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No. 84-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President and DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF LOCAL 36, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AND KEVIN MICHAEL BYRNE, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI

Local 36, International Association of Fire Fighters, AFL-CIO, is the exclusive representative, pursuant to D.C. Code §§ 1-618.10, 618.11, of all employees in the uniformed force of the District of Columbia Fire Depart-

ment ("DCFD") in the ranks of Firefighter through Captain. Kevin Michael Byrne, Curtis J. Callaway, Ronald J. Danner, James A. Funk, Thomas I. Herlihy, Joseph Worth Lane, Jr., Stuart J. Winokur, John E. Yocum and David F. Zollars are white members of the uniformed force of the DCFD who, together with Local 36, have brought suit on behalf of themselves and a class to challenge DCFD's adoption of racial preferences for the making of promotions. *Byrne, et al. v. Coleman, et al.*, D.D.C. No. 85-5626. *See Hammon v. Barry*, 37 BNA FEP Cases 1184 (1985). The principles by which this Court resolves the present case may affect the resolution of the *Byrne* suit as well as the contours of any "affirmative action" program that may ultimately eventuate in the DCFD. *Amici* therefore have a substantial interest in the principles governing the resolution of the instant case. This brief *amici curiae* is filed with the consent of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The school board and the teacher association in this case have agreed that layoffs of teachers shall be determined by a racial quota. This quota is not designed as a means to address racial discrimination in the hiring or laying-off of teachers. No finding has been made by any court or other governmental body that such discrimination even occurred—indeed, the school board has taken the position that there has been no such discrimination. Rather, the racial quota here is designed to serve an operational objective of the school board which is unrelated to the existence or non-existence of prior racial discrimination in filling teaching positions. That objective is to provide "role models" for minority students—an objective which the school board and the teacher association apparently believe can be better served by minority teachers than by non-minority teachers.

The lower courts fully understood that this operational objective was the predicate for the racial quota here. The district court stated as follows (Pet. App. 29a-30a):

> The requirement of some showing of previous underrepresentation of minorities must, of course, be adapted to the facts and circumstances of the particular case. . . .
>
> However, in the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models. See, *Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732, 748 (W.D. Mich. 1980) ("faculty ought to begin to approximate the percentage of minority students in the district").
>
> Because of this one vitally important aspect of the teaching profession, the court holds that in applying the [*Detroit Police Officers' Association v.*] *Young* [608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981)] "substantial underrepresentation" standard, it may compare the percentage of minority faculty with the percentage of minorities in the student body, rather than with the percentage of minorities in the relevant labor pool.
>
> Applying this standard, it is clear that minority teachers were "substantially" and "chronically" underrepresented on the Jackson School District faculty in the years preceding the adoption of the affirmative action plan.

These passages were quoted and adopted by the court of appeals (Pet. App. 8a-9a, 10a).[1]

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[1] References in opinions below to curing "underrepresentation" or "racial imbalance"—and occasional loose use of the term "discrimination"—must be understood in the context of the findings as

This Court has never before determined whether an employer—public or private—could justify a racial quota on the ground that the race of its employees is relevant to the employer's ability to perform its function. In this case, the Court is called upon to make that determination as a matter of constitutional law. But where, as here, the conduct in question may be proscribed by statute as well as by the Constitution, it is not the appropriate course for this Court to venture into constitutional adjudication without first determining the issue under applicable statutory law. Particularly at the formative stage of a body of decisional law, the proper course is to decide constitutional claims only after it is plain that threshold statutory claims are unsound. This Court has consistently refused "to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdiction, until necessity compels it in the performance of constitutional duty." *Reserve Army v. Municipal Court*, 331 U.S. 549, 569 (1947). If the conduct at issue here violates a federal statute, there may never be need for the Court to resolve the constitutional question petitioners seek to raise. See *Cook v. Hudson*, 429 U.S. 165 (1976); *Rice v. Sioux City Cemetery*, 340 U.S. 70 (1955).

The applicable statute in this case is Title VII of the Civil Rights Act of 1964. In the district court, petitioners sought to challenge the racial quota at issue here under Title VII as well as under the Constitution, but that court, finding that "the plaintiffs have neither produced a notice of right-to-sue from the EEOC, nor otherwise alleged that the administrative prerequisites of Title VII have been fulfilled," dismissed "all Title VII claims . . .

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to the nature and purpose of the layoff quota. The "underrepresentation" or "imbalance" referred to is simply the difference between the percentage of minority teachers and the percentage of minority students. And the existence of this difference is apparently all that is meant by use of the term "discrimination" in the opinions below.

for lack of jurisdiction" (Pet. App. 34a). Petitioners did not challenge that ruling in the court of appeals. Accordingly, their petition to this Court is based solely on their constitutional claims, and the Title VII claims are not before this Court.

As we show in part I, *infra*, Title VII prohibits racial preferences in employment that are predicated on the operational needs or objectives of the employer. In § 703(e)(1) of Title VII, Congress created a narrow exception to the Act's general prohibition against discrimination which permits employers to have preferences based on religion, sex, or national origin "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise." Congress did not include preferences based on "race" or "color" in that exception. And the legislative history makes clear that that omission was intentional. In the words of the Act's floor manager in the House, "We did not include the word 'race' because we felt that race or color would not be a bona fide qualification, as would be 'national origin.' That was left out. It should be left out" (see *infra* at 8). Thus, Congress meant to leave no room for an employer to justify a racial preference on the ground that the operation of his business would be better served by filling a position with employees of one race rather than another.

If we correctly understand the meaning of the statute, there would have been no occasion for the Court to resolve the constitutional question in this case but for the failure of petitioners properly to assert the Title VII issue. That peculiar procedural posture is not a sound basis for constitutional adjudication of an issue of such a sensitive nature. *Cf. Rice v. Sioux City Cemetery*, *supra*; *Cook v. Hudson*, *supra*. At the least, even if there were doubt as to the correct interpretation of the statute,

there can be no doubt that the statutory question is a substantial one which the Court should decide before proceeding to determine the constitutional question. In these circumstances, we urge this Court to dismiss the writ of certiorari as improvidently granted.

In part II, *infra*, we address the constitutional issue in case the Court should decide to rule upon that issue. It is our submission that the racial quota in this case violates the Equal Protection Clause of the Fourteenth Amendment. The operational needs or objectives of a public employer cannot justify a racial quota. The operational needs rationale is not premised on a design to eliminate racial division. Rather, it assumes the existence of a significant degree of racial polarization in our society, and then permits government to cater to that polarization in order to achieve non-racial objectives. In so doing, it would accept, and to a degree perpetuate, the existence of such polarization.

Moreover, the operational needs justification is not self-limited, as are the other "affirmative action" rationales this Court has reviewed, to situations in which an advantage accrues only to some disadvantaged minority. To the contrary, pandering to the racial stereotypes of a *majority* constituency could arguably, in many instances, advance legitimate governmental objectives. The effectiveness of police officers, firefighters, teachers, social workers, psychologists, doctors, supervisors, prosecutors, judges and other governmental occupations may, in certain circumstances, depend upon the racial perceptions of the person or group being served. The logical reduction of the operational needs rationale is to divide government along racial lines, black public servants serving predominantly black communities, and whites serving whites. The Constitution does not permit governmental bodies to go down this road.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED: THE CONSTITUTIONAL ISSUE SHOULD NOT BE REACHED UNTIL THE STATUTORY ISSUE IS DECIDED.

If the contractual provision at issue here were properly challenged under Title VII, the provision would be found to violate the statute. Respondents have acted on the basis of race in determining which teachers to retain, because they believe it desirable for the operation of their enterprise that a certain proportion of the teaching positions be filled by blacks. See pp. 2-3 *supra*. But in enacting Title VII Congress made the considered judgment that employers should not be permitted to discriminate on that basis.

In § 703(a), Congress forbade discrimination on the basis of race, color, religion, sex, and national origin. In section 703(e)(1), Congress provided an exception to that prohibition:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of [employees'] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . .

Section 703(e)(1) is the only provision of the Act that authorizes an employer to discriminate for the purpose of enhancing the "operation of [his] business." But the provision authorizes such discrimination only "on the basis of religion, sex, or national origin," not on the basis of race or color.

Congress' decision to exclude race and color from § 703(e)(1) was deliberate. It was protested by Rep.

Williams, who offered an amendment to add these classifications to § 703(e)(1) and explained:

> Mr. Chairman, why should there be discrimination against a Negro savings and loan association, with a provision that it would be compelled to hire white people whether it wished to or not? Why should there be discrimination against a Negro burial association, by telling it that it must hire white salesmen? Why should there be discrimination against a Negro insurance company, by telling it that it must hire white insurance salesmen, when they and all of us here know this would destroy the business completely because it would destroy its identity as a Negro business, the very quality responsible for its success? [2]

Rep. Celler, Chairman of the House Judiciary Committee, and floor manager of the Civil Rights Act, replied:

> We did not include the word "race" because we felt that race or color would not be a bona fide qualification, as would be "national origin." That was left out. It should be left out.[3]

See also the statement of Rep. Corman, in another context, that permitting black employers to hire only black salesmen because their customers are black would require permitting white employers to hire only white salesmen because their customers are white—a course that Congress should not take because it would perpetuate the very attitudes the bill was designed to erase. 110 Cong. Rec. at 2559; see also *id.* at 2563 (Rep. Roosevelt).

Rep. Williams' amendment was defeated in the House by a voice vote. 1964 Leg. Hist. at 3191. The Senate accepted § 703(e) as written by the House. The Clark-Case materials which explain the views of the Act's sponsors state (*id.* at 3014):

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[2] United States Equal Employment Opportunity Commission, Legislative History of Titles VII and IX of the Civil Rights Act of 1964 (hereinafter "1964 Leg. Hist."), at 3191.

[3] *Ibid.*

> [T]here is no exemption in title VII for occupations in which race might be deemed a bona fide job qualification, . . .

It is thus apparent that in 1964 the sponsors of Title VII rejected the notion that an employer should be permitted to make race-based employment decisions for the purpose of serving the "operation of [his] business." When the Act was extended to public employers in 1972, no change was made in § 703(e)(1); and nothing in the statute grants to public employers any more license to make race-based employment decisions than is granted to private employers.[4] Consequently, the layoff policy at issue here could not survive scrutiny under Title VII.

While the discussion to this point should be dispositive of the Title VII issue, we feel compelled to add that nothing in *Steelworkers v. Weber*, 443 U.S. 193 (1979), implies that Congress in enacting Title VII meant to permit employers to use racial preferences on the ground

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[4] As the Court stated in *Dothard v. Rawlinson*, 433 U.S. 321, 331-332, n.14 (1977), "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." To the extent that Congress desired a different regime in the public and private sectors, this was accomplished in § 701(f) by excluding the following public employees from coverage:

> [A]ny person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the proceeding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

Section 701(f) embodies Congress' judgment of the precise extent to which the inherent functional differences between the public and private sectors should be given weight in developing a comprehensive statutory law of equal employment opportunity. That provision aside, Congress intended that on questions of coverage and legal obligation, private and public employers are to be regarded as a single class.

that there is an operational justification for doing so. In *Weber*, this Court noted that the racial quota there at issue was intended "to accomplish the goal that Congress designed Title VII to achieve." *Id.* at 204. Both the quota in *Weber* and Title VII itself "were structured to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'" *Id.* at 208. Nothing in *Weber* suggests that there is any room under Title VII for use of racial preferences for the entirely different purpose of serving an employer's operational needs; and, as we have shown, Congress precluded such preferences by declining to include race and color in § 703(e)(1). *Weber* therefore has no application to this case.[5]

For the foregoing reasons, the racial quota here would violate Title VII. At the least, there is a substantial issue

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[5] Even if the purpose of the quota here were the same as the purpose of the quota in *Weber*, it is far from clear that the quota plan here would meet the other requirements of *Weber*. The *Weber* Court did not "define in detail the line of demarcation between permissible and impermissible" racial preferences. 443 U.S. at 208. But the Court did point to two factors that distinguish *Weber* from the instant case. First, the plan in *Weber* did "not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers. . . ." *Id.* at 208. Indeed, the quota plan in *Weber* created new opportunities—a new in-plant craft training program—for white as well as black employees. The quota plan here, on the other hand, requires that white employees lose jobs which their seniority would entitle them to maintain. Cf. *Hammon v. Barry*, 37 BNA FEP Cases 609, 622 (D.D.C. 1985). Second, the *Weber* Court emphasized that the racial quota there would end as soon as the percentage of black craftworkers at the plant approximated the percentage of blacks in the local labor force. 443 U.S. at 208-209. Thus "the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Id.* at 208. This was essential to the Court's approval of the plan, because, as the Court observed, the legislative history indicates that Title VII "would not allow establishment of systems 'to *maintain* racial balance in employment.'" *Id.* at 207, n.7 (emphasis by the Court). But that is precisely what the plan here at issue seeks to do.

as to the quota's legality under Title VII. The statutory question should be resolved before this Court ventures to determine whether the Constitution permits a public employer to discriminate on the basis of race in order to further the employer's operational needs. The instant case does not, because of its peculiar procedural history, raise the statutory issue. The writ of *certiorari* should therefore be dismissed as improvidently granted. *Reserve Army v. Municipal Court*, *supra*; *Cook v. Hudson*, *supra*; *Rice v. Sioux City Cemetery*, *supra*.

II. THE RACIAL QUOTA IN THIS CASE IS UNCONSTITUTIONAL.

A. The constitutional issue raised here is different in nature from any the Court has decided before. The so-called "affirmative action" programs this Court has previously measured against the Constitution all were meant in one way or another to end racial divisions that exist in our society. See *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *University of California Regents v. Bakke*, 438 U.S. 265 (1978);[6] *Fullilove v.*

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[6] Mr. Justice Powell, writing separately, discussed a purpose of the quota program in *Bakke* that is akin to the operational needs rationale: "improving the delivery of health care services to communities underserved" (438 U.S. at 310). Justice Powell stated (*ibid.*):

> It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.

Justice Powell went on to quote a passage from the lower court's opinion in that case which included the following (*id.* at 311):

> [T]here are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in

Klutznick, 448 U.S. 448 (1980). Never before has this Court been called upon to approve a racial quota adopted for operational needs.[7]

The operational needs justification is not premised upon a design to eliminate racial division. Rather, it assumes the existence of a significant degree of racial polarization in our society, and then permits government to cater to that polarization in order to achieve nonracial objectives. In so doing, it would accept, and to a degree perpetuate, the existence of such polarization.

Thus, in the instant case, the notion that minority teachers would better serve as role models for minority students is based upon the assumption that in the present state of affairs many students perceive their teachers

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> the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive.

Subsequently, in a concurring opinion in *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980), Justice Powell referred to that discussion in *Bakke* in the following statement:

> Nor has Congress sought to employ a racially conscious means to further a nonracial goal. In such instances, a nonracial means should be available to further the legitimate governmental purpose. See *Bakke*, 438 U.S. at 310-311.

[7] Both courts below made liberal reference to the *Weber* decision. As discussed, *supra* at 9-10, *Weber* did not involve the operational needs rationale, and in any event *Weber* was based solely on Title VII. The courts below apparently assumed that Title VII and the Constitution set identical standards in this area. There is no basis for that assumption: Title VII, especially the part construed in *Weber*, is the product of a particular set of legislative objectives as manifested in the language and history of the statute (*Weber*, 443 U.S. at 202-208); Title VII was not meant to and does not replicate constitutional standards. *Washington v. Davis*, 426 U.S. 229, 238-239 (1976).

through the prism of racial stereotypes, and that, as a result, the race of teachers affects the way in which students respond to teachers. Similarly, it has been argued that the effectiveness of police officers and firefighters is a function of the degree to which they are trusted by the community being served, which in turn, the argument goes, in the present state of our society may be a function of the race of the officers or firefighters. The question posed here is whether a governmental determination to accommodate such racial divisions in order to seek to serve a nonracial objective may validate under the Constitution preferential treatment of one race over another. It is our submission that, however well meaning such objectives may seem, racial preferences of this kind are at the core of what the constitutional proscription of race discrimination is meant to address.

Arguably there may be instances where the present state of racial division in this country poses a significant obstacle to the achievement of important governmental objectives.[8] Perhaps the best articulation of that concern

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[8] There is reason to doubt that the "need" to employ a particular percentage of minority teachers as role models could fit into this category. Teachers have continuing interaction with students over the course of many months. There is little reason to presume that only black teachers can effectively teach or serve as role models for black students. If a school district's goal is to demonstrate to black students that race need not be an impediment to their aspirations, it is far from apparent that such a message cannot be conveyed by white teachers who are dedicated to that goal. History and common experience are surely not devoid of instances in which a white person, whether in public or private life, has served as a role model for a black person, and has contributed to the latter's sense of self-esteem and opportunity. Cf. *Bakke*, 438 U.S. at 311 (Opinion of Powell, J., quoting the lower court opinion in *Bakke*) (" 'there are more precise and reliable ways to identify applicants who are genuinely interested in the . . . problems of minorities than by race' "). In any event, whatever benefit might be thought to accrue from having a particular percentage of black role models may be outweighed by the other lesson that would be taught: that discrimination on the basis of race is not only accepted in our society but sanctioned by the government.

has been in the context of attempts to provide effective law enforcement in certain racially-tense communities. The Sixth Circuit's decision in *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 696 (6th Cir.), *cert. denied*, 452 U.S. 938 (1981), which was heavily relied upon in the opinions below in the instant case, directly confronted this problem and put the argument for a racially-based hiring program in the following way:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.

But to accept that racially-based "perceptions" of one group or another may determine public policy is in part to validate those perceptions. The use of racial stereotypes as a premise for governmental action perpetuates those stereotypes and puts further off the day when racial polarization is not a pervasive factor in our society.

It is important to recognize in this connection that the operational needs justification, based as it is on "public perceptions," is not self-limited, as are the other "affirmative action" rationales this Court has reviewed, to situations where an advantage accrues only to some disadvantaged minority. To the contrary, pandering to the racial stereotypes of a *majority* constituency could arguably, in many instances, advance an important governmental objective. The argument made in the *Detroit Police Officers'* case could as easily be made in many white communities to justify the preferential hiring of white police officers.

It is important as well to recognize that the operational needs justification has potential application to virtually

every facet of governmental activity. The effectiveness of police officers, firefighters, teachers, social workers, psychologists, doctors, supervisors, prosecutors, judges, and other governmental employees may, in certain circumstances, depend upon the racial perceptions of the person or group being served.

The logical reduction of the operational needs rationale is to divide government along racial lines, black public servants serving predominantly black communities, and whites serving whites. At stake is the constitutional principle of nondiscrimination by government and the opportunity for a future society free of racial division. Even assuming the arguable factual predicates of the operational needs rationale, that stake is too high to trade off for the short-term ability of government most effectively to meet today's exigencies.[9]

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[9] Where a school district has engaged in *de jure* segregation, this Court has held that the district is permitted—indeed required—to take race-conscious steps to desegregate the faculty as well as the student body, "as part of the process of dismantling a dual system." *Milliken v. Bradley*, 433 U.S. 267, 282-283 (1977). See also *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969). The justification for such race-conscious action, however, is not the perceived operational needs of the school district, but the constitutional obligation of a district which has engaged in *de jure* segregation "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Columbus Board of Education v. Penick*, 443 U.S. 449, 459 (1979), quoting *Green v. County School Board*, 391 U.S. 430, 437-438 (1968). "[The] [r]acial classifications [sustained in the desegregation cases] thus were designed as remedies for the violation of constitutional entitlement. Moreover, the scope of the remedies was not permitted to exceed the extent of the violations." *Bakke*, 438 U.S. at 301 (Opinion of Powell, J.). In short, nothing in the school desegregation decisions sanctions the use of racial classifications for any purpose other than dismantling a *de jure* segregated school system. The layoff policy at issue here—which forecloses the affected white teachers from being employed at all, rather than merely determining whether they will be assigned to one school or another—gains no support from those decisions. See *id.* at 300, n.39, 305.

Even as to policies that deal solely with student or faculty *assignments*, as distinguished from hiring or layoff practices, the Court

B. We do not mean to suggest that had the racial quota here been based upon some other ground it would pass constitutional muster. To the contrary, we believe this quota would be constitutionally infirm whatever its purported justification.

The layoff quota here is designed to preserve whatever progress the school system has made toward the ultimate goal of "hav[ing] at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools" (Pet. App. 1a). As such, whatever the motivation underlying the quota, it is designed to achieve a certain racial balance. Establishment of racial balance, in and of itself, is *not* a permissible governmental objective. *Bakke*, 438 U.S. at 307 (opinion of Powell, J.); *Fullilove*, 448 U.S. at 529 (dissenting opinion of Stewart, J.).

Nor could the quota be justified as a means to redress prior or current discrimination in the hiring or laying-off of teachers. In the first place, no court or agency has found, and the record in this case does not show, that such discrimination has occurred or is occurring—indeed, the school board has taken the position that there has been no such discrimination (Pet. App. 40a). See *Bakke*,

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has disapproved desegregation remedies that would mandate the maintenance of a particular racial balance. See *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434-436 (1976); *Swann v. Board of Education*, 402 U.S. 1, 24-25 (1971). In so doing, the Court has reasoned that although students have a constitutional right not to be subjected to a dual school system, they have no right to a "particular degree of racial balance or mixing." *Swann, supra*, 402 U.S. at 24; *Spangler, supra*, 427 U.S. at 434.

Finally, we note that the Court has not determined whether any form of racial classification—even as pertains solely to assignments of students or teachers—is permissible in the absence of a finding of *de jure* segregation; that question "raises constitutional difficulties" that have not been resolved by the Court. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 492 n.6 (Powell, J., dissenting). See also *id.* at 472 n.15 (Opinion of the Court).

438 U.S. at 307-308 (Opinion of Powell, J.). Moreover, even if the school board had discriminated on the basis of race in hiring or laying-off teachers, the layoff quota here is in no respect "tailored" to redress such discrimination.[10] The black teachers who would benefit by the quota have, by definition, been hired by the school board —certainly nothing in the record indicates they were victims of hiring discrimination. A racial preference benefiting them does nothing to redress the loss of any individuals who were, *arguendo*, victims of hiring discrimination. Such a preference would serve only to affect the number or proportion of black teachers—the racial balance—not to make any victim whole. There is thus no congruence between the layoff quota and any prior hiring discrimination.[11]

Although the Court has not yet settled on the precise parameters of the "tailoring" requirement, the Court

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[10] As Justice Powell put it in his opinion in *Bakke*, the government's reliance on race must be "precisely tailored" to serve the articulated governmental interest. 438 U.S. at 305. That is to say, a racial classification must be applied only insofar as is "necessary . . . to the accomplishment" of the government's purpose (*id.* at 305), and must be tailored so as to "work the least harm possible to other innocent persons . . . ." (*id.* at 308). *See also Fullilove*, 448 U.S. at 480 (opinion of Burger, C. J., joined by White and Powell, JJ.) (even where Congress acts pursuant to its authority to enforce the Fourteenth Amendment, any use of "racial or ethnic criteria" must be "narrowly tailored to the achievement of [a proper] objective"); *id.* at 486-487 (same); *id.* at 490 (same); *id.* at 551-552 (Stevens, J., dissenting). See also *id.* at 519 (opinion of Marshall, J., concurring in the judgment, joined by Brennan, J, and Blackmun, J.) ("racial classifications designed to further remedial purposes" must, to be sustained, be "substantially related to achievement of [important governmental] objectives").

[11] Nor could the layoff quota be justified as necessary to avoid discrimination in the layoff process itself. If there were no racial quota, layoffs would be governed by strict application of seniority (Pet. App. 1a). Accordingly, there is no basis for any claim that the quota serves to benefit those who would otherwise be victims of racial discrimination in layoffs.

seems unanimous that at least some degree of congruence between the racial preference and prior discrimination must be established for a racial preference to be upheld on this basis. See *Bakke*, 438 U.S. at 299, 305, 307-310 (Opinion of Powell, J.); *id.* at 377 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.) (emphasizing that the program at issue "does not simply equate minority status with disadvantage. Rather, [the program] considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination"); *id.* at 378 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.) ("[I]t is clear from our cases that specific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief *where the probability of victimization is great*") (emphasis added); *Fullilove*, 448 U.S. at 471 (Opinion of Burger, C.J., joined by White and Powell, JJ.) (emphasizing that the program was tailored to apply to "only such minority individuals as are considered to be economically or racially disadvantaged"); *id.* at 511-516 (Powell, J., concurring); *id.* at 540-541 (Stevens, J., dissenting). Under any formulation, the absence of any nexus between the racial preference and prior discrimination would require invalidation of the preference. That is the situation here.

An assertion of "prior discrimination" is not a license to permit racial preferences in any form as long as they benefit individuals who are members of the victimized race. Unless a racial preference is designed to benefit victims of the discrimination being addressed, it is simply a means to benefit one person who has not been victimized at the expense of another person who has committed no wrong, solely on the basis of race. Such a result has all the elements of the race discrimination that is at the core of what the Fourteenth Amendment prohibits.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be dismissed as improvidently granted. If the writ is not dismissed, the judgment of the Sixth Circuit should be reversed and the case remanded with instructions to enter judgment for petitioners.

Respectfully submitted,

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