UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

AMERICAN ALLIANCE FOR EQUAL RIGHTS, **Plaintiff,** **v.** **JORGE ZAMANILLO, *et al.*,** **Defendants.**	**Civil Action No.: 1:24-cv-00509-JMC**

AMICI CURIAE BRIEF OF AFRO LATINO FORUM, ASPIRA ASSOCIATION, AND HISPANIC FEDERATION IN SUPPORT OF DEFENDANTS' OPPOSITION TO THE MOTION FOR A PRELIMINARY INJUNCTION

Kathryn J. Youker
(DC Bar No. 90004024)
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
Tel. (202) 662-8375
Email: kyouker@lawyerscommittee.org

Joanna Wasik
(DC Bar No. 1027916)
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS
700 14th Street NW, Suite 400
Washington, DC 20005
Tel. (202) 319-1000
Email: joanna_wasik@washlaw.org

Francisca D. Fajana*
(NY Bar No. 5475405)
LATINOJUSTICE PRLDEF
475 Riverside Drive, Suite 1901
New York, NY 10115
Tel. (212) 319-3360
Email: ffajana@latinojustice.org
*Pro Hac Vice Motion Forthcoming

DISCLOSURE STATEMENT

Pursuant to LCvR 7(o)(5), the undersigned counsel for the Afro Latino Forum, ASPIRA Association, and the Hispanic Federation make the following disclosures:

Afro Latino Forum does not have a parent company, and there is no publicly owned corporation that owns 10% or more of Afro Latino's stock.

ASPIRA Association does not have a parent company and there is no publicly owned corporation that owns 10% or more of ASPIRA Association's stock.

Hispanic Federation does not have a parent company and there is no publicly owned corporation that owns 10% or more of Hispanic Federation's stock.

/s/ Kathryn J. Youker
Kathryn J. Youker

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INTEREST OF AMICI CURIAE[1]

Amici are organizations dedicated to empowering and advancing the interests of the Latino community in spheres including education and employment. They have an interest in ensuring that the Smithsonian Museum's workforce reflects America's diversity.

AFRO LATINO FORUM. The Afro Latino Forum centers Blackness within Latinidad focusing on Latinos of African descent in the United States. The organization works to provide a bridge that expands understanding about the African Diaspora. It supports the struggles for racial and social justice. Its work is guided by a communal perspective that recognizes the centrality of race. The Afro Latino Forum participated in a taskforce at the inception of the Smithsonian National Museum for the American Latino. The Afro Latino Forum has an interest in expanding access to educational and employment opportunities in the Smithsonian.

ASPIRA ASSOCIATION (ASPIRA). ASPIRA is a national organization dedicated to the education and leadership development of Latino youth. Founded in 1961, its mission is to promote the socioeconomic development of the Latino community through advocacy, education, and youth leadership development. ASPIRA has Associate offices in five states (DE, IL, NJ, NY, PA) and Puerto Rico, as well as formal partnerships with over 75 regional and local organizations across the country. ASPIRA serves over 45,000 students each year in after-school academic enrichment, tutoring, mentoring, career and college counseling, SAT/ACT Prep, and leadership development programs. ASPIRA has an interest in ensuring that college students gain entry into the Latino Museum's internship program.

HISPANIC FEDERATION (HF) is the nation's premier Latino nonprofit membership organization. Founded in 1990, HF seeks to empower and advance the Hispanic community,

[1] The parties, by their counsel, consent to the filing of this Amici brief.

support Hispanic families, and strengthen Latino institutions through work in the areas of education, health, immigration, civic engagement, economic empowerment, and the environment. The HF has an interest in expanding access to educational and employment opportunities in the Smithsonian.

I. INTRODUCTION

At stake in this case is an internship program that encourages undergraduate Latino students of all identities to avail themselves of educational and employment opportunities offered by the Smithsonian Museum of the American Latino ("Latino Museum"). The selection criteria for the internship do not include race or ethnicity. Nor do the application materials limit entry to any race or ethnicity. The selection process is entirely race and ethnicity neutral. Nevertheless, claiming non-Latino bias, Plaintiff asks this Court to enjoin the internship program because the internship program's participants are mostly Latino students.[2] Plaintiff essentially asks that the Equal Protection Clause be used as a bludgeon to deter equal opportunity. Plaintiff's position finds no support in equal protection jurisprudence.

First, Amici provide appropriate backdrop by explaining the racial and ethnic heterogeneity among Latinos, the legacy of discrimination that persists against them, and the value of an internship program that expands opportunity for Latino students. Latino students who participate in the internship program do not take away opportunities from non-Latinos. They are poised to bring fresh perspectives in the future to the preservation of our collective American story. Next, Amici refute Plaintiff's distortion of equal protection principles. Amici argue that Plaintiff is unlikely to prevail on its Equal Protection claim because Defendants' aspirational and laudable statements regarding mitigating the paucity of Latinos in the Smithsonian's workforce do not evince discriminatory intent. Stripped of any invidious discrimination, the internship program easily scales rational basis review and is constitutional.

Accordingly, this Court should deny Plaintiff's motion for a preliminary injunction.

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[2] This litigation looms amidst a national trend to roll back racial progress in the wake of the Supreme Court's affirmative action decision. *See e.g.*, Liam Knox, *A New Legal Blitz on Affirmative Action*, Inside Higher Ed (September 20, 2023), https://www.insidehighered.com/news/admissions/traditional-age/2023/09/20/affirmative-action-lawsuits-return-vengeance.

II. BACKGROUND

Plaintiff misunderstands the heterogeneity of identities within the Latino construct. It ignores relevant historical context that helps explain the under-inclusion of Latinos in the American workforce. And Plaintiff crucially disregards the value of addressing the paucity of Latinos as workers in the Smithsonian's workforce. Amici address these arguments.

A. Latinos Are Multiracial and Multiethnic.

Plaintiff's bald assertion that "not a single intern identified as black, Asian, or white" (Pl.'s Mot. at 4-5, ECF No. 3) in the two years since the internship program's inception, makes faulty assumptions about race and ethnicity and fundamentally misconceives Latino identity. Nearly 64 million Latinos—19.1% of U.S. population—live in the United States.[3] They are racially, ethnically, and socioeconomically diverse. Many are of Indigenous and African ancestry, and many are not. Many speak Spanish and many do not. There is no singular Latino experience. Migration patterns, the history of colonialism, generational roots in the U.S., shifting politics and more, influence how Latinos self-identify. Within the Latino population, about six million self-identify as Afro-Latino, twenty-eight million identify as two or more races, while more than ten million identify as white (down from 26.7 million in 2010).[4] Thousands of Afro-Latinos do not, contrary to Plaintiff's simplistic view, subscribe to a singular identity.[5] They are both Black and

[3] "Latino," "Hispanic" and "Latinx," while often used interchangeably, mean different things. "Hispanic" refers to individuals who originate from Spanish-speaking countries. *See* 42 U.S.C. § 300u-6(g)(2). "Latino" or the gender neutral "Latinx," meanwhile, refers to individuals whose origins are from Latin America. *See* Hugo Lopez, et al., *Who is Hispanic?*, Pew Research (September 23, 2021), https://www.pewresearch.org/fact-tank/2021/09/23/who-is-hispanic/. Amici use the term Latino. For data on Latino population, *see* U.S. Census Bureau, *Hispanic Heritage Month: 2023* (August 17, 2023), https://www.census.gov/newsroom/facts-for-features/2023/hispanic-heritage-month.html.

[4] Lopez, *Who is Hispanic?*, *supra*, n.3.

[5] *See* Gustavo López & Ana Gonzalez-Barrera, *Afro-Latino: A deeply rooted identity among U.S. Hispanics* (March 1, 2016), https://www.pewresearch.org/short-reads/2016/03/01/afro-latino-a-deeply-rooted-identity-among-u-s-hispanics/

Latino. Plaintiff's false choice—Latino v. non-Latino—renders the interns it describes *race-less* and, importantly, is unsupported by Census data.

Further, Latino is a pan-ethnic category that describes peoples of Latin American heritage.[6] Ethnicity is understood to denote national origin, geography, culture, and language. It is not interchangeable with race.[7] Lastly, contrary to Plaintiff's suggestion, not everyone who has a Spanish surname is ethnically Latino.[8]

Having dispelled Plaintiff's false dichotomy between ethnicity and race, Amici turn to the history of discrimination against Latinos.

B. Latinos Endure a Legacy of Discrimination in the Educational and Employment Spheres.

In its seminal ruling extending the reach of the Fourteenth Amendment's Equal Protection Clause to Latinos, the Supreme Court explained "[t]hroughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws." *Hernandez v. Texas*, 347 U.S. 475, 478 (1954). At the time of the *Hernandez* decision, Latinos were heavily concentrated in Texas and California where

[6] *Id.*

[7] While the law accords claims of discrimination based on ethnicity the same analytical framework as race, it does so not because of the inherent interchangeability of both concepts, but because ethnicity is subsumed within race. *See* e.g., *Vill. of Freeport v. Barrella*, 814 F.3d 594, 605 (2d Cir. 2016) (extending employment discrimination protection to a white Latino because ancestry or ethnic characteristics are within the conception of race).

[8] *See,* Pl.'s Mot. at 5 (ECF No. 3) (listing the surnames of interns who do not "publicly identify their race or ethnicity"), 8 (claiming that Defendants "bar[] all non-Latinos from the internship."). Many Filipinos have Spanish last names but are not ethnically Latino. *See, e.g.*, Chit Lijauco, *Tracing the Origins of our Filipino Surnames*, (February 15, 2022), https://www.tatlerasia.com/lifestyle/others/tracing-the-origins-of-our-filipino-surnames (explaining an 1850 Spanish edict mandating adoption of Spanish surnames). Americans of Filipino ancestry are not included in the Census Bureau's definition of Americans of Spanish descent. To be so coded, a person must trace their roots to Mexico, Puerto Rico, Cuba, Central or South American and other Spanish speaking countries. *See* Lopez, *Who is Hispanic?*, *supra*, n.3.

80% of school districts were segregated.[9] Indeed, the Texas constitution's requirement of separate schools for Black students was also applied to Mexican American students. *See, e.g.*, Albert H. Kauffman, *Latino Education in Texas: A History of Systematic Recycling Discrimination*, 50 St. Mary's L.J. 861, 867 (2019). Texas also relegated English-speaking Latino students to segregated English instructional schools because they had Spanish surnames.[10] *Id*.

Unequal educational opportunity for Latinos endures. Our nation's capital is no exception. Although it is a thriving multi-racial city, it has profoundly segregated and unequal schools.[11] Latino students comprise 22% of the District of Columbia Public Schools.[12] But nearly 75% of these students attend intensely segregated schools with less than 10% white population, while one-in-four attend schools with virtually no white students.[13] Intensely segregated and nearly homogenous schools typically are under-resourced, have high concentrations of low-income students and produce poor educational outcomes.[14]

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[9] Julisa Acre, *Racial segregation of Latino students continues with English-only laws*, UnidosUS Blog (September 29, 2021) https://unidosus.org/blog/2021/09/29/racial-segregation-of-latino-students-continues-with-english-only-laws/.

[10] For a comprehensive history of the exclusion of Latinos in schooling, employment, housing, and in other spheres, *see, e.g.*, Richard R. Valencia, *The Mexican American Struggle for Equal Educational Opportunity in Mendez v. Westminster: Helping to Pave the Way for Brown v. Board of Education*, 107 Tchrs. Coll. Rec. 389, 395–96 (March 2005) (discussing proliferation of separate schools for Mexican children in the Southwest); Jorge C. Rangel & Carlos M. Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 Harv. C.R.-C.L. L. Rev. 307, 308–09, 311–14 (1972) (recounting pervasive discrimination against Mexican Americans in spheres including education, housing, public accommodation and employment).

[11] Gary Orfield & Jongyeon Ee, *Our Segregated Capital: An Increasingly Diverse City with Racially Polarized Schools*, UC Civil Right Project (February 2017), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/our-segregated-capital-an-increasingly-diverse-city-with-racially-polarized-schools/POSTVERSION_DC_020117.pdf.

[12] *DCPS at a Glance: Enrollment*, District of Columbia Public Schools (SY 22-23), https://dcps.dc.gov/page/dcps-glance-enrollment.

[13] Orfield & Ee, *Our Segregated Capital*, supra, n.12, at 47, 66.

[14] Janel A. George, *The End of "Performative School Desegregation": Reimagining the Federal Role in Dismantling Segregated Education*, 22 Rutgers Race & L. Rev. 189, 201-02 (2021).

The D.C. public schools' data reflect national trends. Latinos are about 30% of all K-12 public school students but one-half of them attend schools where the student body is 75% or more Latino.[15] In 80% of schools with predominately Latino student populations, many of these students are eligible for free or reduced lunch—a marker of poverty.[16] Latino students also experience language-based segregation. Three-quarters of English Language Learners in public schools are Spanish speakers.[17] In other words, Latino students experience a phenomenon dubbed "triple segregation"—segregation by race/ethnicity, poverty, and linguistic isolation.[18]

Despite tremendous strides made by Latinos, disparities persist. About 32% of Latinos between the ages of 18-24 are enrolled in college compared to 58% of Asian Americans students.[19] On average, Latino workers earn 73 cents to a dollar, while Latino women experience the largest pay gap, earning 57 cents to the dollar.[20] Over the course of a forty-year career, Latino women lose well over one million dollars, exacerbating racial and ethnic wealth gaps.[21] Afro-Latinos fare

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[15] U.S. Gov't Accountability Office, *K-12 Education: Student Population Has Significantly Diversified, but Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines*, (June 16, 2022), https://www.gao.gov/assets/gao-22-104737.pdf.

[16] *Id*. at 13.

[17] Kristen Bialik, et al., *6 facts about English language learners in U.S. public schools*, Pew Research Center, (2016) https://www.pewresearch.org/short-reads/2018/10/25/6-facts-about-english-language-learners-in-u-s-public-schools/

[18] Rachel F. Moran, *Persistent Inequalities, The Pandemic, And the Opportunity to Compete*, 27 Wash. & Lee J. C.R. & Soc. Just. 589, 601 (2021).

[19] Lauren Mora, *Hispanic enrollment reaches new high at four-year colleges in the U.S., but affordability remains an obstacle*, Pew Research Center (October 2022), https://www.pewresearch.org/short-reads/2022/10/07/hispanic-enrollment-reaches-new-high-at-four-year-colleges-in-the-u-s-but-affordability-remains-an-obstacle/.

[20] For data on Latino workers, *see*, U.S. Dept. of Labor, *Earning Disparities by Race and Ethnicity*. For Latino women wage gap, see Jocelyn Frye & Rose Khattar, *Women of Color and the Wage Gap*, Center for American Progress (November 2021), https://www.americanprogress.org/article/women-of-color-and-the-wage-gap/

[21] *See* Frye & Khattar, *Women of Color and the Wage Gap*, *supra*, n.21.

worse. They share similar profiles with Black people on virtually all socioeconomic and asset-centered indices.[22]

Closing these gaps in education and employment require myriad concerted interventions. The Latino Museum's undergraduate internship program is but one tiny intervention. The Latino Museum should not be hamstrung from voluntarily expanding opportunity. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S.Ct. 2141, 2263 (2023) (Sotomayor, J., dissenting) ("our Nation's institutions [need not cement segregation] in service of superficial neutrality that promotes indifference to inequality and ignores the reality of race.").

C. Latinos Are Being Trained for the Museum's Workforce in Which They Are Grossly Under-Included.

Just as the National Museum of African American History & Culture immortalizes the struggles and contributions of Blacks from slavery to *Plessy*[23] to *Brown*[24] and well beyond,[25] the Smithsonian Museum for the American Latino, educates the public about Latino history and culture, and their experiences and contributions to the American experiment.[26] It teaches, for example, that in 1947—seven years before *Brown*—the Ninth Circuit ruled segregation of Mexican American students unconstitutional. *See Westminster Sch. Dist. of Orange Cnty. v.*

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[22] *See* Michelle Holder & Alan A. Aja, *Afro-Latinos in the U.S. Economy*, Lexington Books, 59 (2021).
[23] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[24] *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)
[25] African American civil war veterans began the agitation to commemorate African American influences on American history. They aimed to ensure that their contributions would not be excised or forgotten by future generations of Americans. Although they faced racially charged opposition, they persevered. Congress passed legislation establishing the museum in 2003. *See* National Museum of African American History & Culture, *Historical Origins*, https://siarchives.si.edu/history/national-museum-african-american-history-and-culture#:~:text=The%20newest%20of%20the%20Smithsonian's,the%20National%20Mall%20in%201915.
[26] *See* Smithsonian Museum of the American Latino, https://latino.si.edu/.

Mendez, 161 F.2d 774 (9th Cir. 1947). And that Juan Rodriguez, who hailed from modern-day Dominican Republic, was the first non-Native American to settle in New York.[27]

The Latino Museum also equips students with technical knowledge and skills to enter and succeed in the Smithsonian's workforce. The application materials ask a prospective student to describe how their identities, life experiences and/or perspectives shape their academic, professional and community work.[28] It is not hard to see how, for example, a Black Filipino who has a Spanish last name but does not ethnically identify as Latino might want to explain how her intersecting identities inspired her to pursue an internship at the Latino Museum. Such a student's essay is entirely consistent with the Supreme Court's pronouncement in *SFFA v. Harvard*, 143 S.Ct. at 2176 ("nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."). No student's choice to discuss her identities—racial, ethnic, gender, disability, or socioeconomic status—should be silenced.

Publicly available federal government data show that Latinos comprise about 5% of the total Smithsonian workforce of over 6,300 employees.[29] That is abysmal for a population that is 19% of the U.S. The data also are indicative of systemic barriers to opportunity.[30] The creation of an internship program to help train future leaders to expand the Smithsonian's workforce, to better

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[27] *Id*.

[28] *See* Latino Museum Studies Program Undergraduate Internship Application Materials, https://latino.si.edu/sites/default/files/docs/2024-lmsp-undergrad-applicationmaterials.pdf.

[29] U.S. Office of Personnel Management, Annual Report to the President, Hispanic Employment in the Federal Government FY 2018 (February 2021) https://www.opm.gov/policy-data-oversight/diversity-equity-inclusion-and-accessibility/reports/hispanic-2018.pdf

[30] *See e.g.*, Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. Mich. J. L. Reform 387, 413 (2017) (noting "the very existence of racial disparities … establishes the existence of pervasive racial injustice that demands" redress).

reflect our rich diversity, and to help magnify the stories we tell future generations about America scarcely qualifies as an affront to the Equal Protection Clause.

III. ARGUMENT

A. Plaintiff is Unlikely To Prevail On Its Equal Protection Claim Because It Proffers No Evidence of Discriminatory Intent.

Plaintiff's request for a preliminary injunction should be denied because it fails to make a clear showing of a likelihood of success on the merits—a necessary element for the issuance of a preliminary injunction.[31] *See Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (stating without deciding that "we read *Winter [v. Natural Res. Def. Council, Inc*., 555 U.S. 7 (2008)] at least to suggest if not to hold that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.") (internal quotation and citation omitted). Amici weigh in only on that element to underscore Plaintiff's distortion of Equal Protection law.[32]

The Equal Protection Clause subjects racial classifications, through facially discriminatory policies, to strict scrutiny. *See Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003). Alternatively, facially neutral policies where the circumstantial evidence demonstrates intentional discrimination can violate Equal Protection. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., et al.*, 429 U.S. 252, 265-66 (1977); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Plaintiff fails to show discriminatory intent through a facial classification or circumstantial evidence.

The Latino Museum does not classify and exclude students based on race or ethnic background. Nor does it implement the internship program in an intentionally discriminatory manner, as Plaintiff fails to provide evidence of how students are chosen and the Latino Museum

[31] The other three factors are a showing of irreparable harm, that the balance of the equities favors the movant, and the issuance of an injunction is in the public interest. *See e.g., Singh v. Berger*, 56 F.4th 88, 95 (D.C. Cir. 2022).
[32] Amici take no position on Defendants' motion to dismiss.

describes the selection process at length, showing that race or ethnicity is not a factor in the selection process.

Under the *Arlington Heights* test, a plaintiff can demonstrate intentional discrimination through circumstantial evidence. 429 U.S. at 265-66. In that case, the Supreme Court set forth a series of considerations for analyzing "whether invidious discriminatory purpose was a motivating factor" in a government body's decisionmaking. *Id.* at 267-68. The inquiry starts with whether the policy "bears more heavily on one race than another." *Id.* at 266 (citation omitted). Other factors include: "the historical background of the [jurisdiction's] decision;" "[t]he specific sequence of events leading up to the challenged decision;" "[d]epartures from the normal procedural sequence;" and "[t]he legislative or administrative history, especially ... [any] contemporary statements by members of the decisionmaking body." *Id.* Ultimately, Plaintiff needs to show that the Latino Museum adopted the policy "because of, not merely in spite of, race." *Feeney*, 442 U.S. at 279.

Plaintiff does not attempt to apply the *Arlington Heights* test, and even if it did, Plaintiff does not produce any evidence establishing any of the *Arlington Heights* factors. Plaintiff offers no evidence that non-Latinos even applied to the internship program, let alone that they were systematically rejected at rates higher than Latinos. That flaw is fatal to Plaintiff's argument. *See, e.g., Coal. for TJ v. Fairfax Cty. Sch. Bd.*, 68 F.4th 864, 881 (4t h Cir. 2023) *cert. denied*, ---S. Ct.---, 2024 WL 674659 (Mem.) (Feb. 20, 2024) ("[t]he proper metric [for measuring disparate impact requires] evaluation of a given racial or ethnic group's share of the number of applications versus that group's share of the offers extended [and making comparisons across groups]"). Other than referencing the Act of Congress that authorized the creation of the Latino Museum and the

internship,[33] Plaintiff fails to show the historical background of the Museum's decision to establish the internship program's selection process or the specific sequence of events leading up to the challenged decision. Rather than providing evidence of a departure from the normal procedural sequence, the record shows that the application process was conducted in conformity with the process for all of the Museum's internships, fellowships, and other academic appointments through a centralized system administered by the Office of Academic Appointments and Internships. ECF No. 10-1 at 6-8. Plaintiff also lacks proof of any contemporary discriminatory statements by members of the body that established the internship's application process.

Pointedly, lacking any indicia of discriminatory intent, Plaintiff relies instead on an inverse meaning of the Equal Protection Clause, claiming that public pronouncements by the Latino Museum encouraging Latino students to apply and lamenting their 5% representation in the Smithsonian's workforce is somehow pernicious. That is a blatant misapplication of the Equal Protection Clause.

To begin, Defendants' awareness of the under-inclusion of Latinos in the Smithsonian's workforce is not unlawful. Courts have consistently said decisionmakers need not be race-blind. For example, in *Coalition for TJ*, 68 F.4th at 35, the Fourth Circuit recently held there was no Equal Protection violation when a high school sought to increase the racial diversity of its student body but used a policy that did not treat applicants differently because of their race, stating: "To the extent the Board may have adopted the challenged admissions policy out of a desire to increase the rates of Black and Hispanic student enrollment at TJ — that is, to improve racial diversity and inclusion by way of race-neutral measures — it was utilizing a practice that the Supreme Court has consistently declined to find constitutionally suspect." (citing *Tex. Dep't of Hous. & Cmty.*

[33] Pl.'s Mot. at 2 (ECF No. 3).

Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545 (2015)); *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 48 (1st Cir. 2021) ("The fact that public school officials are well aware that race-neutral selection criteria ... are correlated with race and that their application would likely promote diversity does not automatically require strict scrutiny of a school system's decision to apply those neutral criteria."); *Doe ex rel. Doe v. Lower Merion*, 665 F.3d 524, 548 (3rd Cir. 2011) ("designing a policy 'with racial factors in mind' does not constitute a racial classification if the policy is facially neutral and administered in a race-neutral fashion."); *Hayden v. County of Nassau*, 180 F.3d 42,51 (2d Cir. 1999) ("nothing in our jurisprudence precludes the use of race-neutral means to improve racial and gender representation."); *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir.), *cert. denied*, 525 U.S. 811 (1998), ("racial motive" [cannot be a] "synonym for a constitutional violation" [because] "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute reflect a concern with race. That does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause.").

Further, there is nothing nefarious about reviewing readily available data and professing aspirational objectives to mitigate known racial disparities. *See* Pl.'s Mot. at 3. Rejecting an Equal Protection challenge to the Boston School Committee's revamped selection criteria which, among other considerations, accounted for the under-inclusion of low-income students from certain zip codes in its competitive exams schools, the First Circuit cautioned against deterring an institution from deploying race neutral efforts to "reduce unnecessary racial disparities." *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 89 F.4th 46, 60-61 (1st Cir. 2023). *See also Sargent v. Sch. Dist. of Philadelphia*, 2022 WL 3155408, *6 ,*8 (E.D. Pa 2022) (finding that setting aspirational objectives to increase the number of students of color qualified to apply to competitive schools and being aware of racial demographics are not evidence of discriminatory

purpose). *Id*. at 60-61. Nor is targeting resources to promote the inclusion of an under-included group tantamount to discrimination. It is the exact opposite. Doing so expands opportunity to overcome systemic barriers. *See, e.g., Weser v. Glen*, 190 F. Supp.2d 384, 399 (E.D.N.Y. 2002) (targeted outreach efforts that "serve to broaden a pool of qualified applicants and to encourage equal opportunity, but do not confer a benefit or impose a burden do not implicate the Equal Protection Clause.") (citation omitted).

To suggest that the Latino Museum may not voluntarily implement an internship program to help rectify glaring disparities is to turn a blind eye to the meaning and purpose of the Equal Protection Clause.[34] Ultimately, the point of expanding opportunity to Latino students "is to give [them] necessary tools to contribute to closing the equity gaps [some of which were discussed in section II(B), *supra*] so that [their] progeny—and therefore all Americans—can compete without race mattering in the future. That intergenerational project is undeniably a worthy one." *SFFA v. Harvard*, 143 S.Ct. at 2275 (Jackson, J., dissenting). This Court should reject Plaintiff's attempt to pervert the Equal Protection Clause to cement injustice.

B. The Internship Program Easily Scales Rational Basis Review.

Free from invidious discrimination, the internship program survives rational basis review. Rational basis review "affords the policy choices of [decisionmakers] a strong presumption of rationality." *Sanchez v. Off. of State Superintendent of Educ.*, 45 F.4th 388, 395 (D.C. Cir. 2022) (citation omitted). Under this framework, Plaintiff faces the formidable "task of refuting every conceivable basis which might support" the internship program. *Id.* at 396 (citation omitted). The Latino Museum has a legitimate interest in encouraging under-included Latinos to seek internship opportunities. The Museum rationally concluded that the Smithsonian is served by a well-trained

[34] *Slaughter House Cases*, 83 U.S. 36, 71-72 (1872) ("One pervading purpose [for which the 14th Amendment was created], lying at [its] foundation, and without which [it] would [not] have been even suggested" was the remediation of caste-based discrimination.).

and diverse workforce. The majority in *SFFA* agree that a diverse student body is a "commendable" interest so long as it is pursued through race neutral means. 143 S.Ct. at 2166. The Latino Museum's internship program does just that.

CONCLUSION

Amici respectfully urge this Court to deny Plaintiff's request for a preliminary injunction.

Dated: March 15, 2024

Respectfully submitted,

/s/ Kathryn J. Youker
Kathryn J. Youker
(DC Bar No. 90004024)
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
Tel. (202) 662-8375
Email: kyouker@lawyerscommittee.org

/s/ Francisca D. Fajana
Francisca D. Fajana*
(NY Bar No. 5475405)
LATINOJUSTICE PRLDEF
475 Riverside Drive, Suite 1901
New York, NY 10115
Tel. (212) 319-3360
Email: ffajana@latinojustice.org
*Pro Hac Vice Motion Forthcoming

/s/ Joanna K. Wasik
Joanna K. Wasik (Bar No. 1027916)
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS
700 14th St. #400
Washington, D.C. 20005
Tel. (202) 319-1000
Email: Joanna_Wasik@washlaw.org