No. 84-1340 (12)

In The
Supreme Court of the United States
October Term, 1985

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

v. Petitioners,

JACKSON BOARD OF EDUCATION, JACKSON, MICHIGAN; RICHARD SUNBROOK, President; DON PENSON; ROBERT MOLES; MELVIN HARRIS; CECILIA FIERY; SADIE BARHAM; and ROBERT F. COLE, Respondents.

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

BRIEF OF AMICUS CURIAE MICHIGAN CIVIL RIGHTS COMMISSION, MICHIGAN DEPARTMENT OF CIVIL RIGHTS

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INTEREST OF AMICUS

On behalf of the Michigan Civil Rights Commission and the Michigan Department of Civil Rights, the Michigan Attorney General respectfully offers this brief amicus curiae for Supreme Court consideration in accordance with Supreme Court Rule No. 36. The Attorney General's position in this brief amicus curiae is aligned with Respondent's interests proposed in this case.

These state agencies advance a unique perspective by emphasizing the obligation of a public employer to participate

in affirmative action plans, and by tracing the state of Michigan's longstanding commitment to equal employment opportunity. Additionally, these agencies seek to convey the practical and theoretical importance of upholding the opinion of the Sixth Circuit Court of Appeals in view of the direct impact that decision has on the state of Michigan's public employment contracts and other affirmative action efforts.

OPINION BELOW

The United States District Court opinion is reported at 546 F. Supp. 1195 (E.D. Mich. 1982) and the United States Sixth Circuit Court of Appeals decision is found at 746 F.2d 1152 (6th Cir. 1984).

STATEMENT OF THE CASE

This case presents the issue whether public employers can constitutionally enforce affirmative action exceptions to strict seniority-based layoffs that have been collectively bargained for and approved by union employees. This case also challenges the validity of affirmative action programs designed to maintain minority participation in the face of predictable reductions in the number of minority employees.

The provisions at issue appear in the negotiated employment contracts between the Board of Education of the City of Jackson, Michigan, and the Jackson Education Association. In accordance with a 1968 settlement of an education desegregation complaint filed with the Michigan Civil Rights Commission, the Jackson Board of Education agreed to remedy minority underrepresentation by instituting affirmative action policies in the recruitment, hire and promotion of its faculty. The out-of-line seniority layoff provisions were introduced to

comply with the Commission's order by prohibiting a greater percentage of minority personnel from layoff than the percentage of minorities currently employed. *Wygant*, 746 F.2d at 1158.

The courts below recognized the validity of the Jackson Board of Education's conclusion that substantial underrepresentation of minority faculty plagued their teaching staff and impeded their school desegregation program. *Wygant*, 746 F.2d at 1156. The courts below dismissed Petitioner's challenges. *Id.* at 1161.

SUMMARY OF THE ARGUMENT

The final resolution of the issues raised in *Wygant*, 746 F.2d at 1152, is certain to bring into question the validity of public employment contracts containing race-conscious layoff provisions and of other affirmative action efforts by the state of Michigan.

The position *amici* advocate in this brief is based on the state of Michigan's demonstrated commitment to equal employment opportunity. The need for and development of the State's affirmative action policies illuminate the State's responsibility as a public employer to eliminate discrimination against minorities. Employment contract terms providing for affirmative action exceptions to strict seniority based layoffs are necessary to make equal employment opportunity a reality in Michigan.

There are certain parallels between the state of Michigan's response to equal employment needs and the Jackson School Board's decision to voluntarily institute affirmative action policies. Both of these employers utilize a last-in; first-out seniority system. Both have engaged in voluntary efforts to

achieve equal employment opportunity through collectively bargained agreements permitting out-of-line seniority layoffs.

The Michigan Civil Rights Commission and Michigan Department of Civil Rights believe that the State's affirmative action policies are a positive manifestation of Michigan's obligations to advance the goals of equal employment opportunity. Thus, it is imperative that the Sixth Circuit Court of Appeals' decision in *Wygant* be upheld so that the state of Michigan can continue its efforts to promote minority participation at all levels of public employment in compliance with applicable statutory and constitutional law.

ARGUMENT

INTRODUCTION

The purpose of this amicus brief is to demonstrate the state of Michigan's interest in the continued validity of out-of-line seniority layoffs. Such provisions have been included in the state's collective bargaining agreements so that when a layoff would have caused a disparate impact, an underutilization, or an increase in an existing underutilization of a protected class, minority participation is conditionally preserved. These contract terms along with other affirmative action efforts have been effective in maintaining increased minority paprticipation in state employment. It is essential that affirmative action exceptions to strict seniority layoffs remain available options to management and labor when a reduction in force will predictably have a disparate impact.

During times of economic prosperity, employers have the opportunity to recruit, hire and promote minorities through affirmative action programs. By and large, such opportunities have significantly increased minority involvement in state

classified service. However, in times of economic d[illegible] the advancements made toward equal employment opp[illegible] ity are particularly vulnerable to the impact of a red[illegible] force where the seniority system requires last-in, [illegible] layoffs.

I. THE STATE OF MICHIGAN'S EFFORTS TO ACHIEVE EQUAL OPPORTUNITY

The state of Michigan has historically been in the f[illegible] of legislative and judicial policy guaranteeing its [illegible] equality of opportunity. As early as 1835, the Mi[illegible] stitution emphasized the concept of equality, stating that "[illegible] man or set of men are entitled to exclusive or separate [illegible] ileges." *Michigan Const. of 1835, art. 1, § 3.*

Racial segregation in public education was prohib[illegible] 1867 by the Michigan legislature. *1867 Mich. Pub. Acts* [illegible] In 1869, a statute was enacted which forbade licensed [illegible] insurance companies from considering race in the issuance [illegible] insurance policies. *1869 Mich. Pub. Acts 77.* Racial discrimination in public places of accommodation, amusement or recreation became a criminal offense in 1885. Also in that year, race discrimination in jury selection and qualification was prohibited. *1885 Mich. Pub. Acts 130.*

The 1908 Michigan Constitution augmented equal employment opportunity by providing that ". . . no removal [illegible] racial or religious considerations. "*Mich. Const. of 1908,* [illegible] § 22. The Michigan Constitution of 1963 presently in effect further advances civil rights guarantees, art. 1 § 2, and creates a constitutional Civil Rights Commission, *art. 5, § 29*, the only state civil rights agency with a foundation

Even before the creation of the Civil Rights Commission as a a constitutional body, the state of Michigan established the Fair Employment Practices Commission, *Mich. Comp. Laws 423.301 et seq. (1948)* (repealed 1976). This Commission was authorized to enforce employment discrimination prohibitions against both private and governmental employees. The Elliott-Larsen Civil Rights Act, which replaced the 1955 legislation continued these prohibitions against employment discrimination. *Mich. Comp. Laws §§ 37.2201, 37.2202 (1976).*

Michigan courts, like the Michigan legislature, have demonstrated sensitivity to civil rights issues. For example, in *Bolden v. Grand Rapids Operating Corp,* 239 Mich. 318, 214 N.W. 241 (1927), the state Supreme Court held that the Act prohibiting race discrimination in places of public accommodation was a constitutional exercise of the police power.

Additionally, a statute barring lower wages for women than for men similarly employed was declared constitutional by the Michigan Supreme Court, *General Motors Corp. v. Read,* 294 Mich. 558, 293 N.W. 751 (1940).

Recent Michigan decisions considering the validity of affirmative action plans have been supportive. For example, employees of the Michigan Department of Corrections challenged the state's use of affirmative action procedures for transfer and promotion which gave special consideration to candidates on the basis of race or sex. The Michigan Court of Appeals held that race and sex "may be factors used by an employer when the plan is designed in an effort to correct prior discriminatory practices and a present selection method may not be free from discriminatory efforts." *Local 526-M, Michigan Corrections Org. v. Civil Service Comm'n,* 101 Mich. App. 546, 555, 313 N.W.2d 143, 148 (1981).

The Sixth Circuit Court of Appeals found, after consideration of a race-conscious promotion plan employed by the Detroit Police Department, that substantial underrepresentation of minorities in the department justified the use of distinctions based on race. *Detroit Police Officers Ass'n v. Young,* 446 F. Supp. 979 (E.D. Mich. 1978), *rev'd.* 608 F.2d 671 (6th. Cir. 1979), *cert. denied,* 452 U.S. 938 (1981); *Baker v. City of Detroit,* 504 F. Supp. 841 (E.D. Mich. 1980), *app. sub. nom., Bratton v. City of Detroit,* 704 F.2d 878 (6th. Cir. 1983), *cert. denied,* 104 S. Ct. 703 (1984).

The Sixth Circuit's endorsement of affirmative action plans voluntarily instituted by employers is based on the reasonableness of the plan determined by certain factors: whether the plan is substantially related to the objective desired; whether alternatives are available; whether it results in the imposition of a constitutionally forbidden stigma on those disadvantaged by it; and whether those individuals adversely affected by the plan have interests that have been unnecessarily thwarted. *Young,* 608 F.2d at 694, 696; *Bratton,* 704 F.2d at 889-892. These standards were used to evaluate the affirmative actior plan in the courts below in *Wygant,* and since the plan withstood scrutiny, it was held valid.

While there is no question that judicial decisions have favorably advanced the state's equal employment objectives, executive action is essential to the creation and enforcement of affirmative action policies. Through the initiative of the Governor's office, the state of Michigan has made great strides toward achieving equal employment opportunity in all of the departments of state government. Various strategies have been adopted by the state. In 1972, a Civil Service rule change was authorized to broaden lists of eligible applicants so that qualified racial and ethnic minorities and women who had passed the civil service examination but were not among the top three candidates could be included in the competition for

appointment.[1] In 1973, the selection rule which had previously limited choice to the top three candidates was changed to a band width of closely related scores to provide a wider range of choice and include qualified minorities and women in the selection pool. At the same time, a policy was adopted which provided additional examination opportunities in classifications where minorities and women were underrepresented and whch encouraged additional recruiting efforts where minorities and women were not represented on the eligibility rosters. Studies of selection procedures and their effects have been implemented to asssess possible disparate impact.

These endeavors to achieve equal employment opportunity arose out of the findings of a 1971 joint study conducted by the Michigan Civil Rights Commission and Michigan Civil Service Commission at the request of then Governor Milliken, which exposed pervasive underrepresentation of minorities in state departments. "White males were represented in over 90% of all classes in state service and exclusively occupied nearly 60% of all classes. Of these classes which contained only white males, some 850 were at the 11 level or above." *Mich. Civil*

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[1]

The "Rule of Three" selection procedure, authorized by the Civil Service Commission, required that, for each vacant position, the Civil Service Commission certify to the employing agency the top three names on the eligible roster; the employing agency was required to make its selection from among those three names only. *Mich. Civil Service Comm'n Rules art. 26 B-3 (1955).* The band width selection procedure replaces the 'Rule of Three' and requires that for each vacant position, the Civil Service Commission will certify to the employing agency the list of those persons who have scored, for example, between 96 and 100 on an examination, and when that listing is exhausted, the Commission will then certify the names of persons scoring between 91 and 95. *Mich. Civil Service Comm'n Rules, 3-4.4 (1983).*

In all instances, those persons certified have been examined and are deemed qualified, and the Civil Service Commission retains its standards of merit, efficiency and fitness.

Rights Comm'n, Review of Mich. State Classified Service at 2 (1971).

The first Executive Directive was issued in 1971 to address this substantial racial underrepresentation. Under this Directive (1971-8), the Department of Civil Service was charged with implementing recommendations to attain the goal of reasonable representation in all state classified employment. An affirmative action plan for each department was then ordered by Civil Service. Subsequently, four additional Executive Directives and Orders have reaffirmed Michigan's commitment to non-discrimination in state employment. In Executive Directive 1975-3, the Michigan Equal Employment Opportunity Council (MEEOC) was created to oversee the state's equal opportunity program and to evaluate the affirmative action plans of each department.[2] Progress toward eliminating discrimination in the state classified civil service is evidenced by the increasing representation of minorities: In 1971, 17 of the 21 departments in state government had significant underrepresentation of minorities; by 1979, 11 of these 21 departments met or nearly met the minority representation reflected in the state's population.

Despite this progress, the next Executive Directive identifies ". . .areas in which more must be done if we are to achieve our goal of providing a state personnel system which is truly open to all people. These . . .directives are . . .intended to stimulate additional actions." *Exec. Dir. 1979-2.* The 1979 Directive focuses on requiring pre-appointment review of all upper level positions to encourage minority involvement in all ranks of state employment.

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[2]

One Department, the Michigan State Police, has been under a federal Court order relative to minority hiring since 1977, *United States* v *Michigan,* No. G 75-472-CA 5 (W.D. Mich. Sept. 29, 1977).

Since it was apparent in 1979 that layoffs were imminent due to budgetary reductions, the MEEOC liasion staff prepared a report on the potential impact of personnel reductions on minorities. *Mich. Equal Employment Opportunity Council, 1980 Report.* As a result of this report, MEEOC's guidelines for departmental affirmative action plans were updated to include layoff protection for minority group members. With union approval, out-of-line seniority layoff provisions were adopted in the 1980 state employment contracts. The Civil Service Commission also acted to reduce the projected disparate impact of layoffs by amending Section 1 of its rules to include an affirmative action exception to seniority layoffs. *Rules of the Mich. Civil Service Comm'n, § 2-19.3d (1983).*

The state has continued its efforts to achieve equal employment opportunity for all. Executive Order 1983-4 established the Michigan Equal Employment and Business Opportunity Council (MEEBOC) with the Lieutenant Governor as chair. The Council was ordered to issue guidelines for the development of affirmative action programs for each state department, agency and Commission.[3] Executive Order

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[3]

One recent example illustrates the state's commitment to equal employment opportunity and the difficulties in achieving a more representative work force. In 1984, the Legislature enacted a onetime only, voluntary, early retirement scheme. *Mich. Comp. Laws §§ 18.1411, 38.19(a) (1984).* These statutes provided for voluntary, early retirement incentives for persons who had a certain length of service combined with age requirements, and also specified that state departments could only fill 25% of the vacancies created by such retirements. All vacancies where replacements were authorized were required to be filled ". . .in accordance with affirmative action goals and objectives reflected in MEEBOC approved affirmative action guidelines." *Mich. Comp. Laws § 18.1411(6) (1984)* MEEBOC was directed to review all proposed replacements to assure that statutory requirements were met.

Initially, MEEBOC planned to review only the replacements, but because many of the vacated positions were at higher levels and replacements were made by promotion, a chain of promotions and hires resulted,

1985-2 continued the authority of MEEBOC and the Lieutenant Governor. It further required review by both the Civil Rights Commission and the Civil Service Commission of a state overall affirmative action plan.

II. MICHIGAN'S OBLIGATIONS TO PROMOTE AFFIRMATIVE ACTION IN THE STATE CLASSIFIED CIVIL SERVICE.

As a public employer, the state of Michigan has a clear obligation to insure that minorities are fairly considered in hires and promotions. In fact, this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), validated a private employer's decision to voluntarily implement a collectively bargained affirmative action plan. Subsequent lower court decisions, interpreting and applying *Weber*, have extended to the public sector the option of voluntary affirmative action.[4]

The Jackson Board of Education has the same responsibilities as the state of Michigan for providing equal employment opportunity. Both of these public employers made progress in meeting their obligations by adopting affirmative action plans and by bargaining with their employees to include race-conscious layoff provisions in their employment contracts.

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making review of only one position inadequate. Therefore, MEEBOC undertook review of all hires and promotions for a specified time period. Departments which proposed appointments unrepresentative of the racial and ethnic minorities, women, and handicappers available in the state were required to describe their efforts to achieve a representative pool of candidates, and to demonstrate that full consideration was given to all qualified candidates. The Early Retirement Monitoring Report for the time period from June 3, 1984, through May 22, 1985, shows that a total of 7,713 hires and promotions were made, and 5,463 or 70.8% of those appointments went to white employees.

[4]

See, e.g., *Bratton*, 704 F.2d at 884 n. 18; *La Rivere v. Equal Employment Opportunity Comm'n*, 682 F.2d 1275, 1278-79 (9th Cir. 1982).

In state of Michigan employment, all collective bargaining organizations have agreed to deviate from last-in, first-out seniority layoffs in an attempt to retain recently-hired racial and ethnic minorities. The Michigan State Employees Association (MSEA) represents approximately 26,000 state workers and has included out-of-line layoff provisions in employment contracts with the state since 1980. The present contract provides that, "the employer may lay off and recall out-of-line seniority because of: . . .(e) maintaining an affirmative action program approved by MEEOC or its successors. . ." *Collective Bargaining Agreement, state of Mich. and MSEA, art. 12 § D-6(e) (1983-84).* This language is replicated in the employment contract between the State and the American Federation of State, County and Municipal Employees (AFSCME), which represents 6,900 employees. *Collective Bargaining Agreement, state of Mich. and AFSCME art. XIII § C-3(e) (1983-86).*

The remaining union employees (about 9,100) have also agreed to similar out-of-line layoff provisions in their contracts with the state of Michigan.[5] In particular, the Michigan State Police Troopers' employment contract 1984-86, contains an affirmative action exception to seniority layoffs, "to continue or initiate a Department of Civil Service-approved selective certification, or to administer an affirmative action program in accordance with Executuive Order 1983-4, or its successor, and pursuant to Civil Service Commission approved guidelines and procedures." *Collective Bargaining Agreement, state of Mich. and Mich. State Police Troopers Ass'n, art. 12 § 6-b(1) (1984-86).* In sum, all state employees, either through their collective bargaining agreements or through Civil Service Commission Rule § 2-19.3d (1983), are obligated to follow out-of-

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[5]

These unions are Local 31-M Service Employees International Union (SEIU); Corrections Organization (MCO); Michigan Professional Employees Association; and Michigan State Police Troopers Association.

line layoff provisions. It is apparent that the state and its employees have acknowledged the vital importance of affirmative action goals and attempted to realize these goals by affirmative action exceptions to seniority-based layoffs.

Further evidence of the state's commitment to fulfill its obligations as a public employer to provide equal employment opportunity include MEEBOC's 1985 proposal for an overall affirmative action plan for all state employment, and the Civil Service Commission's decision in August, 1984 to institute an affirmative action training program for all managers in state government.

III. THE LAYOFF PROVISIONS IN THE JACKSON BOARD OF EDUCATION-JACKSON EDUCATION ASSOCIATION'S COLLECTIVE BARGAINING AGREEMENT ARE CONSISTENT WITH ITS SETTLEMENT AGREEMENT WITH THE MICHIGAN CIVIL RIGHTS COMMISSION.

The Michigan Civil Rights Commission has a unique interest in the controversy surrounding the Jackson Board of Education's use of affirmative action exceptions to seniority layoffs. The Michigan Constitution assigns to the Civil Rights Commission jurisdiction over complaints of unlawful discrimination. The Commission is given broad power both to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by the constitution, and to secure the equal protection of such civil rights without such discrimination. *Mich. Const. art. 5, § 29.* In accordance with the latter responsibility, the Commission together with the state Board of Education issued a Joint Policy Statement in 1966 announcing that:

> The State Board of Education and the Civil Rights Commission emphasize also the importance of democratic personnel practices in achieving integration. This requires making affirmative efforts to attract members of minority groups. Staff integration is a necessary objective to be considered by administrators in recruiting, assigning, and promoting personnel. Fair employment practices are not only required by law, they are educationally sound.
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> Michigan Civil Rights Commission and State Board of Education, Joint Policy Statement (April, 1966)

This policy expression highlights the importance of insuring equal employment opportunity within the context of establishing a program for equality of educational opportunity.

The Jackson Branch NAACP filed a Complaint in 1968 with the Michigan Civil Rights Commission alleging discriminatory practices by the Jackson Board of Education, *Mich. Civil Rights Comm'n, Complaint No. 6485*, filed by Jackson Branch NAACP (1968) (Att. A). Pursuant to its constitutuional obligations, the Commission investigated the allegations and sought to remedy the apparent violations by negotiating an order of adjustment with the Jackson Board. In this settlement the Board agreed "to take affirmative steps to recruit, hire and promote minority group teachers and counselors as positions become available and pursue other programs now in progress to provide equality of opportunity." *Mich. Civil Rights Comm'n, Notice of Disposition, Complaint No. 6485, filed by Jackson Branch NAACP, II § 5 at 3 (1968)* (Att. B.). Amici submit that the out-of-line seniority layoff provisions in the Jackson Board of Education's employment contracts with its teachers since 1972 are consistent with overall desegregation efforts undertaken in compliance with the Commission's order of adjustment.

IV. THE EFFORTS OF THE JACKSON BOARD OF EDUCATION TO INSURE EQUAL OPPORTUNITY.

In its capacity as a public employer, the Jackson School Board has a legal responsibility to insure that minorities are not discriminatorily disqualified from employment. The instant case focuses particularly on the layoff aspect of employment.

Since layoffs have been inevitable in Michigan's educational community due to the economy and declining enrollment, and since strict seniority-based layoffs would have a disparate impact on minorities, the Jackson School Board met its duty not to discriminate against minorities when it agreed with the teachers' union not to lay off a greater percentage of black teachers than their representation in the teacher work force.

The contractual provision in effect since 1972 of the collective bargaining agreement between the Jackson Education Association and the Jackson Board of Education provides:

> In the event it becomes necessary to reduce the number of teachers through layoffs from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnl laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance.
>
> Professional Negotiations Agreement, Jackson Board of Education and Jackson Education Association, art. XII, § B-1 (1972-1973).

The terms of this layoff program protect increases in minority hiring from dissolution through the layoff procedure. If a strict seniority-based layoff procedure had been followed by the Jackson Board of Education, minority teachers would have been virtually eliminated. The out-of-line layoff provision more evenly distributes the burden of a personnel reduction on all teachers. The School Board's attempts to remedy chronic underrepresentation of minorities among its personnel comports with its responsibilities as a public employer.

Like the state of Michigan's affirmative action efforts, the Jackson Board of Education's affirmative action plan is voluntary, and not in response to any judicial finding of past discrimination. In *University of California Regents v. Bakke*, 438 U.S. 265, 364 (1978) (Brennan, J., dissenting in part), Justice Brennan's opinion in which Justices Marshall, White and Blackmun concur, states that:

> Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race conscious remedial action would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of the law. And, our society and jurisprudence have always stressed the value of voluntary effort to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its past effects rather than a prerequisite to action.
>
> 438 U.S. at 364.

Another parallel between the state's affirmative action efforts and those of the Jackson Board of Education is that in each case out-of-line layoff provisions result from collective bargaining. Both state employees and Jackson teachers recognize the benefits of having an integrated work environment and have therefore agreed to out-of-line layoff terms in their

employment contracts. As described above, (p 12) represented state employees support the adoption of employment contracts containing affirmative action language and have renewed such contracts since 1980. The Jackson Education Association first voted to include the out-of-line layoff language in its 1972 contract. *Professional Negotiations Agreement, Jackson Bd. of Ed. and Jackson Ed. Ass'n, art. XII, § B-1 (1972-73).* Affirmative action goals are also set forth in that agreement, including the Association's acknowledgment of gross underrepresentation of minority personnal in the Jackson School District. *Id. art. VII.* Both of these provisions, arts. VII and XII, have appeared in the Jackson teachers' contract since 1972, and are included in the contract presently in effect. *Professional Negotiations Agreement, Jackson Bd. of Ed. and Jackson Ed. Ass'n. art. IX § D-3, 4 (1983-85).*

V. POLICY CONSIDERATIONS SUPPORTING PUBLIC EMPLOYERS' USE OF OUT-OF-LINE SENIORITY LAYOFF PROVISIONS.

There are strong policy considerations compelling public employers to make race-conscious employment decisions absent a prior judicial finding of intentional discrimination. Michigan has a fundamental interest in maintaining a representative work force that adequately reflects the diversity of the citizens it serves. Moreover, the state is responsible for the enforcement of laws prohibiting discrimination in the public and private sectors. Since state law requires both sectors to maintain nondiscriminatory work environments, the state as an employer must be bound by the same standard. Because it is a major employer with approximately 55,000 employees, the state's personnel decisions have repercussions on the employment environment throughout Michigan.

Providing equal educational opportunity is also an area of substantial state concern. A racially segregated school system

deprives minority children of benefits they would receive in a racially integrated school system, *Brown v. Board of Education*, 347 U.S. 483, 493-494 n.11 (1953). This Court has recognized a state's obligation to make race-conscious efforts to compensate for the continuing impact of segregation, *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15 (1971).

The state also has a significant interest in ameliorating the disabling effects of identified discrimination. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980). An employer's voluntary decision to undertake affirmative action programs to erase manifestracial imbalance in employment does not violate Title VII, 452 U.S.C. 2000e (1964). *Weber*, 443 U.S. at 207; *Bratton*, 704 F.2d at 884.

VI. THE DECISION IN WYGANT MUST BE AFFIRMED TO ALLOW PUBLIC EMPLOYERS TO CONTINUE TO PROVIDE EQUAL EMPLOYMENT OPPORTUNITY TO ALL.

A finding for petitioner will have far-reaching effects because it will seriously jeopardize the state of Michigan's progress toward achieving equal opportunity through affirmative action. The contracts between the State and its employees, like contract at issue, contain affirmative action exceptions to last-in, first-out seniority layoffs. In both cases, the inclusion of this language in the contracts is the result of voluntary collective bargaining by union and management representatives. Out-of-line layoff provisions have advanced the goals of equal employment opportunity by insulating a percentage of minorities from the disproportionate impact of a strict seniority layoff. Minorities constitute a preponderance of last hired employees since their hiring results in part from recent compliance by employers with equal opportunity statutes. Attempts to increase the minority representation in any given

work force can be frustrated due to the necessity of layoffs in times of economic recession. Consequently, minority employees are especially vulnerable to strict seniority layoff procedures.

A finding by this Court that collectively bargained, out-of-line seniority layoff provisions are constitutionally permissible will allow public employers to continue affirmative action policies. A decision negating these layoff provisions may inhibit voluntary affirmative action efforts and seriously impede progress towarded segregation in the work force. If this Court disallows collectively bargained out-of-line seniority layoff, the objectives of federal and state employment discrimination statutes will be thwarted.

CONCLUSION

The state of Michigan's commitment to equal employment opportunity in the public sector has been steady and successful over time. Further efforts are necessary to ensure that all civil service employees are guaranteed equal employment opportunity at all levels of state employment. Continuing progress through affirmative action by the state of Michigan may be deterred by constitutional challenges if this Court reverses the Sixth Circuit Court of Appeals' decision in *Wygant*. In the long run, a decision that is adverse to Respondent in this case will cause severe disruption in the struggle to achieve equality of opportunity in employment for all.

In view of the similarity between Michigan's and the Jackson School Board's voluntary affirmative action efforts, and in

view of Michigan's longstanding commitment to equal employment opportunity, *amici* Michigan Civil Rights Commission and the Michigan Department of Civil Rights respectfully urge this Court to affirm the Sixth Circuit's decision.

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