

No. 12-682

IN THE
Supreme Court of the United States

BILL SCHUETTE,
MICHIGAN ATTORNEY GENERAL,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION,
INTEGRATION AND IMMIGRANT RIGHTS
AND FIGHT FOR EQUALITY BY ANY MEANS
NECESSARY (BAMN), *ET AL.*,
Respondents.

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

**BRIEF OF THE ASIAN AMERICAN LEGAL
FOUNDATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST

The Asian American Legal Foundation (“AALF”) is based in San Francisco, California.¹ It was founded to promote the civil rights of Asian Americans. For much of this nation’s history, Americans of Asian origin were denied equal access to public schools and universities due to racial prejudice. They have often needed the protection of laws to live free of racial persecution.

If this Court finds Article I section 26 of the Michigan Constitution (“Section 26”) invalid, its decision will likely lead to renewed discrimination against Asian Americans in school admissions—not only in Michigan, but also in San Francisco, California and across the United States. For example, Section 26 is very similar to Article I section 31 of the California Constitution (“Section 31”), which likewise prohibits racial discrimination in state school admissions and contracting. Invalidation of Section 26 would inevitably lead to invalidation of California’s anti-discrimination law, with consequences throughout the State.

Among other things, such a decision would endanger the remedy secured by AALF’s constituents in *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998), where San Francisco’s K-12 schoolchildren of Chinese descent fought for five years to end racial and ethnic

1. This brief is filed pursuant to blanket letters of consent by all parties that have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

admissions quotas in the San Francisco public school system. See *Ho v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999). In the years since the *Ho* case, proponents of the use of race have lobbied unceasingly to resume race-based admissions in the San Francisco school system but have, so far, been stymied by the presence of Section 31. If this Court were to invalidate anti-discrimination protections in a State's constitution, such a ruling would likely mean renewed race-based discrimination in San Francisco's schools—and in schools throughout the United States.

AALF members supported the *Ho* litigation as well as Proposition 209, the voter initiative that amended the California constitution to add Section 31. AALF and its constituents therefore have a strong interest in the issues that this Court will decide in the instant case.

Accordingly, AALF and its constituents respectfully ask this Court to hear their arguments in favor of Petitioner.

SUMMARY OF ARGUMENT

The Court should apply common sense and reject the argument of Respondents that a State law protecting the civil rights of everyone somehow offends equal protection. A law forbidding race- and gender-based discrimination in public employment, education and contracting cannot violate the Fourteenth Amendment. In particular, Respondents' argument that members of minority groups are somehow harmed by Section 26 flies in the face of reason. Section 26 does not single any group out for unequal treatment, nor does it reorder the political

process to make it more difficult for individuals of any group to vindicate their right to equal treatment. To the contrary, it protects the rights of all individuals to equal treatment under the law.

As the history of Asian Americans in this country amply demonstrates, it is ethnic minorities that are most benefited from laws such as Section 26 that prohibit discrimination. The long struggle of Chinese Americans for equal access to schools in California and elsewhere is a case in point. Viewed historically as faceless members of a “yellow horde,” in years past, individuals of Chinese descent were often the victims of official actions directed at “race” meant to serve the greater public good. The onus extended to Chinese American children who sought to attend public schools. *See, e.g.,* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 Asian L.J. 181, 207-208 (May 1998).

San Francisco and other cities flatly denied “Chinese” children the right to attend public schools. When courts ordered their admission, the State of California established separate “Chinese” schools, to which Chinese American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864. Even in our times, school officials who believed they were acting in good faith have sought to classify Chinese American students by race for unequal treatment. *See* David I. Levine, *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, 54 (Spring 2000).

In case after case, it was appeals to the courts under laws such as the one at issue here that brought equal rights to citizens of Chinese descent. While the equal protection clause of the Fourteenth Amendment is, of course, paramount, the struggle has always been to persuade states, counties and cities to prohibit the kinds of discrimination forbidden by the Fourteenth Amendment. Article I section 31 of the California Constitution, paralleling Article I section 26 of the Michigan Constitution, now emphatically prohibits race-based discrimination in public education and contracting. It provides important protections to Asian Americans and to individuals of all races. If this Court were to strike down Section 26, California's similar provision would follow. The result would be a great setback for all Americans, but particularly for vulnerable minorities who need the protection of laws guarantying them the right to be judged as individuals rather than as faceless members of some "race."

For these and other reasons set forth herein, the Court should uphold Section 26 and grant the relief sought by Petitioner.

ARGUMENT

I. SECTION 26 IS NEEDED TO PROTECT THE RIGHT OF ASIAN AMERICANS TO LIVE FREE OF RACIAL PERSECUTION.

This Court has repeatedly stated that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509

U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). As this Court has explained, “One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities.” *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Nonetheless, in case after case, it has been appeals to laws protecting individual rights that have allowed individuals to live free of persecution. This has particularly been true for Asian Americans.

The experience of Chinese Americans in this country illustrates the importance of laws such as Section 26 that protect individual rights. Throughout their history in this country, individuals of Chinese descent have sought to participate in and contribute to American society but have often faced significant barriers solely because of their race. *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). Their treatment gave rise to the expression “a Chinaman’s Chance,” a term meaning “having little or no chance of succeeding.” News Watch Diversity Style Guide, at http://www.cijj.org/publications_media/20050321-133409.pdf (last checked, June 30, 2013).

Time and again, Chinese Americans received equal treatment only after appealing to the courts for vindication of their rights.

For example, 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 unlawful an act 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.

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this 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), this Court ruled that a Chinese American boy, born in San Francisco, could not be prevented by San Francisco officials from returning to the city after a trip abroad.

Chinese American schoolchildren were long denied access to the public schools. In *Tape v. Hurley*, 66 Cal. 473, 6 P. 12 (1885), the court had to order San Francisco public schools to admit a Chinese American girl who was denied entry because, as stated by the State Superintendent of Public Instruction, public schools were not open to "Mongolian" children. See McClain, *supra*, at 137. In response, the California legislature authorized separate "Chinese" schools to which Chinese American

schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864; *see also* Kuo, *supra*, at 207-208 (noting that “Chinese” were segregated even when “Japanese” were not).

Even though it is not widely known, Chinese American schoolchildren were some of the earliest victims of “separate but equal” jurisprudence as it related to education. In *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902), the district court denied a child of Chinese descent the right to attend his neighborhood school in San Francisco, reasoning that the “Chinese” school in Chinatown was “separate but equal.” 119 F. at 382.

In *Gong Lum v. Rice*, 275 U.S. 78 (1927), this Court affirmed that the separate-but-equal doctrine articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), applied to schools, finding that a nine-year-old Chinese American girl residing in Mississippi could be denied entry to a “white” school because she was a member of the “yellow” race. *Id.* at 87.

Thus, in *Lee v. Johnson*, 404 U.S. 1215 (1971), Justice Douglas wrote that California’s “establishment of separate schools for children of Chinese ancestry . . . was the classic case of *de jure* segregation involved [and struck down] in *Brown v. Board of Education*, 347 U.S. 483 [1954]. . . .” *Id.* at 1216. “*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. *See Yick Wo v. Hopkins*, 118 U.S. 356.” *Lee*, 404 U.S. at 1216.

AALF therefore respectfully submits that Asian Americans have more reason than most individuals in this great nation to appreciate laws such as Section 26 (and California's Section 31) and to know that these laws do not burden but rather promote the rights of Asian Americans and other minorities.

II. THIS COURT SHOULD BE WARY OF EXPERTS AND LUMINARIES WHO ARGUE THAT SECTION 26 SOMEHOW REORDERS THE POLITICAL PROCESS TO BURDEN MINORITIES.

The Court should apply common sense and disregard the blandishments of “experts” and other luminaries who argue that Section 26 reorders the political process to violate equal protection. The purpose of the equal protection clause of the Fourteenth Amendment “is the prevention of official conduct discriminating on the basis of race.” *Washington v. Davis*, 426 U.S. 229, 239 (1976). By its plain words, Section 26 has that same purpose. States have always been free to enact laws protecting personal rights, even—especially—those protected by the federal Constitution. As this Court has stated in an analogous situation, “It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it.” *Crawford v. Board of Ed. of Los Angeles*, 458 US 527, 535 (1982).

The self-serving and cynical statements proffered to show that Section 26 somehow burdens individual rights are a transparent effort to eliminate important protections of individual rights at the state level and do not have as their goal the protection of civil rights. They

are analogous to similar statements that were made in the past in efforts to impede courts from protecting individual rights.

In *Plessey v. Ferguson*, 163 U.S. 537, the Court accepted the view of the experts of the day that, even though all persons were equal before the law, the public good allowed the use of “distinctions based upon color.” The lone dissenter, Justice John Harlan, wrote: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case . . .” *Id.* at 558. History proved Justice Harlan to be right.

In *Brown v. Board of Education*, 347 U.S. 483, this Court properly rejected arguments by state officials from Kansas, Delaware, Virginia and South Carolina that black and white children learned better in a single-race environment and for societal purposes should be kept separate by state mandate. Expressly rejecting any contrary findings regarding “psychological knowledge” made in *Plessey v. Ferguson*, the Court found that use of race produces a “sense of inferiority.” “We conclude that, in the field of public education, the doctrine of ‘separate but equal’ has no place.” *Brown*, at 494-495.

Today, it is universally acknowledged that the Roosevelt administration and military authorities infringed the constitutional rights of Japanese Americans when, during World War II, the government placed them under curfew, then removed them from their West Coast homes and placed them in internment camps, in violation

of state and federal law.² Yet, at the time, when the affected citizens pled with the courts to uphold their rights, the courts passively accepted statements by administration and military officials that such use of race was necessary in the national interest.

In *Hirabayashi v. United States*, 320 U.S. 81, this Court affirmed the conviction of an American citizen found guilty of violating the curfews imposed on Japanese Americans. In *Korematsu v. United States*, 323 U.S. 214 (1944), this Court upheld the conviction of an American citizen of Japanese descent, who had violated an exclusion order by remaining in his San Leandro, California home, rather than go to an internment camp. The courts at all levels deferred to declarations by military authorities that such discrimination by race was necessary to advance compelling government interests. *Id.* 217-219.³ *Amicus Curiae* briefs submitted by officials from the states of Oregon, Washington and California, urged and supported

2. Executive Order No. 9066 was issued on February 19, 1942. It authorized the Secretary of War and certain 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, under color of Executive Order No. 9066, 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).

3. “It was uncontroverted at the time of conviction that [Fred Korematsu] was loyal to the United States and had no dual allegiance to Japan. He had never left the United States. He was registered for the draft and willing to bear arms for the United States.” *Korematsu*, 584 F. Supp. at 1409.

the discrimination. *See Korematsu v. United States*, 584 F. Supp 1406, 1423 (N.D. Cal. 1984).

Much later, of course, it was discovered that government and military figures had misled the courts; and that the government officials had known that there was no national necessity requiring the use of race. *See Korematsu*, 584 F. Supp. at 1420; *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). The 1980 Commission on Wartime Relocation and Internment of Civilians found that the curfew and exclusion orders had been motivated by “racism” and “hysteria” and not “military necessity,” and stated:

[A]t the time of the issuance of Executive Order 9066 and implementing military orders, there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry

...

See Korematsu, 584 F. Supp at 1416. “[T]he government deliberately omitted relevant information and provided misleading information in papers before the court. The information was critical to the court’s determination. . .” *Id.* at 1420.⁴

4. Referring to the *Hirabayashi* and *Korematsu* cases, Justice Powell later wrote, “Only two of this Court’s modern cases have held the use of racial classifications to be constitutional.” *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring). Ironically, those two cases have recently been joined by a third, *Grutter v. Bollinger*, 539 U.S. 306 (2003), where this

Here, also, this Court should be wary of the attempts by Respondents' declarants and *amici curiae* – no matter how well-intentioned and no matter how illustrious their credentials – to manufacture specious arguments to invalidate a state law that protects individuals of all races from discrimination.

III. INVALIDATION OF SECTION 26 WOULD MEAN RENEWED DISCRIMINATION AGAINST CHINESE AMERICAN SCHOOLCHILDREN IN SAN FRANCISCO.

In a relevant case involving AALF's constituents, if this Court were to invalidate Section 26, it would almost certainly result in San Francisco's schoolchildren of Chinese descent again facing racial discrimination in the city's public school system. In *Ho v. San Francisco Unified School District*, filed in 1994, San Francisco's Chinese American schoolchildren were forced to turn to the courts for redress of their rights, in order to halt the school district's policy of classifying and assigning them to the city's K-12 schools on the basis of their race. *See Ho*, 147 F.3d 854; *Ho*, 59 F. Supp. 2d 1021 (on remand); *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316 (1997) (decision giving rise to appeal in 147 F.3d 854).

Court heeded the judgment of experts, including educators, business leaders and even military leaders, to decide that a public school, at least at the university level, may treat students differently based on race. *See Grutter*, 539 U.S. at 330-331. While its decision in *Grutter* is not before the Court in the instant case, the sad truth is that, until *Grutter* is overturned or limited, the clock has been turned back almost a century, to the days of *Gong Lum v. Rice*, 275 U.S. 78, again giving school officials the power to discriminate against students solely because of their race.

In *Ho*, the plaintiff class challenged a consent-decree-mandated racial balancing scheme imposed in *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34 (N.D. Cal. 1983). Without any finding of a constitutional violation to remedy, and doing exactly what Respondents here believe they will be able to do in the absence of Section 26, a consortium of pedagogical and race experts set up a racial balancing scheme with the stated goals of preventing “racial isolation” and providing “academic excellence” in the San Francisco’s schools. *See Ho*, 965 F. Supp. at 1322; *see also Ho*, 147 F.3d at 859; *San Francisco NAACP*, 576 F. Supp. at 40-42, 58. Filled with zeal for their vision of racial engineering, the proponents ignored that the San Francisco school district was already one of the most ethnically diverse in the nation.

Under San Francisco’s admissions program, nine ethnic groups were arbitrarily defined, including “Chinese.” Members of at least four of the groups were required to be present at each school; and no one group could represent more than 45 percent of the student body at any regular school or 40 percent at any alternative school. *See id.*; *see also Ho*, 147 F.3d at 856. By the time of the *Ho* challenge, the school district had enlarged the original nine arbitrary racial categories to thirteen equally arbitrary categories to take into account the growing prominence of additional racial groups in the district. *See Ho*, 147 F.3d at 858. As they were the largest racially identifiable group, the burden of this system of quotas and caps fell heaviest on students identified as “Chinese,” who were most likely to be “capped out” at their neighborhood schools or at desirable magnet schools. *See Levine, supra*, at 55-56. Also, even where preferences were not required to maintain the district’s racial quotas

and caps, the district nevertheless adopted a policy of granting preferences to applicants classified as “Hispanic” or “African American,” *See Ho*, 147 F.3d at 858.

The named plaintiffs’ stories amply illustrate the discrimination:

- Brian Ho was five years old. He was turned away from his two neighborhood kindergartens because the schools had accepted the maximum allowed percentage of “Chinese” schoolchildren. He was assigned to a school in another neighborhood. *See Levine, supra*, at 61.

- Patrick Wong, then fourteen years old, applied for admission to Lowell High School, a selective magnet school. He was rejected because his index score was below the minimum required for “Chinese” applicants. However, his score was high enough that he would have been admitted to Lowell had he been a member of any other racial or ethnic group. He was then rejected at three other high schools because such schools had already “capped out” for “Chinese” students. *Id.*

- After moving into a San Francisco neighborhood, Hillary Chen, then eight years old, was not allowed to transfer into any of three elementary schools near her new home because all three schools had accepted the maximum number of “Chinese” schoolchildren allowed under the district’s scheme. *Id.*

As this Court warned in *Richmond v. Croson*, 488 U.S. 469 (1989), San Francisco schoolchildren were stigmatized by the district’s use of race. *See Croson*, 488 U.S. at 493 (use of race promotes feelings of “racial inferiority”

and “racial hostility”). As stated by the parent of one “Chinese” youth turned away because of his ethnicity, “He was depressed and angry that he was rejected because of his race. Can you imagine, as a parent, seeing your son’s hopes denied in this way at the age of 14?” Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon*, San Francisco Examiner, at C-2 (Feb. 14, 1999).

As Lee Cheng, Secretary of AALF, testified in a written statement for hearings held by the U.S. House of Representatives, 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 after concluding that their unfair denial is a form of punishment for doing something wrong.

Lee Cheng, *Group Preferences and the Law*, U.S. House of Representatives Sub-Committee on the Constitution Hearings (June 1, 1995), at <http://judiciary.house.gov/legacy/274.htm> (last checked June 30, 2013).

Another insidious byproduct of San Francisco’s racial balancing plan was “rampant dishonesty,” as parents of all races attempted to misreport children’s racial identity to gain admission to desired schools. See Michael Dorgan, *Desegregation or Racial Bias?*, San Jose Mercury, at 1A (June 5, 1995). “[S]ome black families in Bayview-Hunter’s Point have gone so far as to take Hispanic surnames to protect their children from busing.” *Id.* at 10A. “People know if they want to go to a particular school that has a

lot of Caucasians, they should put down something other than Caucasian, and they do.” *Id.* at 10A (quoting School Board President Dan Kelly).⁵

After five years of vigorous litigation, the *Ho* case settled on the first day of trial with the defendants agreeing to (i) cease using race to assign students to the city’s schools and (ii) end the mandatory requirement of self-classification by race on student enrollment forms. *See Ho*, 59 F. Supp. 2d at 1025 (approving settlement). Settlement in *Ho* would never have been reached if the district court and the Ninth Circuit Court of Appeals (on an interlocutory appeal from the district court’s denial of plaintiffs’ request for dissolution of the consent decree) had not emphasized to defendants that under prevailing law they were almost certain to lose at trial. *See Ho*, 59 F. Supp. 2d at 1024-25 (noting burdens placed by Ninth Circuit’s ruling and district court’s prior finding that “defendants had shown little likelihood of prevailing at trial”).

In addition to bringing the *Ho* case, members of AALF worked to pass Proposition 209, a California voter initiative that added Article I Section 31 to the State constitution. Similar to Article 26 at issue in this case, Section 31 provides, “The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Cal. Const. Art. I § 31(a).

5. On the school enrollment forms, parents were threatened with “perjury” if they misreported the race of their child. *See Ho*, 147 F.3d at 862.

Section 31 safeguards the remedy secured in *Ho*. If this Court invalidates Michigan’s Section 26, California’s similar Section 31 will follow. If that happens, it is almost certain that the San Francisco school district will again try to implement a race-based student assignment program, in spite of the *Ho* settlement. This is not idle conjecture. San Francisco school officials who favor use of race debate the issue every time a new Supreme Court case surfaces that might offer them support. *See e.g.*, Bob Egelko, Heather Knight, SCHOOLS, Justices Take Cases On Race-Based Enrollment, San Francisco Chronicle, at B-1 (June 6, 2006) (“If the Supreme Court upholds the Seattle system . . . Prop. 209 is a moot point. . . Federal laws would override a state initiative.” (quoting board member Mark Sanchez).)

It is therefore very important to AALF and its constituents—and to the schoolchildren of San Francisco—that this Court uphold Section 26.

CONCLUSION

Section 26, by its plain words, protects the right of all individuals to be free from race- and gender-based discrimination. As the experience of Asian Americans in this country demonstrates, such laws are needed. Furthermore, invalidation of Section 26 would almost certainly lead to invalidation of California's similar Section 31 and to renewed attacks on the remedy secured in the *Ho* case, emboldening proponents of racial engineering to resume discrimination against Chinese American schoolchildren in San Francisco.

Because Section 26 is congruent with and does not violate the equal protection clause of the Fourteenth Amendment, and because Section 26 represents a lawful measure to protect individual rights, the Court should grant the relief sought by Petitioner.

Respectfully submitted,

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