No. 23-170

In the Supreme Court of the United States

COALITION FOR TJ,
Petitioner,

v.

FAIRFAX COUNTY SCHOOL BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE ASIAN AMERICAN COALITION FOR EDUCATION, THE ASIAN AMERICAN LEGAL FOUNDATION, AND FRIENDS OF LOWELL FOUNDATION, IN SUPPORT OF PETITIONER

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THE INTEREST OF *AMICI CURIAE* [1]

This case, involving use of proxies to reduce enrollment of Asian Americans at Thomas Jefferson High School ("TJ"), is of critical importance to *amici curiae* and their constituents, who are Americans of Asian ethnic descent. *Amici* believe it is vitally important that this Court grant certiorari and provide timely clarification that schools cannot evade this Court's recent ruling in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College v. Univ. of North Carolina,* 143 S. Ct. 2141 (2023), by using "race-neutral" proxies.

Asian Americans have historically faced discrimination and even violence because of their ethnicity. In the educational arena, Asian Americans have been subjected to egregious discrimination based on their ethnicity for almost as long as Asians have been in America. At many selective schools, Asian Americans have been subjected to admissions processes that have denied them equal access to opportunity because of their skin color. Many of *Amici's* constituents have children who were denied entrance to or who may one day aspire to attend TJ or other selective institutions with similar discriminatory admissions practices.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. *Amici Curiae* have timely provided notice of their intent to file this brief to counsel for all parties.

Issues raised by this case are particularly poignant as the Asian American community has recently been experiencing a pandemic of race-based violence, with vulnerable Asian Americans viciously attacked and even murdered in the streets of American cities. These horrific attacks are often carried out using the same rationale applied to justify discrimination in education—that Asian Americans are inexorably "other," do not contribute to diversity, are "overrepresented," and less deserving of basic rights.

The Asian American Coalition for Education ("AACE") is an apolitical, non-profit, national alliance. It is devoted to promoting equal rights for Asian Americans in education and education-related activities. The leaders of AACE and its supporting organizations are Asian American community leaders, business leaders and, most importantly, parents. They are not professional "civil rights advocates" and do not get funding from large corporations or multibillion dollar foundations, but were forced to become civil rights advocates to expose, stop and prevent the discrimination against their communities and children that the "professionals" ignore, downplay and facilitate. In similar *amici* filings, AACE has represented more than 300 Asian American organizations. More information on AACE can be found at http://asianamericanforeducation.org.

The Asian American Legal Foundation ("AALF"),

a non-profit organization based in San Francisco, was founded in 1994 to protect and promote the civil rights of Asian Americans. AALF focuses its work on situations where Asian Americans are discriminated against for a purportedly benign purpose and where high profile groups and individuals deny that discrimination even exists. Members of AALF were instrumental in the struggle to end discrimination against Chinese American students in the San Francisco, California public school system. *See Ho v. San Francisco Unified Sch. Dist.,* 147 F.3d 854 (9th Cir. 1998). More information on AALF can be found at http://www.asianamericanlegal.com.

The Friends of Lowell Foundation ("FOLF") is a non-profit organization formed by Lowell High School (San Francisco) alumni for the purpose of protecting and preserving their alma mater as an alternative, magnet public school with admissions determined by academic merit. In 2021, FOLF was among the organizations that successfully challenged the San Francisco Board of Education's replacement of Lowell's long-standing merit-based admissions with a racially-motivated and unfair lottery. This lottery had been justified as a "race-neutral" means to make Lowell more "diverse." In addition to advocating for merit-based admissions, FOLF works to improve educational opportunities for younger children so that they will eventually be prepared to apply to and excel at rigorous schools like Lowell. More information on FOLF can be found at

https://www.friendsoflowell.org/.

Amici Curiae ask this Court to hear their arguments in support of Petitioner.

SUMMARY OF ARGUMENT

Amici Curiae are appalled that the Fairfax County School Board (the "Board") has adopted an admissions plan at Thomas Jefferson High School ("TJ") designed to reduce Asian Americans enrollment, and urge this Court to grant certiorari and examine that plan under strict scrutiny.

While the Board's stated goal was to mirror the "diversity" of Northern Virginia, not only was the admissions plan deliberately crafted to reduce Asian American enrollment through the use of proxies, the message sent by school officials was that Asian Americans were "overrepresented" and lacking in "diversity"—messages that have historically caused immense suffering to Asian Americans.

Throughout the long history of Asians in this nation, they have faced discrimination rationalized by depicting them as featureless members of a "yellow horde," lacking the human attributes of other Americans, "overrepresented," and not deserving to be treated as individuals. It is thus sad to see Asian Americans again subjected to negative stereotyping and discrimination, and at one of the nation's leading high schools.

The pernicious view that Asian Americans are "overrepresented" and do not contribute to diversity at TJ and certain other selective schools is unfortunately common across the nation. It causes real and tangible harm, resulting in Asian American children being excluded from educational and other opportunities, causing them to feel a sense of inferiority, anger, and hopelessness in their academic endeavors, knowing they will face higher and often insurmountable hurdles because of their ethnicity. It has also led to increased discrimination and violence against members of the Asian American community.

The communications of Fairfax County School Board members, the racial data they studied, and their statements at the time, make abundantly clear that their goal was racial balancing. The plan they adopted worked exactly as designed, reducing Asian American enrollment at TJ dramatically. The Board's reliance below on *Grutter v. Bollinger,* 539 U.S. 306 (2003), for a compelling diversity interest to justify the plan was not only misplaced, as the diversity interest found in *Grutter* exists only in higher education, it also demonstrates that the Board well knew it was engaged in racial engineering.

America exists in a competitive, often hostile world. If it is to retain its leading position it needs to place more emphasis on merit, not less. Attempts to destroy the academic character of selective schools like TJ in the name of racial balancing are not only

unconstitutional, they are misguided in terms of those they purport to help. Deficiencies in K-8 education cannot be addressed by racially balancing TJ and other academic high schools. All that would accomplish is to destroy these schools' academic natures, depriving Americans of all ethnicities of a valuable public resource. Then, only the wealthy would have access to superior education.

This Court should grant certiorari so that it can determine whether a school's use of proxies to achieve racial goals allows it to evade strict scrutiny.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A SCHOOL DISTRICT MAY EVADE STRICT SCRUTINY BY MANIPULATING FACIALLY-NEUTRAL ADMISSIONS CRITERIA TO ACHIEVE A DESIRED RACIAL OUTCOME.

A. The New TJ Admissions Plan Was Deliberately Crafted to Reduce Asian American Enrollment.

Amici and their constituents are appalled that, once again, Asian Americans are considered "overrepresented," justifying attempts to limit their participation and access to opportunity in American society—this time as students at Fairfax County's selective Thomas Jefferson High School. Such

attempts at racial balancing are something this Court has long taught is forbidden. "We have many times over reaffirmed that '[r]acial balance is not to be achieved for its own sake.'" *Parents Inv. In Comm. Sch. v. Seattle School No. 1*, 551 U.S. 701, 127 S. Ct. 2738, 2757 (2007) (citing cases).

By deliberately crafting changes to enrollment rules so as to reduce the "overrepresentation" of Asian Americans at TJ, the Fairfax County School Board "demeans the dignity and worth" of Asian Americans by judging them by ancestry instead of by their "own merit and essential qualities." *Rice v. Cayetano,* 528 U.S. 495, 517 (2000).

As the district court correctly found, the Board's overriding purpose in changing the admissions standards at TJ, furthered by the means it chose—removing the entrance exam, capping admission from each middle school at 1.5%, and giving bonus points for "Experience Factors"—was to reduce Asian American enrollment:

> Throughout this process, Board members and high-level FCPS officials expressed their desire to remake TJ admissions because they were dissatisfied with the racial composition of the school. A means to accomplish their goal of achieving racial balance was to decrease enrollment of the only racial group "overrepresented" at TJ—Asian Americans. The Board employed

> proxies that disproportionately burden Asian-American students.

Pet.App. 95a; *id.* 106a-108a (district court decision).[2]

As the record shows, the Board targeted Asian American enrollment using the demographics of the feeder middle schools—capping each at 1.5%, since it determined most Asian American applicants came from six middle schools. *See id.; Coalition for TJ v. Fairfax Cty. Sch. Bd.,* 68 F. 4th 864, 875 (2023). It also gives "experience factor" points to applicants who are "English-language learners" or from "historically underrepresented" middle schools that cannot be used by most Asian American applicants. *Id.* at 875, 877, 900; Pet.App. 88a-89a. The Board carefully chose its proxies for race, based on scrutiny of racial data, and "extensive racial modeling" of the effect of new admissions proposals. *Id.* at 898-99; Pet.App. 59a, 63a, 67a-70a.[3] And, it achieved exactly the result predicted—a 26 per cent reduction in Asian American enrollment at TJ. Pet.App. 53a, 89a.

The situation is similar to that in Y*ick Wo v. Hopkins*, 118 U.S. 356 (1886), where this Court found that San Francisco's facially-neutral laundry licensing ordinance was impermissibly crafted to target Chinese Americans:

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[2] References to "Pet.App." are to the Appendix to the Petition.

[3] Rather incredibly, the court below ignored the fact-findings of the district court and held, "the Coalition cannot establish that the Board adopted its race-neutral policy with any discriminatory intent." *Coalition for TJ,* 68 F. 4th at 867.

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances…the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74. Here, as in *Yick Wo,* the School Board should not be allowed to practice racial discrimination just because it does so using facially-neutral proxies. This Court should grant certiorari so that it can examine the TJ admissions plan under strict scrutiny, something that the court below failed to do. *Coalition for TJ,* 68 F. 4th at 887; Pet.App. 43a (applying rational basis scrutiny); *but see Johnson v. California,* 543 U.S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context…")

B. The Burden of the TJ Admissions Plan Falls Heaviest on Those Least Able to Bear It.

A key component of the Board's plan is the capping of enrollment from each middle school at 1.5%, since it determined that a majority of Asian American applicants came from six such feeder schools. Pet.App. 71a. As intended, the effect was to reduce overall Asian American enrollment at TJ, in a

manner akin to what results when race-based gerrymandering is used to reduce the overall impact of black voters. However, in the TJ school admissions context, "[t]he set-aside disproportionately forces Asian-American students to compete against more eligible and interested applicants (often each other) for the allocated seats at their middle schools." Pet.App. 98a. The result is that less socioeconomically advantaged Asian American candidates, who are not as well prepared, are at a severe disadvantage.

Making the situation worse, the admissions plan considers an applicant based on middle school attended rather than school zoned. As a result, there is a "special penalty" imposed on students from disadvantaged and low performing neighborhoods who nonetheless have gained admittance to one of the more academic middle schools. Pet.App. 73a.

Thus, perversely, at the targeted feeder schools, the burden of the racial discrimination falls heaviest on the most disadvantaged Asian American students who aspire to attend TJ.

C. Contrary to the School Board's Belief, Asian Americans Are Themselves Diverse and Contribute Significantly to Diversity.

The Board's underlying premise that Asian Americans are monolithic and do not contribute to diversity is wrong. While crafting methods to

decrease Asian American enrollment to increase "diversity," the Board failed to consider that "Asian" encompasses many diverse ethnic groups, each of which is a distinct minority: "Asian Americans trace their roots to more than 20 countries in East and Southeast Asia and the Indian subcontinent, each with unique histories, cultures, languages and other characteristics." Abby Budiman & Neil G. Ruiz, *Key Facts about Asian Americans, a Diverse and Growing Population, Pew Research Center* (April 21, 1921), *found at* https://www. pewresearch. org/fact -tank/ 2021/04/29/key-facts-about- asian-americans/ (last visited 9/9/2023).

Within each of these "Asian" countries (and their American descendants), there are further racial, dialect and other distinctions, multiplying the diversity even more. Between each of these many "Asian" subgroups there is considerable variance in terms of educational tradition; and within each, as might be expected, there are extreme differences in family background and resources. Indeed, Asian Americans have the highest income inequality of any racial group in the United States. *See Income Inequality in the U.S. Is Rising Most Rapidly Among Asians,* Pew Research Center, July 12, 2018, *found at* https:// www.pewresearch .org/social- trends/2018/ 07/12/income- inequality-in-the-u-s-is -rising- most-rapidly-among-asians/ (last visited 9/9/2023).

Thus, by any reasonable measure, Asian Americans contribute significantly to diversity.

D. The Message that Asian Americans are "Overrepresented" Encourages Hostility and Violence Against this Minority Not Only in Schools But Also in the Streets of Our Cities.

As this Court has warned, "Classifications based on race carry a danger of stigmatic harm." *Richmond v. J. A. Croson Co.,* 488 U. S. 469, 493-94 (1989). "Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.*

The case presently before this Court is part of a multi-year trend that has resulted in increased hostility directed against Asian Americans, not just in schools but also in the streets of our cities. *See Anti-Asian Hate Crimes Rose 73% Last Year, Updated FBI Data Says,* NBCNews (Oct. 25, 2021), *found at* https://www. nbcnews.com/news/ asian-america/anti-asian- hate-crimes- rose-73-last-year-updated- fbi- data-says -rcna3741 (last visited 9/9/2023); *Anti-Asian Hate Crimes Increased 339 Percent Nationwide Last Year*, Report Says, NBCNews (Jan. 31, 2022), *found at* https://www. nbcnews. com/news/asian-america/anti-asian-hate-crimes-increased-339-percent- nationwide-last-year-repo-rcna14282 (last visited 9/9/2023). *Surge in Anti-Asian Hate Crimes Raises Fears,* Daily Bulletin (March 5, 2021), *found at* https://www. dailybulletin. com/ 2021/03/05/surge-in -anti-asian- hate-crimes-

raises-fears -in-southern- california/ (last visited 5/7/2022).

Increased hostility toward Asian Americans has particularly been felt in San Francisco, California, ironically the center of much of the historical anti-Asian racism. *See Hate Crimes Against Asian Americans Are on the Rise,* Time, Feb. 18, 2021, *found at* https:// time.com/5938482/asian-american-attacks/ (last visited 9/20/2023); *SF Police Data Shows 567% Increase In Reports Of Hate Crimes Against Asian Americans,* The Guardian (Jan. 26, 2022), *found at* https://www. theguardian. com/us-news/ 2022/jan/26 /san -francisco-increase- hate-crime-anti-asian-aapi (last visited 9/20/2023).

In a strange inversion, discrimination against Asian Americans in school admissions is increasingly justified by the accusation that "Asian American students 'benefit from white supremacy' and 'proximity to white privilege,'" apparently thought to render them legitimate targets of racial bias. *See DOE-Sponsored Group Said Asians Benefit From White Privilege,* New York Post (May 26, 2019), *found at* https://nypost.com/2019/ 05/26/doe-may-have-claimed-asian- students-benefit -from-white-supremacy/ (last visited 9/20/2023).

The stereotyping of "Asians" as deficient in ordinary human qualities and "overrepresented," undoubtedly plays a role in the hostility, unprecedented in modern times, toward Asian Americans. Media and prominent individuals have

encouraged this dangerous trend by stating openly (and erroneously) that without race-conscious action, Asian American students might end up filling all the places at colleges, *See* Eugene Volokh, *Which Political Leader Expressed Concerns about California Universities "fill[ing] their entire freshman classes with nothing but Asian Americans?"* Reason (May 19, 2015), *found at* https://reason.com/volokh/2015/05/19/which-political-leader-express/ (last visited 9/9/2023). That same unfortunate—and racist—sentiment, which ignores that individual rights are at stake, is demonstrated by the Fairfax County School Board.

II. THE RATIONALE USED TO JUSTIFY DISCRIMINATION AT TJ ECHOS THE REPELLANT STEREOTYPES HISTORICALLY USED TO JUSTIFY DISCRIMINATION AGAINST ASIAN AMERICANS.

A. Throughout Much of America's History, Persecution of Asian Americans Was the Shameful Norm.

The Board views Asian Americans as "overrepresented" and not contributors to "diversity." This attitude evokes the same stereotypes historically used to justify discrimination against Asian Americans, when they were marginalized as somehow lacking in ordinary human qualities, and denied opportunities open to other individuals. *See, e.g.,* Charles McClain, *In Search of Equality* (Univ. of

Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991); Victor Low, *The Unimpressible Race* (East/West Publishing Co. 1982).

While Asian American immigrants were drawn to the United States by its promise of a better life, all too often they found only hardship and the dangerous work that nobody else wanted. Their treatment was so dismal it gave rise to the expression "a Chinaman's Chance," a term meaning, "Little or no chance at all; a completely hopeless prospect." The Free Dictionary, *found at* https://idioms.Thefreedictionary.com/Chinaman%27s+chance (last visited 9/9/2023).[4]

Historical court cases in which Asian Americans struggled for equal treatment provide a record that is tragic, outrageous and impossible to refute.

In 1854, in *People v. Hall,* 4 Cal. 399, 404-05 (1854), the California Supreme Court invalidated the testimony of Chinese American witnesses to a murder, explaining that Chinese were "a distinct people . . . whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown;

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[4] There are various explanations for the origin of this phrase. "One is that they were given the most dangerous jobs, such as setting and igniting explosives. Another is that judges and juries routinely convicted Chinese defendants on the flimsiest of evidence. A third is that Chinese miners were allowed to work gold claims only after others had taken the best ore." *Id.*

differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference."

In *Ho Ah Kow v. Nunan,* 12 F. Cal. 252 (C.C.D. Cal. 1879) (No. 6,546), a district court invalidated San Francisco's infamous "Queue Ordinance" on equal protection grounds.

In *In re Ah Chong,* 2 F. 733 (C.C.D. Cal. 1880), the court found unconstitutional a law forbidding Chinese Americans from fishing in California waters.

In *In re Tiburcio Parrott,* 1 F. 481 (C.C.D. Cal. 1880), the court declared unconstitutional a provision of California's 1879 constitution that forbade corporations and municipalities from hiring Chinese Americans.

In *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), the Supreme Court ruled that Chinese were "persons" under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance.

In *In re Lee Sing,* 43 F. 359 (C.C.D. Cal. 1890), the court found unconstitutional the "Bingham Ordinance," which had mandated residential segregation of Chinese Americans.

In *United States v. Wong Kim Ark,* 169 U.S. 649 (1898), the Supreme Court ruled that a Chinese American boy, born in San Francisco, could not be prevented from returning to the city after a trip abroad.

B. The Page Act and Chinese Exclusion Act.

The Page Act of 1875 was the first restrictive federal immigration law, and effectively barred the entry of Chinese women to the United States under the guise of preventing prostitution. *See Page Act of 1875,* Wikipedia, *found at* https://en.wikipedia.org/wiki/Page_Act_of_1875 (last visited 9/9/2023.) In 1882, in an even more extraordinary attack on equal protection, Congress passed the Chinese Exclusion Act, a law enacted to prevent an entire ethnic group from immigrating to the United States. *See Chinese Immigration and the Chinese Exclusion Acts, found at* https:// history.state.gov/ milestones/1866-1898/ chinese-immigration (last visited 9/9/2023). As aptly described by opponent Republican Senator George Frisbie Hoar, it was "nothing less than the legalization of racial discrimination." *Id.*

It was not until 1943, when China was an ally in the war against the Empire of Japan, that the United States finally repealed the Chinese Exclusion Act. *Id.*

C. World War II Internment of Japanese American Families.

One of the most egregious modern attacks on the constitutional rights of Asian Americans occurred during World War II, when entire families of Japanese Americans were removed from their West

Coast homes and placed in internment camps.[5] Supported by the statements of authorities and experts who declared the discriminatory measure necessary to national security, the internment of Americans in concentration camps on American soil was allowed by the courts. *See Hirabayashi v. United States*, 320 U.S. 81 (1943). Only decades later was it acknowledged there had been no justification for this abrogation of constitutional rights. *See Korematsu v. United States,* 584 F. Supp. 1406, 1416-20 (N.D. Cal. 1984) (motivation was "racism" and "hysteria" and not "military necessity"); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

D. The Disgraceful History of Discrimination Against Asian Americans in Education.

After the 1776 Revolution, Americans agreed with Thomas Jefferson "that the future of the republic depended on an educated citizenry" and that universal public education should be provided to all children. Johann N. Neem, *The Founding Fathers*

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[5] Executive Order No. 9066, issued February 19, 1942, authorized the Secretary of War and military commanders "to prescribe military areas from which any persons may be excluded as protection against espionage and sabotage." Congress enacted § 97a of Title 18 of the United States Code, making it a crime for anyone to remain in restricted zones in violation of such orders. Military commanders then issued proclamations excluding Japanese Americans from West Coast areas and sending them to internment camps. *See Korematsu,* 584 F. Supp. at 1409.

Made Our Schools Public. We Should Keep Them That Way, The Washington Post, Aug. 20, 2017, *found at* https://www.washingtonpost.com/news/made-by-history /wp/2017/08/20/early- america-had-school-choice-the-founders-rejected-it/ (last visited 9/20/2023). Alas, that noble sentiment did not extend to Asian American children, who were often denied access to public education.

In Tape v. Hurley, 66 Cal. 473, 6 P. 12 (1885), it took a court battle to force San Francisco schools to admit a Chinese American girl denied entry because, as stated by the State Superintendent of Public Instruction, public schools were not open to "Mongolian" children. *McClain, supra,* at 137. In response to the ruling, the California legislature authorized the establishment of separate "Chinese" schools: "When such separate schools are established, Chinese or Mongolian children must not be admitted into any other schools." *See* Tape v. Hurley, Aftermath, *found at* https://en.wikipedia.org/wiki/Tape_v._Hurley (last visited 9/20/2023.) Chinese American schoolchildren were restricted to those schools until well into the twentieth century. *Ho,* 147 F.3d at 864.

Asian American schoolchildren were among the first victims of the "separate-but-equal" doctrine created in *Plessy v. Ferguson,* 163 U.S. 537 (1896). The Court created the doctrine in a case where a black passenger attempted to board a "white" railway car. *Id.* In 1902, in *Wong Him v. Callahan,* 119 F.

381 (C.C.N.D. Cal. 1902), this doctrine was applied to schools when a court ruled that Chinese American children in San Francisco could be barred from "white" schools because the "Chinese" school in Chinatown was "separate but equal."

In *Gong Lum v. Rice,* 275 U.S. 78 (1927), the Supreme Court affirmed that the separate-but-equal doctrine applied to K-12 schools, finding that a nine-year-old Chinese American girl in Mississippi could be denied entry to the local "white" school because she was a member of the "yellow" race. *Id.* at 87.

In *Ho v. San Francisco Unified Sch. Dist.,* 147 F.3d 854, a striking modern example of discrimination against Asian Americans, constituents of *amici curiae* were forced to engage in five years of vigorous litigation to end the San Francisco school district's policy of assigning children to K-12 schools based on their race. *See id.*; *San Francisco NAACP v. San Francisco Unified. Sch. Dist.,* 59 F. Supp. 2d 1021 (N.D. Cal. 1999).

The *Ho* case was particularly ironic as just a few decades earlier, in *Lee v. Johnson,* 404 U.S. 1215, 1215-16 (1971), Supreme Court Justice Douglas, recognizing the long history of discrimination against Asian Americans in education, wrote: "Historically, California statutorily provided for the establishment of separate schools for children of Chinese ancestry." *Id.* "That was the classic case of *de jure* segregation involved [and found unconstitutional] in *Brown v. Board of Education* [347 U.S. 483 (1954)]. . . " *Id.*

"Brown v. Board of Education was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco." *Id.*

Unfortunately, as demonstrated by TJ and certain other selective institutions, the same discriminatory intent is alive today, now cloaked as a striving for "diversity."

III. IF THE TJ ADMISSIONS PLAN IS ALLOWED TO STAND, OTHER SELECTIVE SCHOOLS WILL CONTINUE TO USE OR WILL ADOPT SIMILAR ILLEGAL METHODS TO ACHIEVE RACIAL GOALS.

A. Racial Balancing Will Destroy Our Public Academic Schools, Leaving Americans of All Ethnicities Poorer.

The situation at TJ is very similar to what has been happening across the nation to other selective public schools, where proponents of racial balancing seek to eliminate merit-based admissions.

- **San Francisco's Lowell High School.** At San Francisco's selective Lowell High School, proponents of racial balancing also deem Asian Americans to be "overrepresented." First voting to halt consideration of test scores and grades as a "temporary" Covid measure, the San Francisco School Board then, in a covert process similar to that

in Fairfax County, voted to make the change permanent. "On February 9, 2021, the Board, in a 5–2 vote, made that change to a lottery-based system permanent, citing 'pervasive systemic racism' and the school's lack of diversity as reasons." *See Lowell High School / Lottery Based Admissions*, Wikipedia, *found at* https://en.wikipedia.org/wiki/Lowell_ High_ School_(San_Francisco) (last visited 9/11/2023). Then, two years later, after plummeting student performance and a recall of three board members, merit-based admission was re-instated—at least for now. *Id.*

In San Francisco, as in Fairfax County, proponents of racial balancing seek to increase "diversity" by limiting Asian American enrollment. However, far from discriminating against anyone because of race, Lowell, like TJ, reached across racial and socioeconomic lines to enable children of all ethnicities to excel in a public school environment open to all:

> Lowell High was open to any student with the necessary academic qualifications. Lowell's merit-based admissions did not consider (much less discriminate based on) race. To get into Lowell, a student needed only to attend school consistently, do their assigned work, and study enough to achieve good grades and pass their proficiency exams.

> All of that can be accomplished by students of any race.

Diane Yap, *SFNAACP Fails Black Students,* Critical Rice Theory (Dec. 22, 2021), *found at* https://dianey. substack. com/ p/sfnaacp-fails-black-students ?s=w (last visited 9/10/2023).

- **Boston's Exam Schools.** In Boston, the city's three "Exam schools" are under attack. Citing perceived "overrepresentation" of Asian and white Americans, the board first adopted an admissions plan using zip codes as proxies for race, then, following public disclosure of the racial animus underlying the plan, changed it to a system emphasizing socioeconomic status. *See Boston Public Schools Sued over Alleged Race-Based Admissions,* Breitbart (June 13, 2022), *found at* https://www. breitbart.com/education /2022/06/13 /boston -public-schools-sued -over- alleged-race -based-admissions/ (last visited 9/11/2023).

That Boston's racial balancing plan was fueled by racism was amply demonstrated. Boston School Committee Chair Michael Loconto, at the October 21, 2020 meeting just hours before approving the Zip Code proxy plan, was caught by a "hot mike" making anti-Asian slurs. *Boston School Committee Chair Resigns After Outrage Over His Mocking Of Asian American Names, found at* https://www.wbur.org/ edify/ 2020/10/22/ loconto-mocking-resigns (last visited 9/11/2023); *see Federal Judge Withdraws*

Opinion After Anti-White Texts Emerge In Boston Public Schools Case, Washington Examiner (July 12, 2021), *found at* https://www.washingtonexaminer. com/ news/ federal- judge-retracts-opinion-antiwhite - texts (last visited 9/11/2023). "Judge William Young, who had issued an opinion favoring the school system's plan to factor ZIP code into admissions, said that he could no longer stand behind that opinion after it appeared that the body's push was motivated by racial animus." *Id.*

- **New York's Specialized High Schools.** New York's eight selective specialized high schools come under perennial attack, always fueled by the accusation that Asian Americans and whites are "overrepresented." *See Expelling Asian Americans From Top Schools Proves NYC Education Is Off The Rails,* New York Post, May 3, 2021), *found at* https://nypost. com/2021/05/03/ expelling-asian-americans-from- top-schools-proves- nyc-education-is-off-the-rails/ (last visited 9/11/2023). "Anti-Asian violence in New York right now is more than random street-corner sucker punches and terrifying subway shoves. It's also the deliberate disassembly of meritocratic public education under the guise of ethnic equity…" *Id.*

Unless the present political trend of elevating skin-deep diversity over merit is stopped, it will lead to the elimination of all public academic high schools. That would be unfortunate, destroying a vital public

resource and leaving only the wealthy with access to academic enrichment.

B. Merit-Based Admission is Fair for All; Moreover, it is Necessary if America is to Retain its Leading Position in the World.

Common sense should tell us that if some ethnic groups are "underrepresented" at an academic school where admission is based on grades and test scores, racially balancing enrollment is not going to fix the underlying K-8 educational deficiencies; it will only result in an admissions policy that trammels individual rights while obfuscating the actual problems. If America is to retain its position as a technology and business leader, it should value and encourage academic achievement. *See Harvard Warns That Chinese Tech Is Rapidly Overtaking American Capabilities,* The Byte, *found at* https://futurism. com/the-byte/harvard-report-china-tech (last visited 9/10/2023). "'In some races, [China] has already become No 1,' reads the report. 'In others, on current trajectories, it will overtake the US within the next decade.'" *Id.*

China's recent history furnishes a cautionary example illustrating the danger in elevating politicized "equity" over merit. "During China's Cultural Revolution, Chinese dictator Mao Zedong abolished China's college entrance exam in order to bring "class equity" to workers, peasants, and

soldiers." Yukong Zhao, *The Assault On Meritocracy Helps No One* (Orange County Register, June 3, 1921) *found at* https://www.ocregister.com/2021/06/03/the- assault- on-meritocracy- helps-no-one/ (last visited 9/20/2023). "After destroying meritocracy, China educated millions of revolutionaries who could not conduct research or manage enterprises." *Id.* "As a consequence, China's technological innovation stalled, and its economy rapidly collapsed." *Id.* "In 1977, Chinese leader Deng Xiaoping wisely restored meritocracy [including] the college entrance exam." *Id.* "Since then, China has rapidly become a global superpower in technological innovation." *Id.*

The present nationwide campaign to destroy academic schools in the name of racial balancing is misguided and must be stopped before it produces disastrous consequences for our future.

America was founded on the principle of meritocracy. While some proponents of racial balancing want to pretend that in education only Asian Americans still believe in that principle, in fact that is not true, as shown by a recent Pew Research Center poll. "The survey . . . asked more than 10,000 respondents what factors should matter for college admissions. In a landslide, respondents favored academic achievement over race and gender." *Americans for Merit-Based Admissions,* Wall Street Journal (April 28, 2022), *found at* https://www.wsj.com /articles /americans-for -merit-based-admissions -pew-research- poll-ibram- x-kendi-

11651181826 (last visited 9/10/2023). Nearly three of four said race or ethnicity should not be a factor in admissions. That included 59% of blacks, 68% of Hispanics, 63% of Asians and 62% of Democrats. *Id.*

Any K-8 educational deficiencies in Fairfax County should certainly be addressed. All children, of whatever ethnicity, deserve to be nurtured, educated and guided toward the highest possible achievements. Racial politics in high school admissions is not the answer, however. Addressing educational deficiencies requires real work at K-8 levels, as well as honesty in confronting the true problems—including common-sense factors such as truantism and lack of parental involvement. While Fairfax County is enviably placed in terms of resources for doing the necessary work compared to many other communities, there are also non-governmental resources that can be utilized. *See e.g.,* Matt Zalasnick, *How Colleges Partner With K-12 On Student Success,* University Business (Oct. 17, 2019), found at https://universitybusiness.com/higher-ed-k12-partnerships/ (last visited 9/10/2023). If the Fairfax County School Board truly wants to help K-8 children it believes are missing out on educational opportunities, it should be able to find lawful ways of helping them, without obfuscating the true problems and violating the rights of other individuals.

IV. THIS COURT'S RECENT RULING IN *STUDENTS FOR FAIR ADMISSIONS* DOES NOT ADDRESS THE URGENT ISSUE PRESENTED HERE.

Following this Court's landmark ruling in *Brown v. Board of Education,* 347 U.S. 483 (1954), some local school boards attempted to evade desegregation through purportedly neutral mechanisms such as "student placement laws" and "freedom of choice" plans. *See Aftermath of Brown v. Board of Education,* Legal Information Institute, *found at* https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/aftermath-of-brown-v-board-of-education (last visited 9/20/2023). Similarly, at TJ, school officials are achieving desired racial results using facially-neutral methods, which proponents hope will evade this Court's recent ruling in *Students for Fair Admissions,* 143 S. Ct. 2141.

This Court should grant certiorari to consider whether a high school's use of facially-neutral proxies to accomplish its racial goals must be examined under strict scrutiny—an issue not settled by the decision in *Students for Fair Admissions.* In the Harvard/UNC college cases, admissions officers were aware of and considered the race of the applicant at crucial points in the process. *Id.* at 2154-56. By contrast, at TJ, admissions officers do not know the race of the applicant; proxies are used to achieve the desired racial result. *Coalition for TJ,*

68 F. 4th at 875; Pet.App. 19a. Furthermore, at the high school level, consideration of race in admissions is even less likely to be permissible than in higher education. *See Parents Inv. In Comm. Sch.,* 127 S.Ct. at 2742.

The TJ admissions plan was carefully designed to exploit the demographics of Fairfax County's Asian American K-8 students, much as with race gerrymandering cases where voting districts are drawn to dilute the effect of black voters. In redistricting cases, "[s]trict scrutiny applies when race is the 'predominant' consideration in drawing district lines…" *Shaw v. Hunt,* 517 U.S. 899, 907 (1996). This Court has stated that, "outside the districting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller v. Johnson,* 515 U.S. 900, 913 (1995).

If we are to avoid decades of additional discrimination and litigation such as was caused by the post-*Brown* efforts of segregationists, it is urgent that this Court emphatically clarify that a school's use of race-neutral proxies will not shield a racially-motivated admissions program from a searching inquiry under strict scrutiny.

CONCLUSION

Some 70 years ago, in *Brown v. Board of Education,* 347 U.S. 483, this Court recognized the inherent injury to individuals when schools treat children differently because of their race; and found that such discrimination was unlawful, whatever the stated rationale. That same reasoning should apply here today.

This Court should grant certiorari so that it can consider whether a school may evade strict scrutiny by using proxies to racially balance enrollment.

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