

No. 22-1280

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**COALITION FOR TJ,**

*Plaintiff-Appellee,*

v.

**FAIRFAX COUNTY SCHOOL BOARD,**

*Defendant-Appellant.*

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**On Appeal from the United States District Court  
for the Eastern District of Virginia, No. 1:21-cv-00296-CMH  
Honorable Claude M. Hilton, District Court Judge**

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**BRIEF OF *AMICI CURIAE*, THE ASIAN AMERICAN COALITION FOR  
EDUCATION, AND THE ASIAN AMERICAN LEGAL FOUNDATION, IN  
SUPPORT OF *PLAINTIFF-APPELLEE*, SEEKING AFFIRMANCE**

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Lee C. Cheng  
Asian American Legal Foundation  
11 Malta Street  
San Francisco, CA 94131  
Tel: (510) 238-9610  
Fax: (510) 977-5127

Gordon M. Fauth, Jr.\*  
Litigation Law Group  
1935 Addison Street, Suite A  
Berkeley, CA 94704  
Tel: (510) 238-9610  
Fax: (510) 977-5127

*Attorneys for Amici Curiae*

## FRCP 26.1 and Local Rule 26.1 Disclosure Statements

*Amicus Curiae*, Asian American Coalition for Education is a nonprofit national organization, and not a corporation. It has no parent corporation and no stock. It does not know of any publicly held corporation that has a direct financial interest in the outcome of the litigation.

*Amicus Curiae*, Asian American Legal Foundation is a nonprofit corporation organized under the laws of California. It has no parent corporation and no publically held corporation owns 10% or more of its stock. It does not know of any publicly held corporation that has a direct financial interest in the outcome of the litigation.

### Statement Of Party Consent To Filing Of *Amici Curiae* Brief

All Parties to the Appeal have consented to the filing of this brief by *Amici Curiae* pursuant to Fed. R. App. P. 29(a)(2) by giving blanket consent to the filing of *amicus curiae* briefs.

### Rule 29 Statement

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than *Amici Curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

Date: June 21, 2022

/s Gordon M. Fauth, Jr.

Counsel for *Amici Curiae* The Asian American  
Coalition For Education and the Asian American  
Legal Foundation

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## **THE INTEREST OF *AMICI CURIAE***

The case is of critical importance to *Amici Curiae* and their constituents, who are Americans of Asian ethnic descent.

Asian Americans have faced discrimination in education for almost as long as Asians have been in America, as demonstrated by many historical cases. Even today, 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 Thomas Jefferson High School or other selective schools with similar discriminatory admissions practices.

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 attacks are often carried out using the same rationale used to justify discrimination in education: that Asian Americans are inexorably “other,” “overrepresented,” and less deserving of basic rights, including the right to be treated as individuals.

The Asian American Coalition for Education (“AACE”) is an apolitical, non-profit, national alliance representing over 300 Asian American organizations nationwide. It is devoted to promoting equal rights for Asian Americans in

education. The leaders of AACE and its supporting organizations are Asian American community leaders, business leaders and, most importantly, parents. They do not get funding from large corporations or multibillion dollar foundations. They were forced to become civil rights advocates to expose, stop and prevent the discrimination against their children that the “professionals” ignore, downplay and facilitate. 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 children in the San Francisco 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>.

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## SUMMARY OF ARGUMENT

*Amici Curiae* AACE and AALF are appalled that the Fairfax County School Board has adopted an admissions plan at Thomas Jefferson High School (“TJ”) designed to limit Asian Americans enrollment. While the stated goal was to mirror the “diversity” of Northern Virginia, not only was the admissions plan deliberately crafted to reduce Asian American enrollment, the message sent by school officials was that Asian Americans were “overrepresented” and lacking in “diversity.”

Throughout the long history of Asians in America, 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 copied across the nation. It causes real and tangible harm, resulting in Asian American children feeling a sense of inferiority, anger, and hopelessness in their academic endeavors, knowing they will face additional hurdles because of their ethnicity. It contributes to the view that people of Asian descent are “other” and

not fully American, a view that, among other things, has led to increased discrimination and violence against members of the Asian American community.

The communications of Board members, the data they studied, and their statements at the time, make abundantly clear that their goal was racial balancing. The plan they adopted, as designed, worked to reduce Asian American enrollment. Thus, it was proper for the district court to examine the plan under strict scrutiny. The Board has failed to show a remedial purpose for the plan, meaning it is *prima facie* unconstitutional. The Board's reliance on *Grutter v. Bollinger*, 539 U.S. 306 (2003), for a compelling diversity interest to justify the plan is misplaced, as the diversity interest found in *Grutter* exists only in higher education, not K-12. Therefore, the district court properly found the new TJ admissions plan to be an unconstitutional infringement of the rights of Asian Americans.

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 affirm the judgment of the district court.

## ARGUMENT

### **I. THE NEW TJ ADMISSIONS PLAN WAS RACIALLY MOTIVATED, IN VIOLATION OF THE CONSTITUTION.**

#### **A. The Changes Deliberately Target Asian American Enrollment and Perpetuate Stereotypes Historically Used to Justify Persecution of Asian Americans.**

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). *Amici* and their constituents are appalled that, once again, Asian Americans are considered “overrepresented,” justifying attempts to limit their participation in American society—this time as students at Fairfax County’s selective Thomas Jefferson High School.

As the district court correctly found, the Board’s purpose in changing the admissions standards at TJ—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.

JA2966. “[E]mails and text messages between Board members and high-ranking FCPS officials leave no material dispute that, at least in part, the purpose of the Board's admissions overhaul was to change the racial makeup to TJ to the detriment of Asian-Americans.” JA2979. “[T]he Board’s requests for and consideration of racial data demonstrate discriminatory intent...” JA2981.<sup>1</sup>

Indeed, after the enactment of the changes, Asian American enrollment at TJ was reduced by 18 percent—exactly as had been predicted. JA0310; *see* JA2968 (only Asian Americans experienced decrease).

It is disappointing to *Amici* and their constituents that Board members used the George Floyd tragedy as an excuse to discriminate against Asian Americans, another minority that has often suffered because of race: “[I]n looking at what has

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<sup>1</sup> The admissions plan was crafted to target Asian American admission to TJ using the demographics of the feeder middle schools—capping each at 1.5%, since most Asian American applicants came from six middle schools, and giving bonus points that could not be used by most Asian American applicants. JA2968-70. The situation is similar to that in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), where the Supreme Court ruled that San Francisco’s facially-neutral laundry licensing ordinance could not be used to impose an unequal burden on ethnic Chinese. “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.

happened to George Floyd ... we must recognize the ... unacceptable numbers of African Americans that have been accepted to T.J.” JA2960. While the process was largely covert,<sup>2</sup> it is clear from the record that School Board members intended the changes to decrease TJ’s robust Asian American enrollment. In their texts, Board members Abrar Omeish and Stella Pekarsky admitted that Asian Americans were “discriminated against in this process,” that “there has been an anti [A]sian feel underlying some of this,” and that the superintendent had “made it obvious” with “racist” references that Asian Americans were the target. JA0119, JA0125, JA2981-82.

Given the racial motive and also that there was no prior illegal use of race to remedy—*see* JA2982 (“No remedial interest exists here”)—the district court properly found that TJ’s new admissions policy was unconstitutional. It is vitally important that the district court’s decision be upheld because, as discussed in more detail *infra*, throughout American history, whenever accusations that Asian Americans are “different” and “overrepresented” have been allowed to justify unequal treatment, it has led to more discrimination against members of this ethnic group, often with tragic results.

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<sup>2</sup> “The 1.5% plan had not been presented publicly in any meeting before it was voted on.” JA2977.

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

It would be wrong to suppose that Asian American students are uniformly well prepared, and that conditions are merely being “equalized” by the new admissions plan. First, under the Fourteenth Amendment to the United States Constitution, the constitutional injury lies in the absence of equal treatment, whatever the result. *Northeastern Fla. Ch. of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Here, though, what actually happens is that the more socioeconomically advantaged, better prepared Asian American candidates may still gain entry in spite of the ethnic “handicap”; however, less advantaged Asian American candidates will be at a severe disadvantage. “The 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.” JA2969. Thus, perversely, 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 Contribute Significantly to Diversity.**

It is also insulting (and wrong) to think that Asian Americans do not contribute to diversity. While crafting methods to decrease Asian American enrollment to increase “diversity,” the Fairfax County School 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, 2021), *found at* <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/> (last visited 6/18/2022).

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, *located at* <https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/> (last visited 6/20/2022).

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

**D. The Terrible Effect on the Dignity and Self Worth of Children Who Know They Face Discrimination Because They Are “Asian.”**

The School Board’s treatment of Asian American students in Fairfax County contributes to a regime in which, in America today, it is often viewed as somehow shameful to be “Asian.” When Asian American children learn they face barriers because they are deemed to contribute less to “diversity,” they often want to deny their ethnic heritage, or do things to appear less “Asian.” Many researchers have documented the pernicious effects felt throughout the Asian American community. See Yi-Chen (Jenny) Wu, *Admission Considerations in Higher Education Among Asian Americans*, American Psychological Association, found at <https://www.apa.org/pi/oema/resources/ethnicity-health/asian-american/article-admission> (last visited 6/21/2022) (citing sources).

During the *Ho* case, when the San Francisco School District was discriminating heavily against children identified as “Chinese,”<sup>3</sup> as Lee Cheng, Secretary of AALF, testified in hearings before the U.S. House of Representatives,

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<sup>3</sup> The district classified San Francisco’s K-12 students by race using eleven defined ethnic groups, of which five were Asian American. *Ho v. San Francisco Unified School Dist.*, 147 F. 3d 854, 858 (1998). Each group was “capped out” at 40% at a regular school or 45% at an alternative school. Because San Francisco has a large ethnic Chinese population, children classified as “Chinese” were often “capped out” of their neighborhood schools. Named plaintiff Brian Ho had been turned away from his two neighborhood kindergartens. *The Chinese American Challenge to Court-Mandated Quotas in San Francisco’s Public Schools: Notes from a (Partisan) Participant-Observer*, 16 HARV. BLACKLETTER J. 39, 61 (Spring 2000).

Sub-Committee on the Constitution, “Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage . . .” *Group Preferences and the Law*, U.S. House of Representatives Sub-Committee on the Constitution (June 1, 1995), p. 241, at [http://www.archive.org/stream/grouppreferences00unit/grouppreferences00unit\\_djvu.txt](http://www.archive.org/stream/grouppreferences00unit/grouppreferences00unit_djvu.txt) (last visited 6/18/2022).

Consultants on how to get into college openly advise that Asian American students should conceal or downplay their ethnicity: ““We will make them appear less Asian when they apply.”” Bella English, *To Get Into Elite Colleges, Some Advised To ‘Appear Less Asian,’* The Boston Globe, June 1, 2015, found at <https://www.bostonglobe.com/lifestyle/2015/06/01/college-counselors-advise-some-asian-students-appear-less-asian/Ew7g4JiQMiqYNQIIwqEluO/story.html> (last visited 6/18/2022). “And for the college essay, don’t write about your immigrant family . . .” *Id.* See Abby Jackson, *How Asian American Teens are Told to Downplay Their “Asianness” for College Applications*, Insider (June 2, 2015), found at <https://www.businessinsider.com/high-school-students-told-to-appear-less-asian-on-college-applications-2015-6> (last visited 5/6/2022).

The Princeton Review advises Asian Americans: “If you’re given an option, don’t attach a photograph to your application and don’t answer the optional

question about your ethnic background. This is especially important if you don't have an Asian-sounding surname. (By the same token, if you do have an Asian-sounding surname but aren't Asian, do attach a photograph)." Akane Otani, *Tips From the Princeton Review: Act Less Asian, Add Pics if You're Black*, Bloomberg, Nov. 21, 2014, found at <https://www.bloomberg.com/news/articles/2014-11-21/princeton-review-tells-asians-to-act-less-asian-and-black-students-to-attach-photos> (visited 5/6/2022).

School can be a stressful time for all children. Discriminating against Asian American children because they supposedly are "overrepresented" and lack "diversity," as at TJ, makes it even worse. Filled with despair because they know they will face formidable barriers because of their ethnicity, many Asian American students work themselves into ill health, suffering higher rates of anxiety, depression and even suicide. See George Qiao, *Why Are Asian American Kids Killing Themselves?* Plan A Magazine, Oct. 3, 2017, found at <https://planamag.com/why-are-asian-american-kids-killing-themselves/> (last visited 6/20/2022).

This cannot be right. Asian American children should not feel they are less valued and will be discriminated against in education because of their ethnicity.

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**E. Negative Stereotyping Encourages Hostility and Violence against Asian Americans Not Only in Schools But Also in the Streets of American Cities.**

As the Supreme Court aptly 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 an unfortunate trend that has resulted in increased hostility and violence directed against Asian Americans, not just on campuses 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 5/7/2022); *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). *Anti-Asian Hate Crimes Top 10,000 In U.S. Since Start Of Pandemic*, Nikkei Asia (March 14, 2022), found at <https://asia.nikkei.com/Spotlight/Society/Anti-Asian-hate-crimes-top-10-000-in-U.S.-since-start-of-pandemic> (last visited 6/20/2022).

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/](https://time.com/5938482/asian-american-attacks/) (last visited 5/7/2022); *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 6/20/2022).

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,’” making 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 5/7/2022).

The stereotyping of “Asians” as deficient in ordinary human qualities and also “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”?*, Washington Post (May 19, 2015), *found at* <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/19/which-political-leader-expressed-concern-about-california-universities-filling-their-entire-freshman-classes-with-nothing-but-asian-americans/> (last visited 5/6/2022). That same unfortunate sentiment, which ignores that individual rights are at stake, was demonstrated by the Fairfax County School Board.

## **II. THE RATIONALES USED TO JUSTIFY DISCRIMINATION AT TJ ECHO 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 School Board’s discrimination against Asian Americans because they are viewed as “overrepresented” and not contributors to “diversity” evokes the odious stereotypes historically used to justify discrimination against Asian Americans. Throughout early American history, Asian Americans were marginalized as “faceless” members of a “yellow horde,” lacking individuality and not deserving of the opportunities open to other Americans. *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 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 6/20/2022).<sup>4</sup>

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; 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.

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<sup>4</sup> There are various explanations for this phrase’s origin. “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.*

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 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](https://en.wikipedia.org/wiki/Page_Act_of_1875) (last visited 6/19/2022.) 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](https://history.state.gov/milestones/1866-1898/chinese-immigration) (last visited 6/20/2022).* 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.<sup>5</sup> Supported by the statements of authorities who declared the discriminatory measure necessary to national security, the internment of Americans in concentration camps on American soil was allowed by the courts.

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<sup>5</sup> 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, v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984).

*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 Koremats*, 584 F. Supp. at 1416-20 (motivation was “racism” and “hysteria,” 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 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 6/21/2022). Alas, that noble sentiment did not extend to Asian American children, who were often denied access to 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 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](https://en.wikipedia.org/wiki/Tape_v._Hurley) (last visited 5/3/2022.) 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 doctrine was created 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 the city’s K-12 schools based on

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, the same discriminatory intent is still alive today, now cloaked as a striving for “diversity.”

### **III. THE SEARCH FOR DIVERSITY AT A HIGH SCHOOL CANNOT JUSTIFY APPELLANT’S USE OF RACE.**

#### **A. The School Board’s Goal of Mirroring the Demographics of Northern Virginia is Unconstitutional Racial Balancing.**

“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); *see Grutter*, 539 U.S. at

330 (racial balancing is “patently unconstitutional”). As the district court found, the process by which the Fairfax County School Board adopted the new admissions plan was “infected with talk of racial balancing from its inception.” JA2979. More specifically, the Board wanted to address the “underrepresentation” of Black and Hispanic students at TJ by decreasing Asian American enrollment to “reflect the diversity of FCPS, the community and Northern Virginia.” JA0293. JA2961. A Board resolution stated, “the goal is to have TJ’s demographics represent the NOVA [Northern Virginia] region.” JA0240, JA2980. Board members rejected a lottery proposal “at least in part due to a fear that a lottery might not go far enough to achieve racial balancing.” JA2978.

In *Parents*, the Supreme Court emphatically rejected racial balancing as a justification for consideration of race at K-12 schools, explaining: “Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that ‘[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.’” *Parents*, 127 S. Ct. at 2757 (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995).) Refuting the Board’s argument that a search for “diversity” is somehow different, “[r]acial balancing is not transformed from ‘patently unconstitutional’ to a compelling state

interest simply by relabeling it ‘racial diversity.’” *Parents*, at 2758.

It was therefore unlawful for the School Board to deny Asian American students their individuality and to engage in racial balancing in an effort to decrease enrollment of their supposedly overrepresented “group.”

**B. There is No Pedagogical Need for Diversity in K-12 Education That Would Justify the School Board’s Use of Race.**

The purported need for more “diversity” at TJ cannot provide justification for Appellant’s treatment of Asian American students.<sup>6</sup> In *Grutter v. Bollinger*, *supra*, 539 U.S. 306, the Supreme Court found that the University of Michigan law school was permitted, for pedagogical purposes, to consider race to achieve a “critical mass” of minority students, to reap the “benefits that flow from diversity.” *Id.* at 330-333, 343. However, the *Grutter* holding was limited to higher education—and for good reason.

The situation of adults voluntarily attending a national law school, as in *Grutter*, is different from that of children attending a local K-12 school, where attendance is mandatory. Students admitted to law school are adults. They generally expect to move to wherever in the nation the university that accepts them is located. Therefore, in *Grutter*, this Court recognized the state’s compelling

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<sup>6</sup> Even though Appellant argues that its admissions program is justified by the diversity interest recognized in *Grutter*, in the court below, it failed to “argue[] that its actions satisfy strict scrutiny,” something required under *Grutter*. JA2982; *Grutter*, 539 U.S. at 326.

interest in providing a robust diversity of opinions, experiences and ideas, finding that “universities, and in particular, law schools, represent the training ground for a large number of our nation’s leaders.” 539 U.S. at 332. By contrast, at TJ, different considerations predominate. K-12 students need a basic general education. They live at home with their parents. They are limited to local schools in reasonable proximity to their homes. There can be no compelling state interest in diversity.

In *Parents*, the Supreme Court explained the distinction: “In upholding the admissions plan in *Grutter*...this Court relied upon considerations unique to institutions of higher education, noting that in light of ‘the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.’” *Parents*, 127 S. Ct. at 2744 (finding *Grutter* did not apply in K-12) (quoting *Grutter*, 539 U.S. at 329). Furthermore, even under *Grutter*, race is considered only as one of many individual characteristics. “The diversity interest was not focused on race alone but encompassed “all factors that may contribute to student body diversity.” *Parents*, 127 S. Ct. at 2753 (listing factors) (citation omitted). Here, the Fairfax County School Board considered only race in crafting an admissions plan that used proxies for race to limit Asian American enrollment.

#### **IV. DEFICIENCIES IN K-8 EDUCATION CANNOT BE ADDRESSED BY RACIAL BALANCING HIGH SCHOOLS.**

##### **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, to promote “diversity.” The measure was challenged in court, where it was overturned—at least for now. *See S.F. School Board Extends Lowell High Lottery Admission For Another Year, But Debate Is Not Over*, San Francisco Chronicle, Dec. 16, 2021), *found at* <https://www.sfchronicle.com/sf/article/Lowell-High-lottery-admission-likely-to-remain-16705599>.php (last visited 6/16/2021).

In San Francisco, as in Fairfax County, proponents of racial balancing seek to increase “diversity” by limiting Asian American enrollment: “One side has argued that merit-based admissions are elitist, leading to a dearth of Black and brown students and a culture of racism... But opponents say the change hurts

Asian Americans...and will result in a lack of opportunity for high-achieving and hardworking students.” *Id.*

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.

*See* Diane Yap, *SFNAACP Fails Black Students*, Critical Race Theory (Dec. 22, 2021), *found at* <https://dianey.substack.com/p/sfnaacp-fails-black-students?s=w> (last visited 6/18/2022).

- **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 6/20/2022).

That Boston’s racial balancing plan is fueled by racism has been 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*, located at <https://www.wbur.org/edify/2020/10/22/loconto-mocking-resigns> (last visited 6/20/2022). Then, after ruling in favor of the plan, the federal judge hearing the case retracted his opinion after the publication of board members’ anti-White texts. *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 6/20/2022). “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

6/20/2022). “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 superior education.

**B. If America is to Retain Its Leading Position in the World, There Needs to be *More* Not Less Emphasis on Academic Merit.**

Common sense should tell us that if some ethnic groups are “underrepresented” at an academic school like TJ 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 leader, it should, while addressing any problems in K-8 education, 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 6/19/2022).* “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.* 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.

This nation 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, conducted in March, 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?mod=trending\\_now\\_opn\\_2](https://www.wsj.com/articles/americans-for-merit-based-admissions-pew-research-poll-ibram-x-kendi-11651181826?mod=trending_now_opn_2) (last visited 6/21/2022).

Nearly three of four said race or ethnicity should not be a factor in admissions. That includes 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 same opportunities. Racial politics in high school admissions is not the answer, however. Addressing such deficiencies requires real work *at K-8 levels*. While Fairfax County is enviably placed in terms of resources for doing this

work compared to many other communities, there are also non-State 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/colleges-partner-k-12-student-success/> (last visited 6/20/2022). 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.

### CONCLUSION

Some 70 years ago, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme 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 find that the TJ admissions plan is unconstitutional and should affirm the judgment of the district court.

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Respectfully submitted,

Date: June 21, 2022

By: /s/ Gordon M. Fauth, Jr.

Lee C. Cheng  
Director and Secretary  
Asian American Legal Foundation  
11 Malta Street  
San Francisco, CA 94131  
leechcheng@gmail.com  
Tel: (510) 238-9610  
Fax: (510) 977-5127

Gordon M. Fauth, Jr.  
(counsel of record)  
Litigation Law Group  
1935 Addison St., Ste. A  
Berkeley, CA 94704  
gmf@classlitigation.com  
Tel: (510) 238-9610  
Fax: (510) 977-5127

Counsel for *Amicus Curiae* The Asian  
American Legal Foundation

Counsel for *Amici Curiae* The Asian  
American Coalition for Education and  
The Asian American Legal Foundation

## CERTIFICATE OF COMPLIANCE

This *amici curiae* brief complies with all requirements for form. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B)(i). Excluding the parts exempted by Fed. R. App. P. 32(f), it contains 6,492 words. This brief 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). It has been prepared using Microsoft Word in a proportionally-spaced typeface in 14-point Times New Roman type.

Date: June 21, 2022

/s Gordon M. Fauth, Jr.

## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Court's appellate CM/ECF system on June 21, 2022, thereby serving all attorneys of record and participants in the case through the appellate CM/ECF system.

Date: June 21, 2022

/s Gordon M. Fauth, Jr.