

No. 23-1137

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In the  
**Supreme Court of the United States**

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**BOSTON PARENT COALITION FOR  
ACADEMIC EXCELLENCE CORP.,**  
*Petitioner,*

v.

**THE SCHOOL COMMITTEE FOR THE  
CITY OF BOSTON, ET AL.,**  
*Respondents.*

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

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**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* <sup>1</sup>**

This case involves use of zip code block quotas as proxies for race in school admissions, to reduce enrollment of Asian American and white students at Boston’s “Exam Schools,” attempting to circumvent this Court’s recent decision in *Students for Fair Admissions v. Harvard College* (“*SFFA*”), 600 U.S. 181, 143 S. Ct. 2141 (2023), that banned use of race.

*Amici Curiae* and their constituents, Americans of predominantly Asian ethnic descent, believe it is vitally important that this Court grant certiorari to clarify that schools cannot evade equal protection by utilizing “race-neutral” proxies to unequally burden targeted ethnic groups.

Asian Americans have historically faced persecution. In education, they were subjected to egregious discrimination for almost as long as Asians have been in America. At many selective schools, admissions processes denied them equal access to opportunity. Many of *Amici’s* constituents have children who were denied entrance to or who may one day aspire to attend the Exam Schools or other selective institutions with similar discriminatory practices.

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<sup>1</sup> 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 is experiencing a pandemic of race-based violence, with vulnerable members, including the elderly and children, viciously attacked and even murdered in the streets of American cities. These horrific attacks are often carried out using the same rationales applied to justify discrimination in education—that Asian Americans are “other,” “overrepresented,” and not “diverse.”

The Asian American Coalition for Education (“AACE”) is an apolitical, non-profit, national alliance, 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 foundations, but were forced to become civil rights advocates to expose and prevent discrimination that the “professionals” ignore and facilitate. In this *amici* filing, AACE represents the 81 organizations listed in Appendix A hereto. 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 the civil rights of Asian Americans. AALF focuses on situations where

Asian Americans are discriminated against for a purportedly benign purpose and where high profile groups deny that discrimination even exists. Members of AALF were instrumental in the struggle to end discrimination against Chinese American students in San Francisco's public school system. *See Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998). AALF has consistently championed equal protection for Asian Americans, and all Americans. 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 to protect and preserve 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, 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 to prepare them 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 lower courts have approved an admissions plan deliberately created to use zip code block quotas to reduce Asian American and white enrollment at Boston’s three selective Exam Schools.

While the stated goal of the Boston Schools Committee (“BSC”) was to increase “diversity,” communications and statements of board and committee members reveal the racial animus underlying the new admissions plan, much of it directed against Asian Americans. The message sent by school officials throughout was that Asian Americans are “overrepresented” and lacking in “diversity”—sentiments that have historically caused immense suffering to Asian Americans.

Discrimination is not excused just because it purportedly benefits blacks instead of whites. Targeting Asian Americans is particularly unfair, given America’s historical bigotry toward this group—often 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 sad to see Asian Americans again subjected to negative stereotyping and discrimination, and in Boston, a city that was instrumental in the founding of this nation and establishment of its constitutional principles.

The pernicious view that Asian Americans are “overrepresented” non-contributors to diversity at selective schools is unfortunately ubiquitous across the nation. It causes real and tangible harm, resulting in Asian American children being excluded from educational opportunities, causing them to feel a sense of inferiority, anger, and hopelessness in their academic endeavors, knowing they will face additional hurdles because of their ethnicity. It has also led to increased discrimination and violence against members of the Asian American community, including children.

America exists in a competitive world. If we are to retain our leading position we need to place more emphasis on merit, not less. Attempts to destroy the academic nature of selective high schools in the name of collectivist “equity” are not only unconstitutional, they are misguided in terms of those they purport to help. Deficiencies in K-8 education should be addressed, but they cannot be remedied by racially balancing academic high schools—something that will only serve to destroy academic schools, depriving Americans of all ethnicities of a valuable public resource.

If the BSC’s use of proxies to achieve a desired racial result is allowed to stand, this type of discrimination will be emulated across the nation, ushering in decades of further racial strife and division in our schools. It is therefore of utmost importance that this Court grant *certiorari* so that it



can clarify the constitutional principles that are under attack.

## ARGUMENT

### I. **IT IS VITAL THAT THIS COURT EXAMINE BOSTON'S USE OF PROXIES THAT FORCE ASIAN AMERICAN AND WHITE APPLICANTS TO ACHIEVE HIGHER STANDARDS FOR ADMISSION THAN APPLICANTS OF OTHER RACES.**

*Amici* and their constituents are outraged and horrified that lower courts have allowed Boston to use thinly-disguised zip code proxies to place an unequal burden on Asian and white applicants who aspire to attend the city's prestigious "Exam Schools." By tailoring a quota system using zip code blocks, BSC has taken advantage of Boston's neighborhood racial demographics to require students from predominantly Asian American and white neighborhoods to attain a significantly higher GPA for admission than students from black and Hispanic neighborhoods.<sup>2</sup> This Court has rightly

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<sup>2</sup> Citing perceived "overrepresentation" of Asian and white Americans, the BSC adopted an admissions plan using zip codes as proxies for race, then, following public disclosure of the racial animus underlying the plan, adjusted 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 5/5/2024).

called racial distinctions “odious” and “invidious in all contexts.” See *SFFA*, 143 S. Ct. at 2162, 2166 (citations omitted). That same rule should apply here, where racial proxies are used.

The ostensible justification for the new admissions plan was that it would produce student bodies better reflecting the racial makeup of the city. However, racial balancing is 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). Similarly, it was wrong for the courts below to reason that there is no equal protection violation because under the plan total Asian and white enrollment is not below these groups’ “share” of the applicant pool. As this Court has explained, “the Constitution protect[s] persons, not groups.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Here, it is undeniable that the plan was adopted to reduce their enrollment by forcing *individual* Asian American and white applicants to have higher GPAs than others to gain admission.

The admissions plan was deliberately crafted to reduce perceived “overrepresentation” of Asian American and white students at Boston’s exam schools. App. 72a. The plan “demeans the dignity and worth” of these students by judging them by ancestry instead of by their “own merit and essential

qualities.” *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). The plan should not escape scrutiny just because it uses proxies to accomplish its discriminatory purpose. The situation is analogous to that in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), where, more than a century ago, this Court found that San Francisco’s laundry licensing ordinance, even though it did not mention race, was deliberately crafted to target Chinese Americans and therefore unconstitutional:

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 also, a school district should not be allowed to practice racial discrimination just because it does so using proxies “fair” and “impartial in appearance” to accomplish the discrimination.

## II. THE ADMISSIONS PLAN WAS ROOTED IN EVIDENCED RACIAL ANIMUS, AND DESIGNED TO LOWER ASIAN AMERICAN AND WHITE ENROLLMENT.

It is beyond dispute that the admissions plan was designed to lower Asian American and white enrollment. Without even a pretense of impartiality, the Working Group convened by BPS was co-chaired by the President of the NAACP's Boston chapter, with a declared agenda of racial balancing. *See Exam Schools Admissions Task Force, found at [https://www. bostonpublicschools.org/ domain/2931](https://www.bostonpublicschools.org/domain/2931)* (last visited 5/15/2024). A stated goal of the "BPS Racial Equity Planning Tool" utilized was to "Work towards an admissions process that will support student enrollment at each of the exam schools such that it better reflects the socioeconomic, racial and geographic diversity of all students (K-12) in the city of Boston." ASE01755.<sup>3</sup> BSC member Lorna Rivera stated, "[W]e do need to just, you know, be explicit about racial equity, and we do need to figure out again how we could increase those admission rates, especially for Latinx and Black students." App. 76a, n. 21.<sup>4</sup> BSC Vice-Chairperson Oliver-Davila's stated, "I want to see those schools reflect the District. There's no excuse, you know, for why they shouldn't

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<sup>3</sup> Citations in the form "ASE\_\_\_\_\_" are to Bates Numbers of the Joint Agreed Statement of Facts exhibits, *see* First Circuit appendix.

<sup>4</sup> Citations to "App." are to the Petitioner's Appendix.

reflect the District, which has a larger Latino population and black African American population.” App. 77a; ASE00490; *see* ASE01323 (Working Group chart showing anticipated shift in racial balances).

That the Plan was fueled by anti-Asian animus was amply demonstrated by the Plan’s proponents, including BSC chair Michael Loconto, who, at the October 21, 2020 meeting approving the Plan, was caught by a “hot mike” making anti-Asian slurs. *See 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 4/1/2021); App. 62a (“The School Committee Chairperson made racist comments publicly during the October 21, 2020 meeting directed at Boston’s Asian American communities . . .”)

Given the race-balancing agenda and demonstrated racial animus, this Court should grant *certiorari* to examine the admissions plan under strict scrutiny, something that the courts below failed to do. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (“We have insisted on strict scrutiny in every context...”)

### **III. ASIAN AMERICANS ARE DIVERSE AND CONTRIBUTE SIGNIFICANTLY TO DIVERSITY.**

Underlying the racial animus displayed by BSC was the sentiment that Asian Americans did not

contribute to diversity at the Exam Schools. That could not be more wrong. “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 5/6/2024).

Among each of these “Asian” countries (and their American descendants), 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 5/6/2024).

Thus, by any reasonable measure, Asian Americans contribute significantly to diversity. It is ridiculous to suggest otherwise.

#### **IV. THE MESSAGE THAT ASIAN AMERICANS ARE “OVER-REPRESENTED” FUELS HOSTILITY AND VIOLENCE AGAINST MEMBERS OF THIS GROUP.**

As this Court has warned, unless reserved for remedial settings, governmental use of race “may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 493-94 (1989). That is what is happening in the schools and streets of American cities today.

We are presently experiencing a multi-year trend in which schools and institutions at all levels depict Asian Americans as “overrepresented” and seek ways to reduce their numbers. This has fueled resentment and an upsurge in violence against members of this historically disadvantaged minority group.

[A]nti-Asian hate crimes rose 164 percent in 16 of the largest cities and counties in the first quarter of 2021 compared to the same period in 2020. BJA wrote that the first quarter increases in 2021 followed a “historic surge” in anti-Asian hate crimes that started in 2020, with anti-Asian hate crimes increasing 149 percent in 16 of the largest cities in 2020.

U.S. Commission on Civil Rights 2023 Statutory Enforcement Report, *found at* <https://www.usccr.gov>.

gov/files/2023-10/fy-2023-se-report.pdf (last visited 5/7/2024); 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 5/5/2024); *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 5/5/2024). *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 5/5/2024).

Increased hostility toward Asian Americans has particularly been felt in San Francisco, California, ironically the center of 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 5/5/2024); *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 5/5/2024).



In a strange inversion, noteworthy in this case where both Asian and white Americans were targeted, 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.’” 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 5/5/2024).

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. That same unfortunate—and racist—sentiment, which ignores that individual rights are at stake, is demonstrated by what transpired at Boston’s Exam Schools.

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**V. THE RATIONALE USED TO JUSTIFY DISCRIMINATION IN BOSTON ECHOES THE REPELLANT STEREOTYPES HISTORICALLY USED TO JUSTIFY DISCRIMINATION AGAINST ASIAN AMERICANS.**

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

The attitude that Asian Americans are “overrepresented” and not contributors to “diversity” evokes the 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 others. *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 5/2/2024).<sup>5</sup>

Historical court cases in which Asian Americans struggled for equal treatment provide a record of discrimination 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.

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

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<sup>5</sup> 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.*

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](https://en.wikipedia.org/wiki/Page_Act_of_1875) (last visited 5/15/2024.) 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 5/15/2024). 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.**

An egregious modern attack 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>6</sup> Supported by the statements of authorities who declared the 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

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<sup>6</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*, 584 F. Supp. at 1409.

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,” 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 5/15/2024). 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](https://en.wikipedia.org/wiki/Tape_v._Hurley) (last visited 5/15/2024.) 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). This was the first instance in American history where Asian Americans challenged allegedly "benign" racial discrimination.

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, the same discriminatory intent is alive today, now cloaked as a striving for collective "equity" and skin-deep "diversity."

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**VI. THE BOSTON ADMISSIONS PLAN IS PART OF AN ACTIVIST “RACIAL EQUITY” MOVEMENT THAT SEEKS UNCONSTITUTIONALLY TO IMPOSE EQUAL RESULTS AMONG RACIAL GROUPS AT MERIT-BASED SCHOOLS.**

The present racial balancing trend finds its roots in the quota system that Harvard College maintained for Jews during the first half of the 20th century. Beginning in the 1920s, Harvard and other prominent colleges reacted to the perceived “over-representation” of Jews in their student bodies by imposing quotas for applicants of the Jewish faith that persisted through the 1950s. *See* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws*, 66 *Brook. L. Rev.* 71, 111-12 (Spring 2000); Alan M. Dershowitz and Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 *Cardozo L. Rev.* 379, 385-399 (1979).

In another current irony, the present disrespect for law and polarization caused by discrimination cloaked as “racial equity,” in addition to causing violence against Asian Americans, is also a factor encouraging renewed antisemitism at Harvard and other campuses and in the streets. *See U.S. Antisemitic Incidents Soared 140 percent in 2023 – Breaking All Previous Records*, ADL (4/15/2024), *found at* <https://www.adl.org/resources/press-release/>

us-antisemitic -incidents- soared- 140-percent -2023-breaking-all-previous (last visited 5/15/2024).

The legacy of Harvard’s racial balancing remains with us today, at all levels of education.<sup>7</sup> The situation at Boston’s Exam Schools is similar to what has been happening to other selective public high schools nationwide, where proponents of racial balancing seek to eliminate merit-based admissions systems that have been in place for generations.

- **San Francisco’s Lowell High School.** First voting to halt consideration of test scores and grades as a “temporary” Covid measure, the San Francisco School Board then voted to make the change permanent. “On February 9, 2021, the Board ... 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\\_\(San\\_Francisco\)](https://en.wikipedia.org/wiki/Lowell_High_School_(San_Francisco)) (last visited 5/15/2024). 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.*

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<sup>7</sup> The arguments supporting historical and modern-day racial balancing schemes are virtually identical. “President Lowell of Harvard called [the Jewish quota] a ‘benign’ cap, which would help the University get beyond race.” Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability Of Dworkin’s Defense Of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 36 (Winter 1996).

In San Francisco, as in Boston, proponents of racial balancing seek to increase “diversity” by limiting Asian American enrollment. However, far from discriminating against anyone, Lowell, like Boston’s Exam Schools, reached across racial and socioeconomic lines to enable children of all backgrounds to excel in a public school environment open to all:

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 Race Theory (Dec. 22, 2021), found at <https://dianey.substack.com/p/sfnaACP-fails-black-students> (last visited 5/15/2024).

- **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.*

- **Thomas Jefferson High School, Virginia.** With the goal of mirroring the racial “diversity” of Northern Virginia, the Fairfax County School Board adopted an admission plan that scrapped the entrance exam, capped admission from each middle school at 1.5%, and gave bonus points for “Experience Factors.” *See Thomas Jefferson high School Escaped The Supreme Court — And Others Are Eager To Follow*, Politico (2/23/2024), found at <https://www.politico.com/news/2024/02/23/race-in-school-admissions-legal-battles-supreme-court-00142980> (last visited 5/16/2024). There, as in Boston, the admissions plan was crafted to reduce Asian American enrollment using proxies, and the message sent by school officials was that Asian Americans were “overrepresented” and lacking in “diversity.”

Unless the present political trend of elevating skin-deep diversity over individual merit is stopped, it will lead to the elimination of all public academic high schools. That would destroy a vital public resource, leaving only the wealthy with access to academic enrichment.

**VII. ELIMINATING OBJECTIVE CRITERIA FOR ADMISSION TO MAGNET SCHOOLS BENEFITS NO ONE, AND WILL ONLY PERPETUATE RACIAL DIVISIONS WHILE UNDERMINING AMERICA'S COMPETITIVENESS.**

Common sense should tell us that if some ethnic groups are “underrepresented” at an academic high 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. Advocates of racial balancing are not using common sense. If America is to retain its position as the world’s technology and business leader, it must continue to 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 5/5/2024). “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 5/5/2024). “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.*

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 meritocracy, in fact that is not so, as shown by a 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 5/5/2024). 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.*

Educational deficiencies in elementary and middle school education should certainly be addressed. All children, of whatever ethnicity, deserve to be nurtured, educated and guided toward academic success. Racial politics in high school admissions is not the answer. Addressing early educational deficiencies requires real work, as well as honesty in confronting the true problems—including rampant truantism and lack of parental involvement. While Boston is enviably placed in terms of resources for doing the necessary work compared to many cities, 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 5/5/2024). If the Boston School Committee truly wants to help K-8 children it believes are missing out on educational opportunities, it can easily find ways to help them that do not violate constitutional rights.

**VIII. THIS COURT’S RULING IN *STUDENTS FOR FAIR ADMISSIONS* DOES NOT ADDRESS THE ISSUE PRESENTED HERE.**

This Court should grant certiorari to consider whether a school district’s use of facially-neutral proxies to accomplish its expressed racial goals requires examination under strict scrutiny—an

issue not settled by the ruling in *SFFA*, 143 S. Ct. 2141, where this Court found use of race in college admissions to be unconstitutional. In the Harvard/UNC college cases, admissions officers directly considered the race of the applicant. *Id.* at 2154-56. By contrast, with Boston's Exam Schools, proxies are used. While use of race proxies to discriminate would also be wrong at a college, it should be found even less permissible here, at the grade school level. *See Parents Inv. In Comm. Sch.*, 127 S.Ct. at 2742.

The BSC plan using zip code proxies was carefully designed to exploit the racial demographics of the city, 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). That same reasoning should apply here, where race was undeniably the predominant consideration. As this Court has stated, “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).



**IX. THERE IS AN URGENT NEED TO FORBID CYNICAL RACE PROXIES IF THE EROSION OF EQUAL PROTECTION IS TO BE STOPPED.**

Following this Court's landmark ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), 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 5/4/2024). Similarly, in Boston, school officials achieved desired racial results using facially-neutral methods which proponents hope will evade this Court's recent decision in *Students for Fair Admissions*. If their plan succeeds, it will be emulated at countless schools across the nation.

If we are to avoid decades of additional discrimination and litigation such as was caused by the post-*Brown* efforts of segregationists who fought to deny black children equal rights, this Court must emphatically clarify, sooner rather than later, that a school's use of race-neutral proxies will not shield a racially-motivated admissions program from a skeptical inquiry under strict scrutiny. *Amici* implore this Court not to let injustice fester for a day longer than necessary.

## CONCLUSION

Some 70 years ago, in *Brown v. Board of Education*, 347 U.S. 483, this Court recognized the inherent constitutional injury 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*.

Respectfully submitted,

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*May 17, 2024*

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## **APPENDIX**

**Table of Appendices**

Appendix A (organizations represented by  
Amicus AACE)..... 1a-3a

**Appendix A**

1. 1441 Manufactured-Home Residents Association
2. 2Twenty Club
3. 80-20 Educational Foundation, Inc.
4. 80-20 Initiative DC Chapter
5. AAPI Action Group
6. Allstar Institute
7. American Hindu Coalition
8. American Lin Ze Xu Foundation, Inc
9. ASC English & ASC Aplus Program
10. Asian American Agriculture Society
11. Asian American Coalition for Education
12. Asian American Voters
13. Association for Education Fairness
14. Boston Forward Foundation
15. Bowen Capital LLC
16. Californians for Equal Rights Foundation
17. Chimerica Women Association
18. Chinese American Alliance
19. Chinese American Heritage Association Inc
20. Chinese American Parent Association of Loudoun County (CAPA-Loudoun)
21. Chinese American Parent Association of Montgomery County (CAPA-MC)
22. Chinese American Parent Association of Northern Virginia (CAPA-NOVA)
23. Chinese Association of Tallahassee
24. Chinese Club of Western New York
25. Chinese Culture Society of Greater Nashua
26. Chinese Social Services Center
27. Chinese Association of Northwest Arkansas
28. Coalition For TJ
29. Community Center of Houston
30. Equal Rights for All PAC

31. First Han International Language School
32. Fujian Association of South USA
33. Gansu Chinese American Association
34. Global Children Foundation of Virginia (GCF)
35. Global Organization of People of Indian Origin
36. Global Professional Mentorship Foundation
37. Greater Los Angeles Communities Alliance
38. Hanlin Education Foundation of America
39. Harrison Chinese Association
40. Huaxia Evangelical Seminary
41. Korean American Society of Virginia
42. Korean Association of Howard County
43. Korean Association of Montgomery County
44. Korean Association of Princes Maryland
45. Korean Association of Shenandoah Valley
46. Korean Council of Washington DC
47. Korean Television Broadcast USA, Georgia  
(KTB USA)
48. Law Office of Michael Lu
49. Lions Clubs International Woo Rhee Ga LLC
50. Long Island Chinese American Association
51. Lung Kong Tin Yee Association of Sacramento
52. Michigan Conservative Chinese Americans
53. Millburn Short Hills Chinese Association
54. Minnesota Chinese Association
55. NC Asian American Coalition
56. New Jersey Chinese Community Center
57. New York City Residents Alliance
58. NY Laundromat Business Association
59. Orlando Chinese Association
60. Parents Group of New York
61. Peninsula Korean Association of Virginia
62. Resources International Care of America Inc
63. San Diego Asian Americans for Equality
64. Silicon Valley Chinese Association

65. Sino-American Finance Association
66. The Greater San Antonio Chinese Chamber of  
Commerce
67. The Korean American Association of Houston
68. The Korean Association of Maryland
69. Tidewater Korean Association of Virginia Korean
70. United Chinese Association of Utah
71. United Community Oriented Development  
Association
72. United Cultural Association
73. Universal Chinese Culture Recovery Foundation
74. US Korean Association of Washington
75. Utah Chinese Golden Spike Society
76. Venus Chinese School
77. Washington John Baptist Church
78. Washington VA United Korean Senior Citizens'  
Association
79. WEL Education Group
80. World-class Kook Ki Won World TKD Federation
81. Young Chinese American Professional  
Development Association