No. 84-1340

Supreme Court, U.S.
FILED
AUG 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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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, RICHARD SURBROOK, President, DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

*Respondents.*

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

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## BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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## Consent of the Parties

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

## The Interest of the National Association for the Advancement of Colored People

The National Association for the Advancement of Colored People ("NAACP") is a New York non-profit membership corporation. Its principal aims and objectives may best be understood by reference to its Articles of Incorporation:

> . . . voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.
>
> To ascertain and publish all facts bearing upon these subjects and to take any lawful action thereon; together with any and all things which may lawfully be done by a membership corporation . . .

The NAACP has a long-standing history of participating in the United States Supreme Court, both as a party and as *amicus curiae,* in cases presenting constitutional and statutory claims of racial discrimination.

The NAACP is vitally concerned with the issues raised in this appeal. The resolution of these issues will have a direct bearing on whether municipalities, state governments, public boards of education, as the Jackson (Michigan) Board of Education, teachers, and teacher unions, as the Jackson Education Association, may voluntarily adopt

policies and programs which simultaneously seek to remedy the ill results of past and existing racial discrimination and segregation in public education and employment. What is involved here is whether a public school authority and a teachers' union may voluntarily include provisions in a collective bargaining agreement which promote equal educational and employment opportunities for black, white, and Hispanic students and teachers respectively within the principles of the United States Constitution and all laws promulgated thereto.

It is because of the overriding public consequences of the decision in this case that the NAACP is filing this brief as *amicus curiae*.

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### Statement of the Case

This case concerns the policies adopted by the Jackson Board of Education in response to its mandate to provide quality and equal educational opportunities for black, Hispanic and white students attending the public schools in Jackson, Michigan. For the past twelve years, the Jackson Board of Education has adhered to procedures designed to establish and maintain multi-ethnic representation on the

faculties and staffs for the respective institutions within its educational system. Only the constitutionality of the procedure followed in effecting teacher layoffs, incorporated in the collective bargaining agreement between the representative of the teachers, the Jackson Education Association, and the Jackson Board of Education is challenged herein.

Article XII of the Professional Negotiations Agreement ("Article XII"), in pertinent part, provides:

> In the event that it becomes necessary to reduce the number of teachers through layoff 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 personnel laid off than the current percentage of minority personnel employed at the time of layoff . . .

Following the announcement of the proposed layoffs for the 1982-83 school year, several white teachers brought this action in the United States District Court for the Eastern District of Michigan to enjoin the Jackson Board of Education from effectuating layoffs in accordance with the provisions of Article XII. The Complaint alleged that the layoff provision violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 1981, 1983 and 1985, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and the constitution and laws of the State of Michigan. *Wygant* v. *Jackson Board of Education*, 546 F. Supp. 1195 (E.D. Mich. 1982).

The action proceeded before the District Court on cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and on the Jackson Board of Education's motion to dismiss the Complaint for failure to state a claim upon which relief can be granted, under Rule 12(b)(6) of the Federal Rules of Civil Procedure. In deciding the motions, the District Court considered the facts set forth in the Complaint, Affidavits submitted by

the plaintiffs, briefs and oral arguments of counsel, which were not controverted by either party.

According to allegations set forth in the Complaint, the affirmative action clauses in the collective bargaining agreement were designed to remedy "only general societal discrimination," and not past employer discrimination. On their motion for summary judgment, plaintiffs argued that in the absence of judicial findings of past discrimination in the employment of teachers, the affirmative action clauses in the collective bargaining agreement lacked legitimacy of purpose and were therefore, violative of the Equal Protection Clause of the Fourteenth Amendment. The District Court, relying upon *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979) and *Detroit Police Officers Association* v. *Young,* 608 F.2d 671 (6th Cir. 1979), *cert. den.,* 452 U.S. 938 (1981) found that plaintiffs' contention, that only judicial findings of past employer discrimination would support the voluntary adoption of an affirmative action plan by a public employer and union, was without merit. 546 F. Supp. at 1200.

In the District Court's view, the Jackson Board of Education had satisfied the constitutional requirements set forth in *Weber* and *Young* by the adoption and implementation of Article XII. Evidence of substantial and chronic underrepresentation of minority group teachers was disclosed by the comparison of the percentage of minority group teachers (8.3-8.8 percent) with the percentage of minority group students (15.3 percent) existing at the time the plan was conceived. The District Court observed that while the inquiry as to whether there is minority underrepresentation in a job classification typically focuses on a comparison of the employer's labor force with the relevant labor market, such a comparison was not appropriate when the inquiry concerned the underrepresentation of minorities on a public school faculty. According to the District Court, "teaching is more than just a job. Teachers are role-models for their students." 546 F. Supp. at 1201.

The District Court concluded that Article XII was substantially related to the objective of remedying the substantial and chronic underrepresentation of minority teachers. Article XII was designed to prevent a reduction in the minority to majority faculty ratio and to prevent a loss in minority hiring gains achieved through the operation of the Jackson Board of Education's affirmative hiring policy. The constitutionality of Article XII was premised also on the District Court's findings that it did not (1) impose quotas, (2) require the retention of unqualified teachers, (3) unnecessarily trammel the interests of white teachers, (4) stigmatize white teachers affected by a layoff, or (5) oust white teachers in order to replace them with minorities. Because the provision was subject to the collective bargaining process, and thereby renegotiated periodically, it was necessarily a temporary measure. 546 F. Supp. at 1202.

The Title VII claims asserted in the Complaint were dismissed for lack of jurisdiction. The District Court's decision upholding the constitutionality of Article XII required the dismissal of plaintiffs' claims under 42 U.S.C. Sections 1981, 1983 and 1985.

In its affirmance of the District Court's decision granting summary judgment in favor of the Jackson Board of Education, the Sixth Circuit characterized the controversy as a "school case tangentially involving segregation in public schools—this concerning a formula for layoff of teachers of minority races during economically required reductions in staff." *Wygant* v. *Jackson Board of Education,* 746 F.2d 1152, 1134 (6th Cir. 1984). The evidence presented to the District Court and reviewed by the Sixth Circuit was sufficient to establish that the initial adoption of the affirmative action provisions in the collective bargaining agreement coincided with the examination and revision of educational policies to redress problems of racial segregation and isolation in the Jackson Public Schools.

In their Brief, Respondents have presented a detailed statement of the facts and circumstances preceding the adoption of the challenged provision and, accordingly, a restatement of those facts will not be presented herein. The District Court determined that the problem of minority underrepresentation on the faculty was not seriously considered by the Jackson Board of Education until 1969. One of the most significant influences on the timing of the deliberations over faculty desegregation and integration was not mentioned in the District Court's opinion. It is therefore important to note, that in April 1969, the Jackson Branch of the NAACP filed charges against the Jackson Board of Education with the Michigan Civil Rights Commission. The NAACP Complaint alleged, *inter alia,* that black students were being denied guaranteed rights to equal educational opportunity as a result of discriminatory acts in the areas of discipline, assignment and training, curriculum and counselling. Significantly, the NAACP alleged also that the low percentage of black professionals in the school district was indicative of the Jackson Board of Education's discriminatory hiring policies.

The Michigan Civil Rights Commission's investigation of the Complaint uncovered evidence which substantiated the NAACP's charges. Following the investigation, the Commission recommended, and the Jackson Board of Education agreed, that the following affirmative steps be taken to implement its policy of equal opportunity in all areas of education: (1) establish an in-service course on Intergroup Relations; (2) adopt a multi-cultural curriculum; (3) implement new discipline procedures; (4) recruit, hire and promote minority group teachers as positions become available; (5) review teacher assignments so that good balance is reflected in all schools from a standpoint of race, age, sex, background and experience; and (6) discontinue its practice of "tracking" in certain subjects.

Petitioners and various *amici curiae* insist that only judicial or administrative findings that an employer pre-

viously engaged in racially discriminatory employment practices, can justify the use of race in employment decisions. Further, it is argued that considerations of race can never override considerations of seniority in layoff decisions, where it would result in the retention of a less senior minority who has not been judicially determined to be an actual victim of the employer's past discrimination. In the absence of such findings, they argue that the courts below erred as a matter of law, in upholding the constitutionality of race-conscious procedures followed by the Jackson Board of Education in effecting teacher layoffs.

It is clear from the Statement of the Case presented by the Respondents that the arguments advanced by the Petitioners distort the history of racial segregation in the Jackson Public Schools. More importantly, Petitioners' contentions ignore the permissible objectives of the educational policy pursued by the Jackson Board of Education and misinterpret this Court's decisions which authorize, if not encourage, the means adopted by the Board to attain its lawful goals.

## Summary of Argument

The Equal Protection Clause of the Fourteenth Amendment permits a governmental body, in furtherance of legitimate objectives, to make employment decisions based partly on considerations of race, where, as in the case before the Court, race is not the sole determinant. Given the history of segregation in the Jackson Public Schools, and the constitutional obligation to voluntarily take the necessary steps to establish a school system free of racial segregation, the remedial purpose of the provisions in the collective bargaining agreement relating to the creation and maintenance of multi-ethnic representation on the faculty cannot be disputed. Further, the broad discretion accorded to local school authorities to formulate educational policy allows race and ethnicity to be considered along with a teacher's

professional experience, expertise and seniority in employment decisions, including layoffs of teachers for reasons of economy. No violation of the Fourteenth Amendment arises from policies and practices designed to provide equal educational and employment opportunities for black, Hispanic and white students and teachers in an academic setting established and maintained to reflect the multi-ethnic diversity of this society.

## ARGUMENT

### I.

### A School Board May Voluntarily Adopt and Implement Policies to Establish and Maintain a Completely Integrated School System.

#### A. *A School Board May Proceed With the Implementation of a Faculty-Integration Plan Without Judicial Findings of Past Discrimination Against Minority Students and Minority Teachers.*

Prior to the initial adoption of Article XII, the Jackson Board of Education operated a school system which denied black students their constitutional rights to equal educational opportunities. While no court was asked to make such a finding, the Jackson Board of Education, the Michigan Civil Rights Commission, the NAACP, the Ad Hoc Committee of teachers and administrators and the Citizens' School Advisory Committee accepted the reality of a racially segregated Jackson public school system. Once the problem of segregated student bodies was addressed by these entities, it became apparent that the segregationist policies of the Jackson Board of Education extended also to the employment and assignment of teachers within the district.

In the 1970-71 school year, there were no black teachers in 13 of Jackson's 22 elementary schools. In each of these schools, the percentage of white students ranged from 64 percent to 100 percent. Not surprisingly, 8 of the 16 black

teachers in elementary education were assigned to two elementary schools. The percentages of black students in these two schools were 86 percent and 64 percent respectively.[1] The practice of assigning black students and administrators only to schools wherein black students comprised the majority, is clearly symptomatic of a system-wide policy of segregation.

Primary responsibility for disestablishing the system of segregated schools rests with local school authorities. *United States* v. *Montgomery County Board of Education,* 395 U.S. 225, 226 (1969). In *McDaniel* v. *Barrisi,* 402 U.S. 39 (1971), the Court acknowledged the competence of school boards to assess whether its schools were unlawfully segregated and their constitutional obligation to take voluntary affirmative steps to convert to a unitary system. Further, in *Montgomery County, supra* at 232, the court recognized the essentiality of faculty desegregation to the establishment of a public school system free from racial discrimination. The goal to be attained is a ratio of minority to non-minority faculty members in each school that approximates the ratio of minority to non-minority faculty members in the entire school district. Id.

The Jackson Board of Education's desegregation plan contemplated that no school in the district would be identifiable by the racial composition of its teaching staff and that each school would have a multi-ethnic faculty. It immediately realized that a reassignment of the black teachers, then employed, would still leave the faculties of the majority of the schools without the desired multi-ethnic representation. The affirmative action plan for hiring additional minority teachers, conceived and implemented by the Jackson Board of Education, is the appropriate remedy for a problem not uncommon to school desegregation cases.

In *United States* v. *Texas Education Agency,* 467 F.2d 848, 873 (5th Cir. 1972), the Fifth Circuit required the

[1] Department of Health, Education and Welfare, Office of Civil Rights, Elementary and Secondary Public School Survey, Fall 1970.

school district to take similar affirmative action to increase the number of Mexican-American teachers in order to fulfill the mandate of *Montgomery County*. It is significant that the Fifth Circuit, as did the courts below in this case, compared the percentages of Mexican-American teachers to the percentage of Mexican-American students in the school district, in deciding that affirmative action was required to achieve an equitable ratio of minority to non-minority faculty members. In *Fort Bend Independent School District* v. *City of Stafford,* 651 F.2d 1133 (5th Cir. 1981), the Fifth Circuit clarified its holding in *Texas Education Agency* regarding faculty integration, when it considered the question of whether a school district has effectively carried out the mandate of *Brown* v. *Board of Education,* 349 U.S. 294 (1955), and thereby attained unitary status. According to the Fifth Circuit in *Fort Bend, supra* at 1137, a showing of a good faith effort to find sufficient qualified minority teachers to achieve an equitable ratio will rebut any inference of continuing discrimination against minority school children. The establishment and maintenance of a faculty with a percentage of minority teachers equal to that of the percentage of minority students in the school district, however, was held not to be a prerequisite to the attainment of unitary status. The Sixth Circuit, in *Oliver* v. *Kalamazo Board of Education,* 706 F.2d 757 (6th Cir. 1983), adopted the Fifth Circuit's interpretation of the goal to be attained by faculty-integration plans.

The courts in *Oliver* and *Fort Bend* did not hold, as Petitioners' contend, that the racial composition of the student population may never be considered when the inquiry is whether there is adequate minority representation on a teaching staff. Rather, *Oliver* and *Fort Bend* instruct that the disparity between the percentages of minority students and minority teachers does not justify the imposition of racial quotas under an affirmative plan, to achieve a percentage of minority teachers that matches the percentage of minority students in a school district. The Jackson Board

of Education's affirmative action plan does not, by design or effect, contravene the principles set forth in *Oliver* and *Fort Bend*.

When the layoff provision in the collective bargaining agreement is viewed, as it must be, as but one component of a voluntary plan to desegregate and integrate the Jackson public school system, the legitimacy of the governmental purposes served thereby, cannot be disputed. Sound and enlightened educational policy and the obligation to correct the effects of practices which have limited the educational and employment opportunities of minority students and teachers, provide the justification for faculty-integration plans contained in the collective bargaining agreement.

The plenary power of school boards to formulate and implement educational policy which prescribes the complete integration of the school system, was recognized by the Court in *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1, 16 (1971). The federal courts have "consistently supported a school system's affirmative duty and discretion to take steps to remedy racial imbalance, a view that perforce applies to a policy of faculty integration." *Kromnick* v. *School District of Philadelphia*, 739 F.2d 894, 907 (3rd Cir. 1984), *cert. den.*, 53 U.S.L.W. 3483 (Jan. 8, 1985). Thus, the argument that voluntarily adopted race-conscious faculty integration plans violate the Equal Protection Clause of the Fourteenth Amendment has been considered and rejected by the courts in the Second, Third and Ninth Circuits. See *Porcelli* v. *Titus*, 431 F.2d 1257 (3rd Cir. 1970), *cert. den.*, 402 U.S. 944 (1971), *Zaslawsky* v. *Bd. of Ed. of Los Angeles*, 610 F.2d 661 (9th Cir. 1979), *Caulfield* v. *Board of Education of the City of New York*, 632 F.2d 999 (2d Cir. 1980) and *Kromnick* v. *School District of Philadelphia, supra.* The race-conscious teacher layoff provision here is substantially similar, in both its purpose and operative effects, to the faculty integration plans before the courts in *Porcelli, Zaslawsky, Caufield* and *Kromnick*. Adherence to the anal-

ysis and reasoning of the Third Circuit in *Kromnick,* compels a similar conclusion as to the constitutionality of the teacher layoff plan before this Court.

In *Kromnick,* the Third Circuit considered whether the Fourteenth Amendment and Title VII were violated by the implementation of a faculty-integration plan requiring the mandatory reassignment of teachers to maintain a ratio of black and white teachers in each school, reflective of the racial composition of the overall teaching staff. Teacher transfers under the reassignment plan adopted by the Philadelphia school board, were made on the basis of seniority, with the least senior teachers being reassigned to fill vacancies within the district. If adherence to strict seniority would result in racial imbalance, then teachers of the over-represented race were to be reassigned, notwithstanding their seniority. Decisions on requests for voluntary transfers were also conditioned upon the maintenance of racial balance. As in the case before the Court, the faculty reassignment plan was incorporated in the collective bargaining agreement between the school district and the teachers' union.

The appellees in *Kromnick,* argued, as do the Petitioners, that the mandatory reassignment plan served no legitimate purpose because it was designed to preserve the status quo and not to remedy past discrimination. But the Third Circuit, 739 F.2d at 905, concluded that the plan to integrate faculties was remedial and a necessary part of the desegregation effort as the Philadelphia school district was still obligated to eliminate racially identifiable schools. Judge Sloviter observed:

> . . . [B]ecause our society has not yet achieved full integration among its component races, in important areas of public life, including housing, employment, and public education, a reasonable plan designed to foster racial balance of public school teachers must be considered as directed toward remedying still existent

racism, even without an applicable court order or pending administrative proceeding. Id.

The court in *Kromnick* relied, in part, upon the wide discretion granted to school boards to formulate educational policies, in deciding that the school board had the authority to implement a race-conscious teacher assignment policy to further educational goals. Additional support for concluding that local and state governmental authorities possessed the competence to adopt race-conscious policies was found in *Detroit Police Officers Assn.* v. *Young, supra,* wherein the Sixth Circuit determined that the Board of Police Commissioners had the authority to voluntarily adopt an affirmative action plan.

The Third Circuit's analysis under the Fourteenth Amendment considered whether the plan adopted by the Philadelphia Board was narrowly tailored to achieve its objective, so as to limit the burden suffered by others. The inquiry, thus, focused on whether the operation of the race-conscious teacher assignment plan gave rise to the evils associated with unconstitutional racial classifications. The court determined that because the plan required the transfer of both black teachers and white teachers, it could not be deemed "racially preferential." No evidence was presented to indicate that the plan: (1) disproportionately impacted upon one race; (2) stigmatized or stereotyped racial groups or (3) imposed racial quotas. As the plan was subject to periodic renegotiation through the collective bargaining process, it was deemed "temporary." The Court, therefore, concluded that the race-conscious teacher reassignment plan was constitutional. 739 F.2d at 907-908.

Neither does the race-conscious layoff provision in the collective bargaining agreement before this Court, operate as an unconstitutional racial classification. Layoffs under the plan affect both white teachers and black teachers and in a proportionate manner. No stigma attaches to any

teacher because of economically required layoffs. The plan is flexible in its numerical requirements because the percentages are based on the racial composition of the faculty which changes from year to year. Because it is subject to periodic renegotiation under the collective bargaining process, the plan must be viewed as temporary. Finally, it violates no contractual or statutory rights of the Jackson school teachers.

That the Jackson Board of Education has taken steps to insure that its educational policy, to establish and maintain multi-ethnic diversity in the curriculum, student bodies, and teaching staffs, is not frustrated by fiscal constraints, is really the gist of the controversy before this Court. When reductions in the teaching staff are required for reasons of economy, experience demonstrates that layoff decisions, based solely on seniority, do not result in multi-ethnic teaching staffs. Yet, considerations of race, professional experience, expertise, along with seniority, do preserve the ethnic diversity on the faculty deemed essential to the quality of education provided in the Jackson Public Schools.

In *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 314 (1978), the plurality of the court recognized that because ethnic diversity contributes substantially to the educational process, race, along with other factors, may be considered in the selection of students for admission to institutions of higher education. Certainly, the principles set forth in Justice Powell's opinion in *Bakke,* would allow a school board to consider race, along with other factors, in its employment decisions, where the goal is to attain ethnic diversity.

The criticality of racial and ethnic diversity on the public school faculty is reflected in the view, expressed by the courts below, that "teaching is more than a job." As the Third Circuit observed in *Kromnick, supra,* at 906.

> Schools are great instruments in teaching social policy, for students learn not only from books, but from the

> images and experiences that surround them. One such lesson is of a spirit of tolerance and mutual benefit, a lesson that is more difficult to absorb when schools attended by black students are taught by black teachers while schools attended by white students are taught by white teachers.

Given the legitimacy of each of the objectives of the educational policies adopted by the Jackson Board of Education and the reasonableness of the procedures it has implemented in furtherance of those objectives, the courts below were correct in upholding the constitutionality of the teacher layoff provision.

**B.** ***A School Board and Teachers Union May Negotiate Modifications to a Bona Fide Seniority Plan.***

The collective bargaining agreement between the Jackson Board of Education and Jackson Education Association incorporates and continues the basic seniority system for the teachers in the Jackson public school system. The Jackson Board of Education did not violate the seniority system when the race-conscious provisions concerning the hiring and retention of minority teachers were instituted within the contract since the two contested provisions were only one of several which pertained equally to the recruitment, hiring and retention of teachers in the system. All teachers are *directly* subject to its terms, and thereby no third-party relationships exist between the teachers and the Jackson Board of Education. The collective-bargaining agreement which has been signed by the teachers, the Jackson Board of Education, and the Jackson Education Association continuously since 1973, which includes the contested race-conscious language, is a voluntary agreement bargained for on an equal basis by the respective parties.

Petitioners' contentions seek to equate seniority rights with the fundamental rights guaranteed by the Constitu-

tion. Yet, seniority rights owe their existence to the collective bargaining process and, as such, are contractual by nature. And while the Jackson Education Association owes a duty of loyalty to all of its members, the law recognizes that a union cannot always satisfy the competing interests of all in its collective bargaining negotiations. In *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953), this Court observed:

> Inevitably differences arise in the manner and the degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The discretion granted to bargaining representatives permits the Jackson Education Association to agree that seniority principles may be subordinated in layoff decisions, if necessary, to preserve ethnic diversity.

The aforementioned factual elements directly distinguish this action from *Firefighters Local Union No. 1784* v. *Stotts,* 164 S.Ct. 2576 (1984) and recent federal circuit court decisions support this distinction. *Turner* v. *Orr,* 759 F.2d 817, 824 (11th Cir. 1985) ; *Equal Employment Opportunity Commission* v. *Local 638,* 753 F.2d 1172 (2d Cir. 1985) ; *Vanguards* v. *City of Cleveland,* 753 F.2d 479 (6th Cir. 1985), *reh. den.,* 36 CCH EPDP 35190 (6th Cir. 1985). *Stotts* involved circumstances where a union and white employees were questioning the constitutional validity of a consent decree which was entered in a federal district court in a suit where they were not named parties but the decree affected their rights under a long established seniority

system. Here, a voluntary agreement, not a consent decree, exists between the parties, negotiated by the Petitioners' bargaining representative (the Jackson Education Association), and ratified by the teachers, obviating any correlation between this action and *Stotts*.

Further, the agreement has a life of three (3) years, which provides the teachers with an opportunity to revise any part or provision of the contract deemed unsatisfactory. The race-conscious provisions in the agreement are not permanent and the policy underlying the provision is periodically reappraised at the expiration of the contract. As noted in a similar context in *Kromnick* when the Third Circuit allowed a race-conscious provision in a collective bargaining agreement between the Philadelphia Board of Education and its teachers involving the reassignment of school teachers within the school system by race, the "[policy] is a formal part of the District's collective bargaining agreement, which is subject to biennial renegotiation, and the plan operates in annual cycles, allowing for reevaluation of its continued necessity." 739 F.2d at 912. Such provisions are contractual in nature, and are aimed solely at creating and maintaining integrated public school systems in Jackson and Philadelphia for both students and teachers, and therefore allowed under the U.S. Constitution.

## II.

**A Race-Conscious Policy or Program in a State Context Is Permissible Under the United States Constitution If It Serves Important Governmental Objectives and Is Substantially Related to Achievement of Those Objectives.**

The Court has previously concluded that "racial classifications are not per se invalid under the Fourteenth Amendment." *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 356. As stated in a recent federal circuit opinion, "[r]acism . . . has not been eliminated, but the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution have been restored to their intended race-conscious and remedial function." *Kromnick* v. *School District of Philadelphia,* 739 F.2d 894, 900. A voluntary race-conscious policy or affirmative action program that employs racial classification which is adopted by a governmental entity for remedial purposes is permissible "if the racial classifications designed to further remedial purposes serve important governmental objectives and is substantially related to achievement of the objectives." *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 359. This standard has been followed in a number of federal circuit court decisions involving race-conscious policies and programs pursuant to voluntary agreements and consent decrees.[2]

When analyzing a race-conscious policy or program, relevant factors as "(1) the importance and validity of the remedial aim, (2) the competence of the agency to choose such a remedy, and (3) the tailoring of the remedy so as to limit the burden suffered by others," *Kromnick* v. *School*

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[2] *Kromnick* v. *School District of Philadelphia, supra; Bratton* v. *City of Detroit,* 704 F.2d 878 (6th Cir. 1983); *Valentine* v. *Smith,* 654 F.2d 503 (8th Cir. 1981); *Zaslawsky* v. *Board of Education of the Los Angeles City Unified School District, supra.*

*District of Philadelphia,* 739 F.2d 894, 904, are important in determining whether such a plan "is permissible or entails unconstitutional racial discrimination." Id. If the race-conscious program adopted and incorporated in the collective bargaining agreement by the Respondent Jackson Board of Education and the Jackson Education Association were analyzed under the aforementioned framework, a constitutionally permissible plan would be evident.

Hereinbefore, we have sufficiently established the competency of the Jackson Board of Education to choose a remedy to eliminate segregation and promote integration within its school system. The integration of the faculty at all the elementary, junior high, and high schools was deemed necessary by both the Jackson Board of Education and the Jackson Education Association to allow the students in the Jackson, Michigan public school system the best quality, multi-diverse, and enriching educational opportunities possible. The Jackson Board of Education and the Jackson Education Association properly executed a program which allowed integration of the faculty simultaneous to the integration of the student population within the respective schools of the said academic system. This Court has noted in another context the importance of a multi-diverse faculty and the importance in which teachers are held in our educational institutions by stating:

> "(t)eachers have direct, day-to-day contact with students, exercise unsupervised direction over them, act as role models and influence their students about the government and the political process." *Kromnick* v. *School District of Philadelphia,* 739 F.2d 894, 904 (quoting *Bernal* v. *Fainter,* 81 L.Ed. 2d 175, 180, 104 S.Ct. 2312, 2316-17 (1984).

The Court further recognized in *Bakke* that discrimination still existed within school systems across the nation

and the need to have race-conscious remedies to eliminate such entrenched practices by stating:

> [i]n 1968 and again in 1971, for example, we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch. And a glance at our docket and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past.
>
> Against this background, claims that law must be "colorblind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. Id., at 327.

The race-conscious program incorporated within the collective bargaining agreement between the Jackson Board of Education and the Jackson Education Association definitely limits the burden suffered by any faculty member. There is no mandatory number or percentage of minority teachers which the Jackson Board of Education must hire by a date certain stated within the agreement, only an expressed goal. Concerning layoffs, minorities as well as whites are subject to layoffs within the same proportion, thereby treating each faculty member equally.

Therefore, the race-conscious program adopted in the agreement satisfies and meets the standard of review as deliberated in *Bakke* and stated hereinabove.

Concerning the issue as to how much past discrimination must the Jackson Board of Education prove before this Court so as to substantiate its race-conscious programs, in view of the Petitioners' rights under the Fourteenth Amendment, this Court has previously stated that:

> . . . the presence or absence of past discrimination by universities or employers is largely irrelevant to resolving respondent's constitutional claims. The claims of those burdened by the race-conscious actions

> of a university or employer who has never been adjudged in violation of an anti-discrimination law are not any more or less entitled to deference than the claims of the burdened non-minority workers in *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 47 L.Ed. 2d 444, 96 S.Ct. 1251 (1976), in which the employer had violated Title VII, for in each case the employees are innocent of past discrimination. *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 365.

The same analysis is appropriate in this action in reference to the claims of the Petitioners though there is evidence in the record which indicates past discrimination existed in the Jackson Board of Education School System.

Petitioners contend that their fundamental rights under the Fourteenth Amendment have been infringed upon by means of the race-conscious provisions in the collective bargaining agreement which the Petitioners claim caused their layoffs from their teaching positions with the Jackson Board of Education. However, there are no fundamental rights involved here as with the respondent in *Bakke.* 438 U.S. 265, 357. Further, the Court in *Bakke* stated:

> Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 128, 36 L.Ed. 2d 16, 40, 93 S.Ct. 1278, 1294 (1973); see *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 n 4, 82 L.Ed. 1234, 1241, 58 S.Ct. 778, 783 (1938).
>
> Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial clas-

> sifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more. Id., at 357.

Therefore, the Jackson Board of Education need not prove that the race-conscious provision in the collective bargaining agreement furthers a compelling governmental purpose and that no less restrictive alternatives are available since the provision did not affect the fundamental rights of the Petitioners either as individuals or as a class, and such a standard is inappropriate in these circumstances.

Further, race is but one of the factors that the Jackson Board of Education considers when laying off teachers. The Jackson Board of Education considers other factors as subject area, special programs in which the teachers are involved, seniority, and the number of teachers in a particular department and school when laying off teachers. Minority teachers are laid off proportionately to that of the white majority teachers. As the Third Circuit stated in *Kromnick* v. *School District of Philadelphia:* "No case has suggested that the mere utilization of race as a factor, together with seniority, school need, and subject qualification, is prohibited." Id., at 903, a statement which still holds here in this action.

## III.

**No Title VII Claims Are Before This Court Due to Lack of Jurisdiction.**

No claims under Title VII, 42 U.S.C. Sections 2000e *et seq.*, are before this Court due to Petitioners' failure to properly file any charges, or complaints, or initiate any proceedings with either the Equal Employment Opportunity Commission ("EEOC") within one hundred and eighty (180) days after the alleged discriminatory act(s) by Respondents were committed. 42 U.S.C. Section 2000e-5(e). Prior U.S. Supreme Court decisions have held that the jurisdictional and substantive requirements of Title VII are applicable to plaintiffs and defendants when one of the parties is a municipal or state governmental entity or employer. *Connecticut* v. *Teal,* 457 U.S. 440, 449 (1982); *Dothard* v. *Rawlinson,* 433 U.S. 321, 331 (1977). A claim(s) based on an alleged discriminatory act(s) is barred if the charge is not timely filed with the EEOC, and a Right to Sue letter is not issued, since such prerequisites are necessary to file a Title VII action. *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 555 (1977); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47 (1974); *Electrical Workers* v. *Robbins & Meyers, Inc.,* 429 U.S. 229, 239-240 (1976). Therefore, the Respondents were entitled to continue their treatment of the Agreement as lawful since the Petitioners failed to file a complaint or charge within 180 days after the alleged discriminatory act. Id.

Further, Petitioners' failure to timely file their charges with the EEOC was raised as a defense by the Respondents in the District Court action and upheld by Judge Joiner, 546 F.Supp. 1195, 1203. Since the Respondents raised the affirmative defense that the Petitioners failed to timely file their charges or complaints and a Letter to Sue was not issued, no waiver was committed by the Respondents. *Zipes* v. *Trans World Airlines, Inc.,* 455 U.S. 385, 392-393 (1982).

## CONCLUSION

The case before the Court does not present a situation where a governmental body is using race as a criteria for the purpose of favoring minority group members at the expense and to the detriment of the rights and expectations of Petitioners, members of the majority group. Rather, the Jackson Board of Education's policy and procedures for teacher layoffs, which considers a myriad of factors, including race, is designed to create and maintain a public school system wherein ethnic diversity is reflected in what is taught, who will teach and who will learn.

For the reasons hereinabove stated, it is submitted that this Court should affirm the decision of the Court below dismissing the Complaint in this action.

Respectfully submitted,

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