly speculative notion that if they did apply to become DSP, they would be among the 3% of applicants (or fewer) who are actually accepted to Amazon's DSP program. Plaintiffs' claimed harm is hypothetical at best. But such speculative injuries are not injuries in fact. Given the conjectural and hypothetical premise underlying Appellants' theories of harm, the district court correctly dismissed Appellants' claims based on well-established Article III standing principles requiring plaintiff to demonstrate an injury-in-fact to maintain a suit in federal court. *See Alexandre v. Amazon.com, Inc.*, 2024 WL 2445705, at *5 (S.D. Cal. May 23, 2024).

The district court's dismissal of Appellants' Section 1981 claims on standing grounds is consistent with numerous other recent lawsuits involving challenges to remedial grants and diversity initiatives where courts have concluded that plaintiffs' injuries were too speculative, indirect, or attenuated to support standing. This includes cases where, like here, plaintiffs attempt to allege with barebone allegations that they are "able and ready" to compete in programs designed to remedy systemic barriers to economic opportunity. Even in such cases, courts must ensure that the alleged injury is "particularized" and "concrete." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (internal

quotation marks and citation omitted).

Further, allowing plaintiffs such as Appellants to maintain the type of Section 1981 claims asserted here, challenging programs that support Black, Latinx, and Native American owned businesses, would fly in the face of the ideals the Civil Rights Act of 1866 and Section 1981 were meant to promote. Congress enacted Section 1981 as a remedial law designed to secure the rights of newly emancipated Black citizens who were historically deprived of the rights to make and enforce economic contracts during Reconstruction. The freedom to contract and participate in the economy on equal terms "as is enjoyed by white citizens" was a critical initial step towards repairing the enduring harms of slavery and mitigating anti-Black economic oppression. The Act's remedial purpose squarely aimed to benefit Black Americans. That purpose remains vital today. Black, Latinx, Native American entrepreneurs continue to face deeply entrenched barriers to economic opportunities in many facets of day-to-day life resulting from historical and ongoing discrimination.

It is that remedial purpose at the very heart of Section 1981 that stands to be subverted to the detriment of Black Americans and communities of color if Appellants' claims are allowed to proceed. Reversing the district court's decision will likely chill private remedial efforts across the country that aim to

close the very real economic gaps that the historical legacies of slavery, segregation, and racism have created in the United States.

This Court should affirm the district court's dismissal of Appellants' lawsuit for lack of standing.

ARGUMENT

I. APPELLANTS' SECTION 1981 CLAIMS BASED ON SPECULATIVE, HYPOTHETICAL INJURIES WERE PROPERLY DISMISSED ON ARTICLE III STANDING GROUNDS.

A. Appellants Do Not Have Standing To Challenge A Private Grant Program For Which They Have Not Satisfied Threshold Eligibility Requirements.

Standing is a "bedrock constitutional requirement" that applies to "all manner of important disputes." *See United States v. Texas,* 599 U.S. 670, 675 (2023). Article III of the Constitution confines federal courts' jurisdiction to "[c]ases" and so-called "[c]ontroversies." U.S. Const. art. III, § 2, cl. 1. This "cases and controversies" limitation has been construed as requiring that a federal case "embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions." *Carney v. Adams*, 592 U.S. 53, 58 (2020). Courts implement this requirement by insisting that a plaintiff "prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable decision." *Id.* (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (quotation marks

omitted)).

The plaintiff has the burden of establishing standing as of the time the lawsuit is brought and maintaining it thereafter. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 430–431. Thus, to maintain a suit in federal court, a plaintiff must show at the outset that they have suffered an "injury in fact," that is, a harm to a legally protected interest that is "concrete and particularized" or "actual or imminent" rather than "conjectural" or "hypothetical." *See Carney*, 592 U.S. at 58 (internal quotation marks and citations omitted); *see also Munns v. Kerry*, 782 F.3d 402, 409 (9th Cir. 2015) (finding that while the Supreme Court's standard for standing for injunctive relief does requires more than a possibility of future harm.).

Appellants have not established standing to maintain their Section 1981 claims in this case. Rather than a concrete or imminent injury, Appellants' claims rest on alleged harms that are merely conjectural and hypothetical. This is because Appellants do not and cannot allege that they have been accepted to the DSP program—an undisputed prerequisite to even being considered for a stipend under the Diversity Grant Program. *See, e.g.*, 3-ER-494, ¶111 (acknowledging that Diversity Grant Program stipends are awarded only to "Black, [Latinx], and Native American contractors *in [Amazon's] DSP program*" (emphasis added)). Indeed, Appellants have not even applied to the DSP program. *See, e.g.*, 3-ER-463, ¶ 4 (alleging that Mr. Alexandre is "able and ready to apply" to become an Amazon

DSP). In other words, Appellants have not overcome the initial, mandatory hurdle to becoming eligible for the Diversity Grant Program—acceptance to the DSP program—and can only ask the Court to speculate that they will ever do so.

Accordingly, and as the district court correctly concluded, Appellants alleged injuries are hypothetical at best and fail to establish an injury-in-fact. *See Alexandre*, 2024 WL 2445705, at *5. Appellants' claim that they would need to pay $10,000 more than Black, Latinx, or Native American DSPs to start a delivery service business is premised on conjecture about acceptance to the DSP Program in the first place. Likewise, Appellants cannot show they face an "imminent" threat of being subjected to the Diversity Grant Program's race-based eligibility requirements, *see Murthy v. Missouri*, 603 U.S. 43, 56-57 (2024), given their failure to apply to the DSP Program, let alone be among the very small percentage of applicants accepted to the program. *See* 1-SER-1. Speculative injuries are not injuries in fact.

B. Courts Reject Attenuated and Speculative Standing Allegations Challenging Race-Neutral Prerequisites to Institutions' Racial Equity Efforts.

The district court's conclusion regarding Appellants' lack of standing is no outlier.

In *Bolduc v. Amazon.com, Inc.*, the plaintiff brought Section 1981 claims challenging the same Amazon grant program at issue here and asserted largely the

same kinds of alleged harms. *Bolduc v. Amazon.com, Inc.*, 2024 WL 1808616, at *4 (E.D. Tex. Apr. 25, 2024) (notice of appeal filed Apr. 26, 2024). Like Appellants here, the plaintiff in *Bolduc* alleged that she never actually applied to the DSP program because of Amazon's policy of providing an avenue to address barriers to entry for Black, Latinx, and Native American DSPs through diversity grants. *Id.* at *2. Instead, the plaintiff alleged that she was "able and ready to apply" to the DSP Program "once Amazon revoke[d] it[s] policy." *Id.*

The *Bolduc* court found that none of the plaintiff's various theories of alleged harm constituted an injury-in-fact for standing purposes. *Id.* at *4-7. The court highlighted how only 3% of applicants were accepted into the DSP Program in 2021 and only 1.6% in 2022, rendering plaintiff's allegations that Amazon would accept her into the DSP Program a "far cry from certainty." *Id.* at *4. Thus, plaintiff's claim that she would need to pay $10,000 more to start a DSP business than a Black, Latinx, or Native American DSP was "merely hypothetical and conjectural." *Id.* The court also reasoned that plaintiff faced no "imminent danger" of being denied equal treatment under the Diversity Grant Program given the "lengthy, competitive, and highly speculative" process involved in becoming a DSP in the first place. *Id.* Plaintiff's claim "flow[ed] from a hypothetical chain of possibilities that might never come to pass." *Id.* at *7. And the court likewise rejected claims that the Diversity Grant Program deterred plaintiff from applying to

become a DSP because her application to become a DSP would allegedly be "less credible" due to her ineligibility for the Diversity Grant Program. *Id.* at *6. Once again, the court explained that because the challenged policies applied only to the Diversity Grant Program, and the DSP program itself lacked any race-based criteria or preferences, these theories of harm failed to add up to a "concrete injury." *Id.* at *4-7.

The *Bolduc* court's reasoning, based on the nearly identical claims, allegations, and circumstances as this case, holds here as well.

Beyond the nearly identical circumstances at issue in *Bolduc*, courts routinely turn away plaintiffs that seek to challenge racial equity policies without first applying for their race-neutral prerequisites. In such cases, courts find no standing because the plaintiff's alleged injuries are too attenuated from the racial equity policy. For example, in *Do No Harm v. National Association of Emergency Medical Technicians*, the district court denied a motion for a temporary restraining order and preliminary injunction under Section 1981. *Do No Harm v. National Association of Emergency Medical Technicians*, 2024 WL 245630, at *1 (S.D. Miss. Jan. 23, 2024). There, Do No Harm alleged on behalf of an unnamed member that a scholarship offered by the National Association of Emergency Medical Technicians ("NAEMT") violated Section 1981. *Id.* Though the scholarship's four eligibility requirements were facially

race-neutral, plaintiff alleged that the scholarship program "flatly" excluded white students because NAEMT described in a press release that the scholarship as "supporting the development of greater diversity in the EMS workforce." *Id.* (internal quotation marks and citations omitted.) Plaintiff further alleged that one of its members was prepared to submit a scholarship application but had not done so. *Id.* at *2.

The court held that the plaintiff's alleged injuries under Section 1981 were too attenuated and speculative to support Article III standing. Despite the NAEMT's general press statement of a commitment to diversity, the court was unable to identify an "actual barrier" preventing the plaintiff's member from submitting a scholarship application and thus it was "not clear that Member A [was] facing imminent injury." *Id.* Rather, plaintiff's claim amounted to "nothing more than an injury that is based on a speculative chain of possibilities." *Id.* at *3 (internal quotation marks and citation omitted). Similarly, here, there is no race-based barrier to Appellants' DSP application, which is a prerequisite to eligibility for the diversity grant program. Yet Appellants chose not to apply. And as in *Do No Harm*, absent first applying for the DSP program, Appellants' alleged injuries rest on a speculative chain of possibilities that are too remote from the diversity grant program to constitute a concrete injury.

Turning away cases where standing allegations are attenuated and speculative, as in *Bolduc* and *Do No Harm*, protects Article III's animating purposes. Standing "track[s] the purposes of the rule against advisory opinions—to ensure a concrete, adversarial presentation of the issues." Eugene Kontorovich, *What Standing Is Good For*, 93 Va. L. Rev. 1663, 1672 (2007). As one constitutional scholar has explained, standing thus "focuses on whether a plaintiff is the right person to bring a given issue before the court." *Id.* at 1670. This is why standing is jurisdictional—"the inquiry is not about the existence of a wrong, but whether the court can respond at the request of *this* plaintiff." *Id.*

Appellants' theory of standing would undermine these core tenets of Article III. For example, it would invite any person who disagrees with a company's internal racial equity policy to challenge it in federal court without first applying to work there. Allowing cases to proceed based on policy disagreements, rather than actual injury-in-fact, will reduce judges to monitoring not cases or controversies but thousands, if not millions, of application processes, rules of entry, and private grantors' selection processes where plaintiffs have philosophical or political concerns. Standing should not be so unmoored from particularized injury. Courts "resolve *cases,* not philosophical disputes[]" or "beauty contests." *Id.* (emphasis added.)

II. ALLOWING APPELLANTS' CLAIMS TO PROCEED HERE WOULD UNDERMINE THE CONGRESSIONAL INTENT OF SECTION 1981.

A. Congress Did Not Intend Section 1981 To Be Used Against Programs Seeking To Further Racial Equity.

Appellants aim to use Section 1981—a statute intended to actualize the promises of the Thirteenth Amendment by guaranteeing equal opportunity in contracting—to attack private, philanthropic measures intended to further racial justice. In addition to finding that Appellants lacked standing, the district court also correctly determined that they failed to state a claim under Rule 12(b)(6). *Alexandre*, 2024 WL 2445705, at *7.

Section 1981 was meant to enable Black citizens to gain the economic power they were deprived of after the end of slavery. It was not intended by Congress to serve as a vehicle to attack private, remedial measures that further economic opportunity for Black people and communities of color. In drafting Section 1981, Congress intended to protect Black citizens from white citizens "whose object was to make their former slaves, dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices[.]" *Doe v. Kamehameha Schs.,* 470 F.3d 827, 836 (9th Cir. 2006) (en banc) (internal quotation marks and citations omitted). Thus, it was passed to abolish "*all badges and incidents of slavery*." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

The seminal cases interpreting Section 1981 highlight this history and purpose. While it is recognized that Section 1981 "prohibits racial discrimination against all groups," many circuits have explained that "the majority plaintiff who asserts a claim of racial discrimination" must still do so "within the historical context of the Act." *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976)); *see also Mills v. Health Care Serv. Corp*., 171 F.3d 450, 457 (7th Cir. 1999); *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992)); *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000). Appellants, however, ask the Court to depart from bedrock principles of Article III standing so that they (and others) can attack and undermine private, remedial philanthropy programs that advance race equity.

Justice Stevens aptly warned his colleagues not to run afoul of "the secure foundation[] laid by others who had gone before [them]" when the Court failed to follow *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (internal quotation marks and citation omitted), interpreting "the right 'to make and enforce contracts' as a guarantee of equal opportunity, and not merely a guarantee of equal rights." *Patterson v. McLean Credit Union*, 491 U.S. 164, 219 (1989), *superseded by statute,* Civil Rights Act of 1991, Pub. L. No. 102- 166, 105 Stat. 1071, *as recognized in CBOCS W, Inc., v. Humphries*, 553 U.S. 442, 450 (2008) (Stevens,

J., dissenting). After lying practically dormant for over a century, "[i]t would indeed be[] ironic if the Civil Rights Act of 1866 was used now to prohibit the only effective remedy for past discriminat[ion] . . . ." *Kamehameha Schs.,* 470 F.3d at 838 (citing *Setser v. Novack Inv. Co.,* 657 F.2d 962, 966 (8th Cir. 1981)). And yet that is precisely Appellants' aim: to undo decades of progress and impede future progress.

B. The Diversity Grant Program Directly Furthers the Remedial Aims of Section 1981 and Should Not Fall Victim to It.

Private grant programs like Amazon's Diversity Grant Program are uniquely positioned to address persistent inequities that result from a long history of Black business owners' lack of access to business funding, furthering Section 1981's historical remedial purpose. Opening the door to suits by individuals with speculative claims of reverse discrimination against remedial grant programs would further undermine Black, Latinx, and Native American entrepreneurs who have historically been excluded from the same economic opportunities white citizens already enjoy. Amazon's Diversity Grant Program addresses three structural barriers that directly impede the success of Black, Latinx, and Native owned businesses: a lack of equitable access to capital, lack of investment opportunities, and higher rates of unemployment for Black, Latinx, and Native Americans in the U.S. Addressing these structural barriers also strengthens the U.S. economy overall.

(i) Lack of equitable access to capital.

A plethora of evidence underscores that Black, Latinx, and Native American entrepreneurs have a lack of equitable access to capital in comparison to white entrepreneurs. For example, Black businesses face a funding rejection rate three times higher than their white counterparts.[3] So it comes as no surprise that Black business owners are less likely to turn to traditional bank loans for financing than white business owners.[4]

The Federal Reserve Report on Firms Owned by People of Color in 2022[5] found that the following racial disparities in business funding continue to persist Black business owners:

- 50% of Black-owned firms reported unmet funding needs compared

[3] Elana Dure, *Black women are the fastest growing group of entrepreneurs. But the job isn't easy* (Oct. 12, 2021); https://www.jpmorgan.com/insights/business/business-planning/black-women- are-the-fastest-growing-group-of-entrepreneurs-but-the-job-isnt-easy; *see also* Majority Staff Report, U.S. Senate Comm. on Small Bus. and Entrepreneurship, Women's Small Business Ownership and Entrepreneurship Report. https://www.sbc.senate.gov/public/_cache/files/7/5/75d60b3 1-44fe-45ec-89ed-965dd86d9l7/CF3C42450C5C4E5B9AB3853329980DF5712DB498532924B25FlAFE0BCBFl78C6.women-entrepreneurship-report-final-sr.pdf.

[4] Gizelle George- Joseph and Daniel Milo, The Bigger Picture Blackwomenomics-Equalizing Entrepreneurship (2021); https://www.goldmansachs.com/insights/articles/black-womenomics-f/black-womenomics-report.pdf.

[5] Federal Reserve Bank, The Federal Reserve 2022 Report on Firms Owned by People of Color, ii, 13, 15, 18 (June 29, 2022).

to 34% of white-owned businesses.

- Among firms that did not apply for financing—that is, nonapplicant firms—50% of white-owned firms said the primary reason they did not seek financing was because they did not need the funding. Comparatively, only 13% of Black-owned nonapplicants reported that they did not apply because they had sufficient funding.

- Compared to other firms, Black-owned nonapplicants were more discouraged about their chances of being approved.

Latinx business owners also face structural barriers to accessing capital. The Brookings Institute found that, although Latinx businesses grew consistently at an annual rate of 5.6% from 2018 to 2021, ultimately they experienced the lowest growth in business equity from 2019 to 2022 in comparison to other demographic groups.[6] Structural barriers including limited acceptance of individual taxpayer identification number by financial institutions, a lack of Spanish language services at financial institutions, and more, have directly impacted equitable access to capital for Latinx business owners.[7] Furthermore, the Stanford Graduate School of Business discussed the following racial disparities in the 2024 State of Latino

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[6] Andre M. Perry, Manann Donoghoe. *Investing in Latino or Hispanic-owned businesses is a winning strategy to drive regional and national growth.* The Brookings Institute, https://www.brookings.edu/articles/investing-in-latino-or-hispanic-owned-businesses-is-a-winning-strategy-to-drive-regional-and-national-growth/.

[7] Michou Kokodoko, *Hispanic Entrepreneurship Grows, but Barriers Persist*. Federal Reserve Bank of Minneapolis (2011). https://www.minneapolisfed.org/article/2011/hispanic-entrepreneurship-grows-but-barriers-persist.

Entrepreneurship Report:

- Latinx-owned business get rejected more often and receive less than they request when compared with white-owned businesses.
- They are 1.3 times more likely than white business owners to rely on personal savings and 1.4 times more likely to rely on family and friends to finance their businesses.
- Female Latinx business owners have only a 39% approval on average from both local and national banks. In contrast, female white business owners receive on average 55% of the amount originally requested from local banks and 65% from national banks, whereas White men receive 60% approval from national banks and 67% from local banks.[8]

Furthermore, Native business owners face unique challenges in accessing capital. The Federal Research Bank of Minneapolis found that Native entrepreneurs on Indian reservations face significant challenges with access to financial institutions, which makes it harder to form relationships with banks and increases the cost of financing new businesses or obtaining mortgages.[9] Also, even if they can overcome these obstacles and access a financial institution, Native business owners still encounter obstacles because they cannot use trust land as

[8] Barbara Gomez-Aguinaga, George Foster, Jerry I. Porras, *2023 State of Latino Entrepreneurship* (March 2024). https://www.gsb.stanford.edu/faculty-research/publications/state-latino-entrepreneurship-2023.
[9] Ava LaPlante & Laurel Wheeler. *Native Entrepreneurs Face Credit-Access Challenges.* Federal Reserve Bank of Minneapolis (February 2024). https://www.minneapolisfed.org/article/2024/native-entrepreneurs-face-credit-access-challenges.

collateral on loans.[10] They also face either a "general unwillingness on the part of financial institutions to lend to reservation-based applicants," or face "prohibitively high interest rates on loans" when financial institutions do lend.[11] The Federal Research Bank of Minneapolis also found similar rates of rejection for access to capital for Native entrepreneurs:

- 39% of non-Native-owned employers received 100% of the financing for which they applied, compared with only 23% of Native-owned employers.
- "Among non-employer establishments, 45% of Native-owned small businesses report that they received none of the financing for which they applied."[12]

(ii) Lack of investment opportunities.

The dire racial disparities for Black, Latinx, and Native owned businesses also extends to venture capital investment opportunities. This gap represents more than a financial setback to start a business—it also limits the capacity to hire employees, invest in necessary equipment, or expand to new locations.

- In 2021, Native entrepreneurs received a disproportionately low

[10] Native Nations Institute at The University of Arizona, *Access to Capital and Credit in Native Communities* (2016), https://www.cdfifund.gov/programs-training/programs/native-initiatives/native-communities-study.

[11] LaPlante & Wheeler, *supra* note 9.

[12] *Id.*

0.013% of U.S. Venture Capital (VC) funding.[13]

- In 2022, Black founders received 1% of total VC funding, with black women-owned business receiving less than 0.35% of all VC funding. Also, half of Black-owned firms reported unmet funding needs, compared to 34% of white-owned businesses.[14]

- In 2023, Latinx owned businesses received less than 1% of VC funds, whereas white owned businesses receive more than three times as much funding per investor from private equity and nearly twice as much funding per investor from venture capital compared with Latinx owned businesses.[15]

And these inequities persist even though "there is strong evidence to suggest that given the same amount of capital, [people of color] are likely to match the performance of, or even outperform, the standard founders receiving funding today."[16]

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[13] Olin Brookings Commission, *Bridging the Startup Funding Gap for Women, Back and Latinx Entrepreneurs* (2023), https://olin.wustl.edu/_assets/docs/research/OlinBrookingsCommission2023-PolicyPaper.pdf.

[14] *See* Vasanth Ganesan et al., *Underestimated start-up founders: The untapped opportunity* (2023); NABA Inc; *Investing in The Future: How Supporting Black Women-Owned Businesses and Entrepreneurs Benefits Us All*, Forbes EQ (Apr. 27, 2023), at 3; *see also* Federal Reserve Bank, *The Federal Reserve 2022 Report on Firms Owned by People of Color*, ii, 13, 15, 18 (June 29, 2022).

[15] Barbara Gomez-Aguinaga, George Foster, Jerry I. Porras, *2023 State of Latino Entrepreneurship*, Stanford Business, Faculty & Research (March 2024), https://www.gsb.stanford.edu/faculty-research/publications/state-latino-entrepreneurship-2023.

[16] The R.O.I. Report: Reimagining Opportunity in Venture Investing, Transparent Collective 5 (2022), *available at* https://www.transparentcollective.com/reports.html#/.

(iii) Higher rates of unemployment.

Every discouraged Black, Latinx, and Native business owner represents an engine of economic growth that could have brought jobs, wealth, and an ethos of self-determination to their community and the country. Entrepreneurs of color are more likely than white employers to hire from within their communities,[17] leading to an increase in high quality jobs and multi-tiered wealth building in these communities.[18] Localized efforts to promote job creation is essential because Black, Latinx, and Native American communities also suffer from higher rates of unemployment. In 2022, the U.S. Bureau of Labor Statistics reported that the unemployment rate for Native Americans was 6.2%, 6.1% for Black Americans, and 4.3% for Latinx Americans in comparison to 3.2% for White Americans.[19] Moreover, Entrepreneurs who launch businesses in their own neighborhoods are also best suited to close gaps in community resources, like opening food businesses

[17] Stephen K. Benjamin, Brian K. Barnett, Greg Fischer, Tom Cochran, *Bridging the Wealth Gap, Small Business Growth*, the United States Conference of Mayors (June 2018), http://www.usmayors.org/wp-content/uploads/2018/06/Bridging-the-Wealth-Gap_June-2018.pdf.

[18] David Baboolall, Kelemwork Cook, Nick Noel, Shelley Stewart, Nina Yancy, *Building Supportive Ecosystems for Black-Owned US Businesses*, McKinsey & Company (October 2020), https://www.mckinsey.com/industries/public-sector/our-insights/building-supportive-ecosystems-for-black-owned-us-businesses.

[19] U.S. Bureau of Labor Statistics, BLS Reports (November 2023), https://www.bls.gov/opub/reports/race-and-ethnicity/2022/.

to address food deserts and poor nutrition.[20]

Furthermore, curtailing race-remedial programs for entrepreneurs from Black, Latinx, and Native American communities further curtails the strength of the U.S. economy overall. McKinsey and Company reported that if existing Black-owned businesses reached the same average revenue as their white-owned industry counterparts, the result would be an additional $200 billion in recurring direct revenues.[21] In 2017, this equated to a roughly 1% increase in GDP.[22] Similarly, The Stanford Graduate School of Business found that if Latinx-owned business could generate $1.4 trillion in additional revenue today and $3.3 trillion in additional revenue by 2030 if they were equitable funded.[23]

The tangible impact remedial programs like Amazon's Diversity Grant program have on addressing structural barriers for entrepreneurs from communities

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[20] Mercedes Gibson, Julia McCotter, *The People of Color Small Business Network, 2021 Impact Report* (November 2022), https://greenlining.org/wp-content/uploads/2022/12/Greenlining-POC-Small-Business-Report-Web-Final.pdf.

[21] David Baboolall, Kelemwork Cook, Nick Noel, Shelley Stewart, Nina Yancy, *Building Supportive Ecosystems for Black-Owned US Businesses*, McKinsey & Company (October 2020), https://www.mckinsey.com/industries/public-sector/our-insights/building-supportive-ecosystems-for-black-owned-us-businesses.

[22] *Id.*

[23] Barbara Gomez-Aguinaga, George Foster, Jerry I. Porras, *2023 State of Latino Entrepreneurship* (March 2024), https://www.gsb.stanford.edu/faculty-research/labs-initiatives/slei/state-latino-entrepreneurship-report.

of color and the broader positive ripple effects such programs have on the economy is best illustrated through the personal story of a DSP grant winner:

- Sophia Strother, CEO of Learning 2 Exhale Industries: Ms. Strother works with the Amazon Delivery Center in Austin, Texas. She is a single mother and survivor of domestic violence and human trafficking. Ms. Strother initially did not have the funds to travel to one of the many interview rounds for the DSP program. She eventually made it through the multi-tiered process, and now employs nearly 80 associates and a fleet of 38 vans. In three years, her company has cleared over $3 million.[24]

Moreover, the testimonials below speak to the value of Amazon supporting Black, Native American, and Latino entrepreneurs and communities through the DSP program:

- Tracey Gibson, CEO of DT Logistics: she began her company with seven employees with the Amazon Delivery Center in Maple Grove, Minnesota. She now employes approximately 100 people, many of whom are people of color with wages that begin at $20.25 per hour. "It really started for wealth creation for my family, and then from there it became even bigger. So I'm able to offer people jobs at a livable wage."[25]

- Cori Gordon, CEO of Cortoyou, LLC: In 2018, at the age of 29, Ms. Gordon began her business with fifteen employees with the Amazon Staten Island fulfillment center and now employes more than 100 employees. She stated that the most rewarding part of starting her own

[24] Ngozi Nwanji, *How Amazon Transformed This Black Woman Founder's Company Into a Multi-Million Dollar Business*, AfroTech (October 2023) https://afrotech.com/amazon-delivery-service-partner-sophia-strother.

[25] CBS News, *Black-Owned Amazon Service Partner Creating Jobs With a "Livable Wage,"* CBS Minnesota (February 2022), https://www.cbsnews.com/minnesota/news/black-owned-amazon-service-partner-creating-jobs-with-a-livable-wage/.

> business was providing jobs to people who needed them the most, especially during the pandemic.[26]

Section 1981 should not be weaponized against remedial programs that actualize the spirit of Section 1981 for Black business owners as well as Latinx and Native entrepreneurs.

Amazon's Grant Program furthers Section 1981's remedial purpose by addressing the persistent inequities in business funding for people of color as compared to white people. In an environment where programs designed to advance economic opportunity for Black communities and other communities of color are facing unprecedented attacks, Section 1981 should not now be weaponized to permit baseless "reverse discrimination" suits against remedial philanthropic programs aimed at providing opportunities for Black, Latinx, Native American, and other business owners of color. Instead, this Court should stand guard against "the formidable hand of custom [that] interposed itself between [B]lacks and economic independence." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 673 (1987), *superseded on other grounds by statute,* Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5114, *as recognized in Jones v. R.R. Donnelley & Sons Co.,* 541 U.S. 369 (2004) (Brennan, J., dissenting) (internal quotation marks and

[26] Atiya Jordan, *Meet Jamaican CEO Cori Gordon One of Amazon's Youngest Delivery Service Partners*, Black Enterprise (March 2022), https://www.blackenterprise.com/meet-cori-gordon-one-of-amazons-youngest-delivery-service-partners/.

citation omitted).

CONCLUSION

Appellants seek to use Section 1981 to subvert the congressional intent of the Civil Rights Act of 1866. To avoid this perverse result, the Court should affirm the district court's dismissal of Appellants' lawsuit.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,070 words, excluding the portions exempted by Rule 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2024 in 14-point Times New Roman.

Dated: December 11, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2024, an electronic copy of the foregoing brief was filed with the Clerk for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished upon the following counsel via the CM/ECF system.

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