No. 84-1340

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, and RICHARD SURBROOK, President; and DON PENSION, 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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PETITIONERS' BRIEF

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QUESTION PRESENTED

Does the Constitution permit a public employer to adopt racial preferences for school teacher layoffs in the absence of judicial or administrative findings of past discrimination in employment or education based solely upon differences between the respective percentages of minority teachers and students?

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The opinion of which review is sought, reproduced at pages 2-19a of the appendix to the petition for certiorari, is reported as *Wygant v. Jackson Board of Education,* 746 F.2d 1152 (6th Cir. 1984). The district court opinion, reported at 546 F. Supp. 1195 (E.D. Mich. 1982), is included in the appendix to the petition at pages 20-36a.

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JURISDICTION

The Sixth Circuit Court of Appeals entered judgment against Petitioners on October 25, 1984. By order of this Court, entered by Justice Sandra Day O'Connor on January 7, 1985, the time for filing the petition for certiorari was extended to and including February 22, 1985. The petition was docketed on February 21, 1985, and this Court granted certiorari on April 15, 1985.

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based upon the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The principal statutory provision involved, 42 U.S.C. § 1983 (1978), provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

STATEMENT OF THE CASE

A. Facts and Background

This is a constitutional challenge to racial preferences adopted by the Respondents, the Jackson Board of Education, and a teachers' union which resulted in the layoff of Petitioners from their jobs as public school teachers. [App. 24a.] Since 1981, Petitioners *Wygant, et al.* have been laid off numerous times. [Pet. L. 3-26.] It is undisputed that Petitioners, tenured teachers, have repeatedly been displaced by less-senior minority teachers because of the racial preferences for layoffs in Respondent's labor contract. [App. 24a.]

The racial preferences [J.A. 8-17] were first adopted in the 1972-73 labor contract between Respondent Jackson Board of Education and the Jackson Education Association. [App. 22a.][1] For the past thirteen years, the racial preferences have been renewed without change in successive labor contracts. They continue in effect in the current contract, which operates until 1988. [J.A. 8.]

Specifically, Article XII.B.1 creates an exception to the otherwise applicable rule of seniority based layoffs (last-hired, first-fired), to the effect that non-minority teachers with greater seniority shall be laid off when necessary to preserve the existing percentage of minority teachers in the Jackson School District. [App. 32a.] The most pertinent provision of the contract is as follows:

> *ARTICLE XII.B.1.* In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with

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[1]App. refers to the appendix to the petition for certiorari. The notation J.A. refers to the Joint Appendix followed by the page number. The notation Pet. L. refers to the Petitioners' Lodging of certain public documents with the Court.

> 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 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.*
>
> *Teachers who are on layoff will not accrue seniority in the district.* Seniority is defined as the length of service of a teacher since the acceptance date of his last letter of appointment for hiring.

[J.A. 13.] (Emphasis added.)

Until the percentage of minority teachers in the faculty (currently 16%) equals the percentage of minorities in the student body (currently 30%), the contract prohibits reduction of the percentage of minority teachers through seniority layoffs. Minority teachers who would otherwise be laid off have therefore been retained at the Petitioners' expense. [App. 24a.]

These differences between the respective percentages of minority teachers and students are not the result of discrimination in teacher employment or education, but are due in large part to the constantly changing racial demographics of the student population.[2] Although racial/ethnic data were not collected until the 1968-69 school year [J.A. 35], the data for subsequent years shows that the relative percentages of minority students has steadily

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[2]Table A, attached, shows that while the number of minority students has remained fairly constant over the years, the number of white students has declined from 11,379 in 1970-71 to 5,425 in 1984-85. (Table A.) This trend has caused the relative percentages of minority students to rise from 16.2% in 1970-71 to 26.4% in 1980-81. By the 1984-85 school year, the minority student population had increased to 30%. *(Id.)*

increased over the years because of declining white student enrollment. [Table A.]

There are no administrative or judicial findings of past discrimination in teacher employment (or education) in the Jackson School District. [J.A. 30-53.] The complaint specifically asserts the lack of such findings, and the Jackson School Board's motion for summary judgment accepts these allegations as true.[3]

The record includes prior judicial findings by a federal district court that rejected contentions that the Jackson School Board has discriminated in the employment of minority teachers. *Jackson Education Association, Inc. v. Board of Education of Jackson Public Schools,* No. 4-72340 (E.D. Mich. Dec. 15, 1976). [App. 36-45a.] In 1974, the teachers' union and minority teachers filed suit because of the Jackson School Board's refusal to apply the minority layoff preferences in the contract. If the Board had applied the layoff preference for minority teachers, it would have resulted in the layoff of experienced tenured teachers and the retention of eleven probationary minority teachers. [J.A. 32.] The Board instead applied strict seniority, contrary to the express language of Article 12.B.1 [J.A. 43.]

The Plaintiffs in *Jackson Education Association* alleged that, prior to the execution of the 1972-73 labor contract, the School Board's employment practices had "the effect of discriminating against the employment of minority groups; . . ." The Jackson School Board successfully contested these allegations. [App. 37a.]

Following a trial on the merits, the federal district court summarized the evidence presented as follows:

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[3]Paragraph 21 of the complaint alleges that: "There has been no finding of past employer discrimination in the hiring of teacher personnel on the part of the Jackson School Board, by a governmental agency competent to rule on such matters."

> In support of their allegations that defendant engaged in employment practices, prior to the making of the 1972 collective bargaining contract, that resulted in hiring policies discriminatory to minority personnel, . . . Plaintiffs submitted Exhibits 14 and 15. Exhibit 14, supplied by the Board, merely sets forth the student racial mix and the number of minority teachers contained in the total teaching faculty. [Footnote omitted.] The evidence further demonstrated that the first black teacher in the City of Jackson was not hired until 1953. Following the 1968-69 academic year, the Board attempted to increase the percentage of minority teachers, causing the minority staff ratio to increase from 3.9% to 8.8% over the next three years. . . .

[App. 41-42a.]

Based on the above evidence, the district court concluded, *sua sponte,* that it lacked subject matter jurisdiction because there was no constitutional violation of the Plaintiffs' rights as regards teacher employment in the Jackson School District.[4] Relying upon *Washington v. Davis,* 426 U.S. 229 (1976) (proof of racially discriminatory purpose is necessary for establishing a constitutional violation of the Equal Protection clause), the district court found that the "*de facto* imbalance" shown by the statistical data was insufficient to show discrimination in teacher employment as a matter of law. [App. 43a.] The court dismissed the complaint without ruling on the Plaintiffs' pendent state law claim for breach of contract.

The same Plaintiffs, again alleging breach of the contract provision requiring minority layoff preferences, brought suit in the Jackson County Circuit Court. [J.A. 39-53.] The Respondents argued that the retention of

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[4]The Court lacked jurisdiction over Plaintiffs' Title VII claim because they failed to exhaust administrative remedies with the Equal Employment Opportunity Commission as required by 42 U.S.C. § 2000e-5. (App. 43a.)

minority probationary teachers at the expense of tenured personnel would have violated the Michigan Teacher Tenure Act, and "the Civil Rights Act of 1964 . . . in that it sets up a racial quota or racial goal and such are necessarily discriminatory." [J.A. 43, 47.]

The Jackson County Circuit Court disagreed. Based upon the same record as was before the federal court in *Jackson Education Association*, the county circuit court concluded:

> It has not been established that the Board had discriminated against minorities in its hiring practices. The minority representation of the faculty was the result of societal racial discrimination.

[J.A. 43.] Then, applying this Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the county circuit court held that the affirmative action provisions of the labor contract were a permissible solution to "societal discrimination." [J.A. 52.] As a result, the Jackson School Board has subsequently adhered to the minority preferences required by the contract. [App. 24a.]

The history of the adoption of the minority preferences can be briefly summarized. In November 1971, one of the School Board's administrators recommended to the racial subcommittee of the school's advisory council that increased recruitment of minority teachers be coupled with protection from layoffs.[5] [J.A. 41.] At the

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[5]As shown in Table C, attached, the percentage of minority teachers employed in the school year prior to the adoption of the racial preferences, 1971-72, was 8.8%. This exceeded the 7.8% availability of minority teachers statewide as shown by the 1970 U.S. Census by Occupation, Michigan Table 54. By the time the racial preferences were adopted in the 1972-73 contract, the percentage of minority teachers in the district had increased to 10.1%. (Pet. L. 57-63).

time, the labor contract between the Jackson Education Association (JEA) and the Board of Education required layoffs on a straight seniority basis. [App. 21a.]

The vast majority of the teachers were opposed to racial preferences for layoffs.[6] In the spring of 1972, representatives of the teachers and the School Board negotiated the minority layoff preferences in the 1972-73 contract.[7] The teachers refused to ratify the contract, but returned to work for the beginning of the 1972-73 school year. The unratified contract resulted in a strike. [App. 22a.] In late fall, the teachers ended the strike and ratified the 1972-73 contract. [App. 22a.]

B. Decisions Below

Petitioners were laid off in April 1981 pursuant to the racial preferences in the contract [App. 24a], and have subsequently been laid off numerous times between 1981-1984. [Pet. L. 3-26.] Petitioners brought suit in federal district court in September 1981, invoking jurisdiction based on *inter alia*, 42 U.S.C. § 1983. Although seven of the eight Petitioners have since been restored to teaching positions, all have outstanding claims for backpay and seniority lost while on layoff. [App. 3a.]

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[6]In January 1972, the Minority Affairs Office of the Jackson Public Schools surveyed the views of the teachers on the seniority layoff policy. Ninety-six (96) percent of the teachers were in favor of the seniority layoff system and were against preferences for minority teachers. [App. 22a.]

[7]The school board and the union were presumably aware of the racial tensions and violence that occurred in February 1972 in Jackson High School, one of twenty-two schools in the district. This may have been a consideration in the adoption of the racial preferences. [App. 22a.]

The district court decided the case on cross-motions for summary judgment. Applying *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the court determined at the outset that judicial findings of past discrimination were unnecessary to sustain voluntarily adopted racial classifications that discriminate against non-minority employees. [App. 27a.]

Although the percentage of minority faculty in the district in the years preceding the layoffs at issue equaled or exceeded relevant labor market availability figures, the district court rejected this comparison.[8] The court instead compared the minority faculty population with the minority student population. Citing as its sole authority the case of *Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732 (E.D. Mich. 1980), *rev'd*, 706 F.2d 757 (6th Cir. 1983), the district court concluded that this comparison was proper because "[t]eachers are role-models for their students." [App. 29a.] Based on the percentage differences between the minority faculty and student populations,[9] the court held that minority underrepresentation was "substantial and chronic" and justified adoption of the racial preferences. [App. 31a.] Finally, the dis-

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[8]Table B, attached, illustrates the relevant labor indicators of the percentage of qualified minority teachers in the State of Michigan compared to the percentage of minority teachers employed in the district for the 1979-80 school year.

[9]Discrepancies between the percentages of minority teachers set forth in Table C and the same data in the Joint Appendix at 108 are explained by the fact that the Joint Appendix figures are based on the total number of teachers on the school district's seniority list before layoffs. The percentages listed in Table C are based on the actual numbers of teachers who taught during the school year as a result of layoffs in spring and recalls in the fall. The percentages of minority teachers in Table C are therefore slightly higher because they reflect operation of the minority layoff preference.

trict court, analyzing the racial preferences under a four-part "reasonableness" standard [App. 31-33a], pronounced them constitutional. [App. 32a.]

The Sixth Circuit affirmed, adopting both the result and reasoning of the district court, adding only the promotion of racial harmony in the community as a supporting rationale. [App. 4-11a.] Nor did the Sixth Circuit consider that its own rejection of the "role model" rationale in *Oliver*, 706 F.2d at 762-763, required reversal here. According to the Sixth Circuit, *Oliver* overturned a judicially mandated layoff quota that nullified the contractual seniority rights of white teachers in the name of the constitutional rights of the students. Conversely, the Sixth Circuit said that this case deals with what a school board and teacher's union may, but need not do, to cure "the past racial isolation of black teachers in the school system concerned." [App. 11a.][10]

SUMMARY OF ARGUMENT

The Respondents' explicit use of race for determining job rights is based on improper racial comparisons, has no remedial purpose, and violates the Petitioners' rights to Equal Protection of the laws under the Fourteenth Amendment.

This Court has never approved the explicit use of race as a "remedy" in the absence of "judicial, administrative or legislative findings of constitutional or statutory violations." *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980)

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[10]The term "racial isolation" typically refers to segregation of an existing student body or teacher corps. It is inapposite here since each school in the district has a completely integrated faculty and student population. (See Sixth Circuit Joint Appendix at pp. 15-34).

(Powell, J., concurring). The Respondents' adoption of the racial preferences in the 1972-1973 labor contract was not designed or intended to remedy identified discrimination: rather, the racial preference was designed to protect minority teachers from layoffs for the stated purpose of achieving "parity" between the percentages of minorities in the teacher staff and the percentages of minorities in the student body.

The courts below sustained the use of race for this purpose and relied on this comparison between the minority student and teacher populations. [App. 29a] However, such an approach was disapproved by this Court in *Hazelwood School District v. United States,* 433 U.S. 299 (1977), wherein the Court held, in the context of teacher employment, that the proper comparison is between the racial composition of the teaching staff and that of the qualified public school teacher population in the relevant labor market. Here, had the school district made layoffs in 1981 without regard to race, minority teachers would have comprised 11% of the total teaching staff for the 1981-1982 school year. This 11% figure approximates the relevant labor market indicators based on the 1980 Census. [Table B.]

Thus, the Sixth Circuit erred as a matter of law in finding "substantial" and "chronic" underrepresentation of minority teachers based upon mere percentage differences between the minority faculty and minority student populations. It compounded this error by relying upon stale data. The courts below compared student/teacher minority representation *prior* to the adoption of the racial preferences in 1972-1973, whereas most of the layoffs at

issue here occurred in or *after* 1981. In the interim, the percentage of minority teachers employed in the Jackson School District reached and exceeded relevant market indicators. [Tables B & C.]

Nor can the Respondents' use of race be justified by reference to the education specific theory that proportional representation of minority teachers and students is necessary to provide sufficient numbers of role models for minority students. As important as race-conscious *remedies* have been in school desegregation cases, this Court has never defined nor endorsed them in preferential terms. Thus, even in the context of dismantling a segregated school system, students do not have a constitutional right to attend a school with a teaching staff of any particular racial composition.

But the case before the Court is not a school desegregation case, where the rights of innocent third parties may have to give way to the necessity of dismantling a segregated school system and eliminating its invidious effects upon the educational experiences of minority students. There is no violation of student rights in the Jackson School District, which has been completely integrated for years. Here, there are no legitimate competing interests to be balanced. Petitioners' constitutional rights to be treated as individuals are at stake, and there is no identified injury that must be remedied at their expense.

Because there is no discrimination in employment or education, the role model rationale invoked below must stand or fall on its own merits or lack thereof. Significantly, Respondents did not offer any evidence to support the use of race on this basis, and the courts below accepted it without legal or evidentiary support. While

this theory might withstand scrutiny under a rational basis test, it cannot justify the preferential use of race as an occupational qualification.

Finally, while calling the use of race "temporary," the courts below sustained a racial preference which has been in effect unchanged for thirteen years and will operate for at least another three years. Given the constantly changing percentages of minority students and faculty, the preferences will likely continue in perpetuity. [Table A.]

For these reasons, the judgment below must be reversed.

ARGUMENT

I. THE FOURTEENTH AMENDMENT FORBIDS THE ADOPTION OF EXPLICIT RACIAL CLASSIFICATIONS BY A STATE OR LOCAL GOVERNMENT UNLESS SUCH CLASSIFICATIONS ARE INTENDED TO REMEDY PAST DISCRIMINATION AND ARE CAREFULLY TAILORED TO ACHIEVE THAT PURPOSE.

The racial classifications adopted by the Jackson Board of Education are unconstitutional because there are no judicial or administrative findings of discrimination in teacher employment and the record below does not and cannot support any such finding. In the absence of discrimination, an attempt to protect minority teachers from layoffs cannot meet the requirement that a remedy be narrowly tailored in response to identified injury. Without findings of discrimination, there is no state interest to support the use of race. As put by the court in *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir. 1981):

> Because the justification for race-conscious affirmative action is remedying the effects of past discrimination, a predicate for the remedy is that qualified persons make findings of past discrimination before the plan is implemented. Absent findings of past discrimination, courts cannot ascertain that the purpose of the affirmative action program is legitimate. Such findings enable courts to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action.

No Justice of this Court has ever suggested that such preferences were tolerable in the absence of a purpose to remedy past discrimination. Indeed, "[T]his Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations." *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (Powell, J., concurring) (hereafter *Fullilove*).

By sustaining the explicit racial preferences in the Respondents' labor contract, the Sixth Circuit expands the power of state and local governments to use racial classifications beyond the permissible boundaries of the Equal Protection clause and the remedial parameters of Title VII. Unless this Court reverses the ruling below, state and local governments throughout the nation will be able to impose racial preferences without regard to whether the use of race has a remedial purpose and responds to appropriate findings of past discrimination.

A. Mere Differences Between The Respective Percentages Of Minority Teachers And Minority Students Is An Improper Basis For Finding Discrimination In Teacher Employment.

The court below purported to make the necessary findings of past discrimination by carving out an unprecedented exception in the context of teacher employment,

allowing racial preferences to be sustained upon a mere showing of statistical differences between the percentages of minority student and faculty populations.[11] "[I]n the setting of this case," the district court concluded, "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. [App. 29a.]

The courts below rationalized the rejection of relevant labor market figures, which gave meaning to the concept of minority underrepresentation in *United Steelworkers of America v. Weber*, 443 U.S. 193, 212 (1979), by referring to the education-specific theory that "teaching is more than just a job. . . . More specifically, minority teachers are role models for minority students." [App. 29a.]

The Sixth Circuit's refusal to consider the relevant labor market in determining the existence of alleged discrimination is an approach disapproved by this Court in the very context of teacher employment. In *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977), this Court warned that: "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Comparisons to the student body, as opposed to the general population, have *even less* probative value.[12]

In *Hazelwood*, this Court specifically considered the question of how to define the relevant labor pool. The

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[11]App. 8a.

[12]See e.g., *Fort Bend Ind. Sch. Dist. v. City of Stafford*, 651 F.2d 1133, 1138 (5th Cir. 1981); *Castaneda v. Partida*, 648 F.2d 989, 1002 (5th Cir. 1981).

case involved allegations that a school district had engaged in a pattern and practice of employment discrimination in the hiring of teachers. This Court rejected the district court's comparison of the racial composition of the district's teacher work force and the student population, and held that such an approach, "fundamentally misconceived the role of statistics in employment discrimination cases." *Hazelwood*, 433 U.S. at 308. Instead, this Court held that the proper comparison in a case involving alleged employment discrimination of school teachers was "[b]etween the racial composition of [the district's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."[13] *Hazelwood*, 433 U.S. at 308.

Had the courts below utilized the *Hazelwood* method for determining what an ideal number of minority teachers would be in a discrimination-free hiring process, they would have readily concluded that minority teachers have been substantially overrepresented in the Jackson School District for several years.[14]

The Sixth Circuit's use of teacher-student comparisons is a clear error of law. In *Weber*, this Court upheld preferential admissions to a craft training program based on a

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[13]Although relevant labor market figures were not presented by either party below, this Court can reverse because (1) the courts below based their decision on an improper comparison, and (2) the relevant labor market indicators have been provided to the Court and are subject to judicial notice.

[14]The relevant labor market indicators shown in Table B illustrate that in 1979-80, the percentage of minority teachers exceeded (1) the percentage of minorities in the general population surrounding the school district; (2) the percentage of qualified minority teachers working statewide; and (3) education degrees conferred on minorities by Michigan colleges and universities.

significant disparity of black craft workers as compared with the civilian labor force. In addition, this Court relied upon numerous judicial findings of discrimination and took judicial notice of the almost total exclusion of blacks from craft unions and the skilled trades. 443 U.S. at 198 n.1.

In its search for evidence of past discrimination in the instant case, the Sixth Circuit and the district court justified the finding of "substantial" and "chronic" underrepresentation [App. 31a] by sole reference to teacher/student comparisons as used in *Oliver v. Kalamazoo Board of Education,* 498 F. Supp. 732 (W.D. Mich. 1980). (Hereafter *Oliver.*) [App. 29a.] In 1980, as part of a court-ordered desegregation remedy, the district court required a 20% quota for the hire and layoff of black teachers, based on the percentage of black students in the school district. In doing so, it nonetheless acknowledged the validity of the superintendent's testimony about the practicalities of hiring and retaining qualified minority teachers. He attributed the recent decline in the percentage of black staff in part to a higher attrition rate among black teachers leaving to take more lucrative jobs in private industry, and to promotions to administrative positions. *Oliver,* 498 F. Supp. at 738-739 n.4.

In an opinion that contradicts the decision below, a different panel of the Sixth Circuit overturned the district court's order in *Oliver,* holding that students do not have a right to a teaching staff of a particular racial composition. The appeals court further admonished the district court to take these "practicalities" into account when devising equitable redress. *Oliver,* 706 F.2d

at 762. There is no reason to believe that the "practicalities" are any different in the Jackson School District.[15]

The data presented to the district court in *Oliver* is also relevant to the instant case, since Kalamazoo is 64 miles from Jackson. This data shows that the Kalamazoo black teacher ratio exceeded most relevant labor market indicators:

> [I]n 1977-78 the District's percentage of Black teachers (11.6%) met, or exceeded, most of the chosen standards, such as: current Black applicant rate—11.7%; percent Black population of Kalamazoo County—5.5%; percent of education degrees conferred on Blacks by Michigan colleges and universities for 1975-76—10.0%; percent Black population in Michigan—9.7%; and percent Black in the United States—11.0%.

498 F. Supp. at 745. Based on these labor market figures, the Sixth Circuit held that the district court erred in approving "the institution of a 'system,' requiring both a hiring quota of 20% black and an ultimate overall teaching staff of 20% black." 706 F.2d at 762. Given the relevant labor market, and the fact that the 20% figure was adopted merely because it approximated the black student percentage at the time, the 20% quota was invalidated as "arbitrary." 706 F.2d at 762-763.

The result in *Oliver* should have occurred here.[16] As in *Oliver*, the Respondents have adopted a goal for racial

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[15]In view of the proximity between Jackson and Kalamazoo, it seems reasonable to conclude that the Kalamazoo and Jackson School Districts have been competing for the same limited pool of formally qualified black teachers. Since the district court here rejected relevant labor market comparisons, it disregarded the statewide availability figures for minority teachers as set forth in *Oliver v. Kalamazoo Board of Education*, 706 F.2d 732, 745 (W.D. Mich. 1980).

[16]The Sixth Circuit's inconsistency created two different results in two similar school districts in medium-size cities sixty-four miles apart. While *Oliver* involved the remedial powers of a federal court, both *Oliver* and the instant case are nonetheless governed by the Constitution's Equal Protection guarantees.

preferences that is erroneously based on the percentage of minority students in the district. Like *Oliver*, the percentage of minority students substantially exceeds the percentage of qualified minority teachers available in the relevant labor market. And, as in *Oliver*, the rigid quota disregards the practicalities of attracting and retaining qualified minority teachers.

Notwithstanding the striking similarities between the present case and *Oliver*, the Sixth Circuit distinguished *Oliver* on the theory that judicially ordered racial preferences are subject to stricter constitutional limitations than are quotas voluntarily adopted by other branches of government. The Sixth Circuit's claim that judicial remedies are subject to stricter constitutional standards is clearly erroneous. Otherwise, it would be permissible for state and local government to promulgate explicit racial classifications that would be judged according to a highly deferential "rational basis" test, and would be upheld so long as the racial classifications are considered "benign." This rationale repudiates the history of the Fourteenth Amendment and Congress's adoption of 42 U.S.C. § 1983 in order to constrain discriminatory state action.

The Sixth Circuit's reasonable basis standard is not conducive to rigorous analysis and enabled it to overlook the fact that its "finding" of discrimination was based on an improper comparison. The fact that the percentage of minority students is higher than the percentage of minority teachers provides no evidentiary basis to conclude that there is discrimination in the hiring of minority school teachers. Indeed, there are any number of reasons for differences between these two groups. The most obvious reason is that declining white student enroll-

ment has caused the relative percentage of minority students to rise. [Table A.] At the same time, the relevant labor pool of qualified minority teachers has remained constant. (Over ten years, the minority teacher availability rate changed 2.2%, from 7.8% in 1970 to about 10% in 1980. *Supra* at p. 6, n.5) It is arbitrary and meaningless to adopt racial preferences based on achieving "parity" between these two groups.[17]

B. The "Reasonableness" Standard Of Review In The Sixth Circuit Does Not Ensure That The Use Of Race Conforms To The Guarantees Of Equal Protection Under The Fourteenth Amendment.

Application of the legally erroneous standard of reasonableness enabled the Sixth Circuit to find "substantial" and "chronic" underrepresentation based on an improper comparison. It compounded this error by selecting data that was compiled more than a decade ago. Specifically, the district court selected *only* those figures *"in the years preceding the adoption of the affirmative action plan."* (Emphasis added.) [App. 9a.]

Obviously, the comparison used and the figures selected virtually dictated the result. Although this lawsuit was filed and challenged layoffs made in 1981, the

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[17]On this point, the Equal Employment Opportunity Commission instructs that the proper purpose of an affirmative action program *"is to overcome previous exclusion,* rather than merely achieve numerical 'parity.'" EEOC, *Eliminating Discrimination In Employment: A Compelling National Priority* IIIX-X3 (1979) (emphasis in original). The Civil Rights Commission has also warned that race-balancing quotas improperly change "the objectives of affirmative action plans from dismantling discriminatory processes to assuring that various groups receive specified percentages of resources and opportunities." U.S. Commission on Civil Rights, *Affirmative Action In The 1980's: Dismantling The Process of Discrimination.* p. 31 (1981).

district court relied upon teacher/student comparisons for the years 1968 through 1972. Using these figures, the district court concluded

> 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. In 1953, there were no black teachers and by 1961, only 1.8 percent of the faculty was black. The Court has not been provided with figures establishing the percentage of black students in the Jackson School District during these years.
>
> However, by the school year 1968-69, black students made up 15.2 percent of the total student population, while black faculty members constituted only 3.9 percent of the total teaching staff. While the percentage of minority students remained relatively constant (15.9 percent in 1971), the percentage of minority faculty members increased, but only to 5.5 percent in 1970-71 and 8.3-8.8 percent in 1971-72. (Footnote omitted) These findings were made by the school board and the Court holds that the school board was competent to make such findings.

[App. 30a.]

Although this was the same evidence previously rejected as insufficient to show a *prima facie* case when presented to a federal district court in 1974-1976, *supra*, p. 5, the courts below erroneously concluded that these differences were the result of discrimination in teacher employment. The district court then purported to apply the four-part test of the joint opinion by Justices Brennan, White, Marshall, and Blackmun in *Regents of the University of California v. Bakke*, 438 U.S. 265, 324 (1978). (Hereafter *Bakke*.) The court then concluded that the racial preferences for teacher layoffs were "reasonable". [App. 31a.]:

> First, the plan is designed to either 1) retain a sufficient number of minority teachers so that the racial

> composition of the Jackson School District faculty will roughly approximate that of the student body, or 2) if that ratio has not yet been achieved, then at least to prevent a reduction in the minority to majority ratio.
>
> * * *
>
> Second, there is no suggestion that the affirmative action layoff provision is anything more than a temporary measure. [Citations omitted.] In fact, the layoff provisions are part of a collectively-bargained contract of limited duration. These provisions, presumably like all other provisions in the contract, are subject to change whenever the contract is renegotiated.
>
> Third, the layoff provisions do not require the retention of unqualified teachers. [Citation omitted.] A layoff provision, by definition, applies only to those previously hired and, presumably, previously found qualified.
>
> Fourth, the layoff provision does not require the layoff of all white teachers or otherwise unnecessarily or individously trammel their interests. [Citations omitted.]

[App. 32-33a.] This reasoning is faulty on all counts.[18]

First, the goal of achieving a numerically specified racial balance is itself constitutionally impermissible without a remedial purpose that responds to identified discrimination. As Justice Powell wrote in *Bakke*, 438 U.S. at 307, the goal of achieving "some specified percentage of a particular group merely because of its race or ethnic origin is not constitutionally permissible and constitutes discrimination for its own sake." This Court has emphasized that there is neither a constitutional necessity nor a right to create racial balances, *Milliken v. Bradley*,

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[18]There is no mention of "remedy" or "discrimination" in the above four part test applied by the Sixth Circuit.

418 U.S. 717, 740-741 (1974), and the goal of racial balancing as a remedy has been specifically rejected by the Court because "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971).

Second, the minority preferences for layoffs cannot be fairly characterized as "temporary" or of limited duration. The courts below, while calling the use of race "temporary," upheld a racial preference which has been in effect for thirteen years and will operate for at least another three years. Moreover, because the objective of the racial preferences is to achieve "parity" between the constantly changing percentages of minority students and faculty, most likely the preferences will continue in perpetuity. The number of minority students has remained the same but the number of non-minorities has decreased. Consequently, the goal of proportional representation between minority faculty and students is unrealistic. Such a goal contrasts sharply with *Weber*, in which preferential selection of craft trainees terminates as soon as the percentage of skilled minority craft-workers *approximates* the percentage of minorities in the civilian labor force. *Weber,* 443 U.S. at 209.

Third, the use of racial classifications to decide who keeps a job cannot be upheld merely because "the layoff provisions do not require the retention of unqualified teachers." [App. 32a.] Layoffs by race inherently disregard considerations of experience and merit. The Jackson School Board recognized this fact when it refused to apply the racial preferences and laid off probationary minority teachers in 1974, choosing to retain tenured white teachers. Apparently, the Board believed that the use of racial preferences to layoff more experienced white

teachers was not in the best interests of either black or white students.

Fourth, one cannot say that the use of race does not "unnecessarily or invidiously trammel" the interests of "white teachers." [App. 33a.] Petitioners, as "white teachers," were laid off and lost pay and seniority, despite their greater seniority over the retained minority teachers. This is a heavy burden to inflict because of race, especially in the absence of any limitations on the operation of the racial preferences, which puts Petitioners in constant jeopardy even after they are recalled. [Pet. L. pp. 3-26.]

In justifying the infliction of this burden upon a few "white teachers," the courts below cited *Fullilove v. Klutznick,* 448 U.S. 448, 484 (1980), (hereafter *Fullilove*), for the proposition that "an affirmative plan is not invalid merely because innocent persons bear the brunt of the racial preference." [App. 33a.] This selective citation to *Fullilove* ignores this Court's explicit warning that the burdens assigned to innocent third parties by such racial classifications are permissible only when "effectuating a limited and properly tailored remedy to cure the effects of prior discrimination . . ." *Fullilove,* 448 U.S. at 484.

The set aside program for minority contractors in *Fullilove* satisfied this requirement because it included procedural safeguards to insure that "the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process." *Fullilove,* 448 U.S. at 449. In contrast, the racial preferences in the instant case have no similar safeguards and, in fact, benefit non-disadvantaged minority teachers who are highly employable

even in a competitive job market.[19] In sustaining the preferences for minority teachers, the Sixth Circuit has effectively rejected Chief Justice Burger's warning against any "program which seeks to confer a preferred status upon a non-disadvantaged minority," *Fullilove,* 448 U.S. at 485, as well as the requirement that race-conscious affirmative action programs be carefully tailored so that they do not "stray from narrow remedial justifications." *Fullilove,* 448 U.S. at 487.

II. STRICT JUDICIAL SCRUTINY AUTHORIZES VOLUNTARY REMEDIES ONLY FOR IDENTIFIED DISCRIMINATION AND THEN ONLY WHEN THE REMEDY IS A CAREFULLY TAILORED RESPONSE TO APPROPRIATE FINDINGS OF DISCRIMINATION.

The prevailing standard of review in the Sixth Circuit departs from established constitutional principles. In *Bakke,* Justice Powell, announcing the judgment of the Court, articulated the traditional "strict scrutiny" standard of review applicable to all governmentally imposed racial classifications:

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. * * * Racial and ethnic distinctions of any sort are inher-

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[19]The Detroit School District, which is 80 miles from Jackson, hires more black teachers than white teachers. *See, Bradley v. Milliken,* 460 F.Supp. 299, 317 (E.D. Mich. 1978). In addition, both the Kalamazoo District (64 miles away) as well as the Flint School District (86 miles away) have affirmative action recruiting programs for minority teachers. *See, Oliver v. Kalamazoo Bd. of Education,* 706 F.2d 757, 762 (6th Cir. 1983); *Marsh v. Flint Bd. of Education,* 581 F. Supp. 614 (E.D. Mich. 1984). Given this competitive market for minority teachers, the Jackson School Board has exhausted the labor pool of qualified minority teachers in Michigan and has, since 1978, been recruiting minority teachers in the South. (J.A. 55).

> ently suspect and thus call for the exacting judicial examination.

Bakke, 438 U.S. at 289-91.

The Sixth Circuit has flatly rejected strict scrutiny, and has instead adopted a "reasonableness" standard, holding that

> One analysis is required when those for whose benefit the Constitution was amended . . . claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination.

Bratton v. City of Detroit, 704 F.2d 878, 886 (6th Cir. 1983).

The Sixth Circuit's erroneous view of the Fourteenth Amendment not only dictated the result in the instant case, but also discards the vital principle that "[i]f both are not accorded the same protection, then it is not equal." *Bakke,* 438 U.S. at 290 (opinion of Powell, J). The reasonableness test used by the Sixth Circuit also contradicts the heightened scrutiny employed by this Court in upholding Congress's set aside for minority contractors. Announcing the judgment of the Court in *Fullilove,* Chief Justice Burger, joined by Justices White and Powell, held that any "preferences based on racial or ethnic criteria must necessarily receive a most searching examination . . . ." 448 U.S. at 491. And Justices Stewart, Rehnquist, and Stevens articulated the traditional strict scrutiny standard in separate dissenting opinions. Id. at 526, 537. Dismissing *Fullilove* as a "plurality decision with little precedential value"[20] the Sixth Circuit has instead explicitly embraced (and purports to apply) the concurring

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[20]*Bratton v. City of Detroit,* 704 F.2d 878, 885 (6th Cir. 1983).

opinion of Justices Brennan, White, Marshall, and Blackmun in *Bakke*. [App. 7a.][21]

Justice Blackmun has observed "that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful." *Bakke,* 438 U.S. at 407. Thus, the operation of thousands of affirmative action programs across the nation must ultimately discriminate against non-minorities. Accordingly, racial classifications ostensibly designed for remedial purposes must be subjected to strict judicial scrutiny. When racial classifications impinge upon individual rights, the individual "is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Bakke,* 438 U.S. at 299 (opinion of Powell, J.).

Because "this Court has never approved race-conscious remedies absent judicial, administrative or legislative findings of constitutional or statutory violations," *Fullilove,* 448 U.S. at 497 (Powell, J. concurring), Petitioners start with the proposition that only *identified* discrimination may rise to the level of a compelling state interest. *See, Fullilove,* 448 U.S. at 498. In employment discrimination cases, such findings must, at a minimum, be based on the relevant labor market for the particular job in question. *Hazelwood,* 433 U.S. at 308 n.13. Subsequent, to this Court's decision in *Hazelwood,* the lower courts have consistently held that the appropriate statis-

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[21]As discussed *supra* at 19-23, the Sixth Circuit has distorted almost beyond recognition the standard articulated in the joint opinion that there must be "a sound basis for concluding that minority underrepresentation is substantial and chronic and is impeding (equal) access of minorities . . . ." *Regents of the University of California v. Bakke,* 438 U.S. 265, 362 (1978) (joint opinion, Brennan, J.)

tical comparison for purposes of identifying discrimination is the relevant labor market of qualified job applicants, as opposed to the general population. This analysis excludes those who are obviously disqualified from employment because of age or other disability, as well as those who do not have the requisite qualifications for the job.[22]

Moreover, disparities between an employer's work force and the relevant labor market must be *statistically significant. See, Castaneda v. Partida*, 430 U.S. 482 (1977). In the case of *Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984), the court held that:

> Once the plaintiff's analysis has focused on the proper groups for comparison, it must yield results that meet generally accepted standards of statistical significance. In other words, both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination.

Therefore, appropriate findings of discrimination must include, at a minimum, statistically significant disparities based on probative comparisons sufficient to create an inference of discrimination. Moreover, the infer-

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[22]*See, e.g., EEOC v. United Virginia Bank*, 615 F.2d 147 (4th Cir. 1980); *EEOC v. Local 14, International Union of Operating Engineers*, 553 F.2d 251 (2d Cir. 1977); *Vuyanich v. Republic National Bank*, 24 F.E.P. Cases 128 (N.D. Tex. 1980). For instance, in *Perham v. Ladd*, 436 F. Supp. 1101, 1106 (N.D. Ill. 1977), the district court rejected statistics that did not compare the relevant labor market:

> [T]he Plaintiff must, at the very least, make a comparison between the sexual composition of the teaching staff of Chicago State and the sexual composition of the qualified teacher and administrative population in the relevant labor market.

ence should also be supported by other evidence that indicates intentional discrimination. *Weber*, 443 U.S. at 198.[23]

When such findings are made by competent authority, the remedial use of race can then be "precisely tailored," *Bakke*, 438 U.S. at 299 (Powell, J.) to remedy *only* those differences between an employer's work force and the relevant labor market that could not have occurred by chance. Otherwise, affirmative action becomes nothing but a numbers game to grant preferences based on race.

Petitioners further submit that any constitutional standard of review for voluntary affirmative action must not repudiate the national policy as expressed in Title VII of the Civil Rights Act.[24] Therefore, when a bona fide seniority or merit system protected under Section 703(h) of Title VII is already in place, an employer should be prohibited from using race as a criteria for job selection, advancement or retention, regardless of any findings of prior discrimination. *See* e.g. *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984); *Franks v. Bowman Transportation Co.*, 424 U.S. 761 (1976).

If employers can distort bona fide seniority and merit systems by injecting racial factors, they will have no in-

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[23]Because the benefit in *Weber* was a training program, rather than a particular job requiring previously acquired skills, training, experience, or education, the probative comparison was therefore the entire civilian labor force. In addition to the statistically significant disparities presented in *Weber*, this Court took judicial notice of the history of intentional discrimination in traditionally segregated job categories of skilled trades and the exclusion of blacks from craft unions. *Weber*, 443 U.S. at 209.

[24]See, e.g., *Great American Savings & Loan Association v. Novotny*, 442 U.S. 366, 373 (1972), *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976) (holding that the 1972 amendments to Title VII extending the act to the public sector was done pursuant to Congress's power to enforce the Fourteenth Amendment.)

centive to spend the money and resources necessary to ensure compliance with Title VII's requirement of non-discriminatory employment policies. Equal employment opportunity costs money, and it is far easier—and cheaper—for employers to buy their peace by caving in to demands for racial quotas. *See, Bushey v. New York State Civil Service Commission*, 53 U.S.L.W. 3477 (U.S. Jan. 8, 1985) (Rehnquist, J., joined by Chief Justice Burger and Justice White, dissenting from denial of certiorari).

If this country is ever to achieve true equal opportunity for all Americans, the policy of the law must provide employers with the proper incentives to comply with constitutional and statutory mandates of equal employment opportunity. But the courts below have facilitated the denial of equal employment opportunity by endorsing outright racial preferences. As long as employers are vulnerable to suits for failing to adopt racial preferences, they will not strive for non-discriminatory policies that protect all races.

This Court must therefore advance and protect the national policy of non-discrimination as expressed in the Fourteenth Amendment and Section 703(a)(2) of Title VII:

> It shall be an unlawful employment practice for an employer . . . (2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-3(a)(2).

The remedial use of race therefore serves a compelling state interest only when unexplained statistical disparities using relevant comparisons are so profound as to

admit of no other explanation but discrimination and there is some other evidence of discrimination. Explanations of statistical disparities might include the impact of bona fide seniority and merit systems and other job related requirements, which should be applied regardless of past discrimination.[25]

When past discrimination is shown and current selection procedures are not bona fide, an employer may use race in selecting from the pool of qualified job applicants or employees provided that the means selected are "narrowly drawn" to achieve remedial purposes. *See, Fullilove*, 448 U.S. at 498 (Powell, J.).[26]

As applied to this case, the proper standard invalidates the result below as an unconstitutional denial of Equal Protection. First, there are no differences between the percentage of minority teachers employed as compared to the availability of minority teachers in the relevant labor market. Accordingly, the use of race achieves no remedial purpose and serves no state interest.

Second, since this a layoff case, one inquiry might be whether layoffs without regard to race would cause the percentage of minority teachers employed in the district

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[25]*N.A.A.C.P. v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974), ("For once an environment where merit can prevail exists, equality of access satisfies the demands of the Constitution.")

[26]This standard would validate *properly drawn* "voluntary" affirmative action plans administered by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) under Executive Order 11246. Also, the standard would not affect minority outreach recruitment programs. It would invalidate, however, the use of race to override merit and seniority systems that are "bona fide" within the meaning of Section 703(h) of Title VII, 42 U.S.C. § 2000(3), *et seq. See, Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

to drop below relevant labor market indicators. Such is not the case here.[27]

But even if layoffs had reduced the percentage of minority teachers employed below acceptable levels, as shown by relevant labor market statistics, an employer should not be permitted to use race to distort a bona fide seniority system. As this Court emphasized, in quoting the congressional history of Title VII:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, *if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis.* He would not be obliged—or indeed permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

Teamsters v. United States, 431 U.S. 324, 350-51 (1977), *quoting* 110 *Cong. Rec.* 7213 (1964) (emphasis by the Court.)

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[27]Following layoffs in the spring and recalls in the fall, 70 teachers lost their jobs to layoffs in the 1981-82 school year. (Pet. L. 1-2). The teacher seniority list for that year (J.A. 57-99) shows that if strict seniority were followed, there would have been 50 minority teachers and 387 non-minority teachers in the school district. Thus, 11% of all teachers would have been minorities, which compares quite favorably to the relevant labor market indicators as shown in Table A.

III. RACIAL PREFERENCES FOR DETERMINING TEACHER LAYOFF RIGHTS CANNOT BE JUSTIFIED BY REFERENCE TO PROPORTIONAL REPRESENTATION FOR MINORITY STUDENTS IN THE ABSENCE OF A CONSTITUTIONAL VIOLATION OF STUDENT RIGHTS THAT REQUIRES SUCH A REMEDY.

As this Court held in *Milliken v. Bradley,* 418 U.S. 717, 744 (1974) (hereafter *Milliken II*), "[t]he controlling principle [is] that the scope of the remedy is determined by the nature and extent of the constitutional violation." In that case, a cross-district busing order in a school desegregation suit was overturned because the trial court imposed its decree on school districts that had not been found to have acted unconstitutionally. Similarly, in *Pasadena City Board of Education v. Spangler,*[28] this Court held that a federal District Court had no power to order a school system to maintain a particular racial mix of students once the effects of unlawful *de jure* segregation had been eliminated.

Milliken II and *Pasadena* involved the extent of judicial power to remedy discrimination. Nevertheless, they should apply here, for they hold that race-conscious remedies are constitutional if, and only if, they are predicated upon constitutional violations and are designed to remedy the identified injury. If this constitutional principle constrains the equity jurisdiction of district courts, it should constrain other governmental actors as well. *Cf. Shelley v. Kraemer,* 334 U.S. 1 (1948). (Judicial action is no less subject to equal protection guarantees.)

In the school desegregation context, this Court has affirmed the remedial power of the federal courts, and by

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[28]427 U.S. 424 (1976).

implication, the discretionary authority of educators, to correct unconstitutional segregation through race-conscious assignments of black and white teachers. In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), this Court decreed that the ratio of white to black teachers in each school be "substantially" the same as the ratio throughout the system. *Swann,* 402 U.S. at 20. But this race-conscious assignment policy applies to blacks and whites alike as regards an existing teaching staff. It speaks to *where,* not to *whether* particular teachers will work.

As important as race-conscious remedies have been in school desegregation cases, this Court has never defined nor endorsed them in preferential terms.[29]

In this regard, Respondents have referred to the Philadelphia School District's voluntary race-conscious teacher assignment program under which each school was required to have between 75% and 125% of the existing proportion of black teachers employed district-wide.[30] *Kromnick v. School District of Philadelphia,* 739 F.2d 894 (3rd Cir. 1984) (upholding the plan). However, Philadelphia's race-conscious assignment policy does not call for preferential treatment. Therefore, *Kromnick* does little

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[29]In *Bakke,* this Court did not defer to a university so far as to endorse a minority admissions quota. Although Justice Powell did suggest that a public educational institution may use race-based preferences to achieve diversity in its student body, 438 U.S. at 305, he insisted on a prior findings of discrimination by a competent body. 438 U.S. at 307, 314-15. Nor was the University's Board of Regents deemed competent to remedy "societal discrimination." 438 U.S. 309, 310.

[30]Respondents' Brief Opposing the Petition for *Certiorari* at p. 4.

to support Respondents' position. Again, the assignment policy in *Kromnick* addresses where—not whether—a particular teacher will work.[31]

Moreover, the case before this Court is *not* a school-desegregation case, where the rights of innocent third parties may have to give way to the necessity of dismantling segregation and eliminating its effects upon the educational experience of minority students.[32] In such cases, "the nature of the violation determines the scope of the remedy," *Swann*, 402 U.S. at 16.

Accordingly, in *Arthur v. Nyquist*, 712 F.2d 816 (2nd Cir. 1983), the court held that while a district court may override a seniority system which perpetuates a racially segregated school system, it may "not exercise this power excessively," and must balance "individual and collective interests." 712 F.2d at 822. The court also emphasized that any relief which infringes upon the seniority rights of non-minority teachers must be strictly "necessary to correct constitutional violations." 712 F.2d at 822.

In this case, there are no legitimate competing interests to be balanced. Petitioners have a constitutional right to equal protection of the laws and there is no countervailing discrimination to be remedied. As shown by the Racial/Ethnic data (set forth in detail at pages 15-34 of the Sixth Circuit Joint Appendix), there are no segregated schools in the Jackson School District. Minority teachers and students are evenly distributed through-

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[31]The labor contract provisions in the Jackson School District requiring teacher school assignments by race are not questioned here.

[32]Casting the net broadly, the Sixth Circuit opened its opinion with the statement that: "This is a school case tangentially involving segregation in public schools. . . ." [App. 2a.]

out each of the schools in the district, and the district is completely integrated.

Even in the context of dismantling a segregated school system, students do not have a constitutional right to attend a school with a teaching staff of any particular racial composition. *Fort Bend Independent School District v. City of Stafford*, 651 F.2d 1133 (5th Cir. 1981) (holding that the percentage of minority faculty need not approximate the percentage of minority students). As regards the teaching staff, the students are only entitled to the "sustained good faith effort to recruit minority faculty members so as to remedy the effects of any discriminatory practices." 651 F.2d at 1140. *Accord, Oliver v. Kalamazoo Board of Education*, 706 F.2d 757, 762 (6th Cir. 1983).

The case before this Court involves an integrated school district that has, for at least the past 15 years, consistently employed minority teachers at a rate well in excess of their availability in the relevant labor market.[33] Accordingly, there is no discrimination in teacher employment *or* education. In the absence of such violations, the decision below cannot be sustained.

IV. A RACIAL PREFERENCE THAT SINGLES OUT A FEW NON-MINORITY TEACHERS TO BEAR THE BRUNT OF LAYOFFS IS NOT A NECESSARY OR PROPER MEANS OF PROVIDING ROLE MODELS FOR MINORITY STUDENTS.

As already demonstrated, there is no discrimination in teacher employment or student education. Therefore, the "role model" rationale invoked below must stand or fall on its own merits or lack thereof.

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[33]Between 1972 and 1981, 25% of the 126 new teachers hired by the district were minorities. (J.A. 55.)

More often than not, the role model rationale has been invoked by educators to justify segregation of existing minority faculty into predominantly minority schools.[34]

In *U.S. v. School District of Omaha*, 521 F.2d 530 (8th Cir. 1975), the school district sought to justify faculty segregation on the grounds that black "role models" should be assigned to teach black children. In rejecting this contention, the Eighth Circuit observed that.

> "such a belief—if truly held—reinforces rather than undercuts the presumption of segregative intent with respect to students, since it would logically suggest herding black students into their own schools where they could be taught by their proper black role models."

521 F.2d at 539 n.14.

Other courts have not hestitated to reject the "role model" rationale as a basis for the assignment of faculty and staff:

> It is not contended by this Court that minority role models are not important for minority students. Racial and ethnic pride is its value. But, in the constitutional scheme, a higher value in the hierarchy is integration. Integration, and the understanding it fosters, will provide both black and white role models for both black and white children.

Arthur v. Nyquist, 415 F. Supp. 904, 946 (W.D.N.Y. 1976).

The Jackson School District has an integrated faculty and student population in each school throughout the district. There is no shortage of role models for minority

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[34]See, e.g., *U.S. v. School District of Omaha*, 521 F.2d 530, 538 n. 14 (8th Cir. 1975); *Morgan v. Kerrigan*, 509 F.2d 580, 596 (1st Cir. 1979); *Reed v. Rhodes*, 607 F.2d 714, 725 (6th Cir. 1979).

students. In 1981-82, the same year as the layoffs of Petitioners, Wendy Wygant *et al.*, 19% of the coaching positions were filled by minority staff [J.A. 105]; 28% of all teacher aides were minorities [J.A. 106]; 16.7% of the administrators were minorities [J.A. 107]; and 13% of all teachers were minorities.[35] At the same time, the minority student population was 27.5%. [Pet. L. 65.] Thus, it is unnecessary to nullify the equal protection rights of non-minority teachers by single-mindedly insisting on a fixed mathematical ratio of minority teachers to students in order to provide "sufficient" number of role models.

Significantly, the Respondents did not offer a shred of evidence in the courts below to support this rationale. As a result, the district court's sole authority for the role model rationale was the soon-to-be reversed case of *Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732 (W.D. Mich. 1980), *rev'd*, 706 F.2d 757 (6th Cir. 1983). The district court in *Oliver* had ordered hiring and layoff quotas that would have maintained a 20% black teacher staff, based in large part on the opinion of an expert witness who testified that a "critical mass" of black teachers was needed to serve as "role models." 498 F. Supp. at 748. The Sixth Circuit specifically rejected the role model rationale as "arbitrary" in relation to the goal of proportional representation.

Furthermore, Petitioners' research of the professional literature on the subject shows that the role model con-

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[35]As noted previously, the 13% figure for minority teachers is the percentage before the layoffs. Actually, after operation of the minority preferences, 16% of the teaching staff were minorities for the 1981-82 school year. Table C. Had strict seniority been followed, minority teachers would have comprised 11% of the teaching staff. Supra 31, n. 27.

cept has little empirical support.[36] *See*, Speizner, *Role Models, Mentors, and Sponsors: The Elusive Concepts*, 6 SIGNS 692, 693 (1981). According to Jeanne Speizner, the concept of role models, in the context of race or gender, first appeared in the literature of education, psychology and sociology in the early 1970's. But these studies focused primarily on white females and were not based on careful empirical research. *Speizner, supra,* at 694 n.145, 708. The methodology was, in Speizner's assessment, who undertook a comprehensive survey of them, "piece meal rather than systematic, anecdotal rather than observational." *Speizner, supra*, at 708. The findings of these studies also varied widely and were contradictory. *Speizner, supra.*

Speizner suggests that the popularity of the notion of race-alike role models may be based on a "psychosocial" assumption, turned into stereotype, that black children suffer from low self-esteem. Only recently has research systematically addressed these assumptions about role modeling and black self-esteem.[37] This recent research

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[36]Petitioners acknowledge the kind of assistance of Professor Monique Weston Clague of the University of Maryland. The discussion that follows was adopted from a draft of her article to be published in the *Journal of Law and Education*.

[37]This statement is based on Petitioners' computer-assisted search of the Educational Resources Information Center (ERIC) data base, as well as the work of Professor Clague, *supra*. ERIC descriptors grouped under the heading Black Teachers were: Role Models, Student Achievement, Teacher Effectiveness, Teacher Influence, Mentors and Student-Teacher Relationships.

does not support such assumptions about role models.[38] For example, the studies that used control groups to factor out economic background conclude that the black children in the studies did not have lower self-esteem than white children and that the more important correlate of low self-esteem is low income.[39]

The *Amicus* brief of the Anti-Defamation League of B'nai B'rith points out that other studies indicate "that minority students perform better academically when their teachers are chosen on the basis of merit or seniority than they do when their teachers are chosen on the basis of racial compatibility."[40]

Finally, let us assume that Wendy Wygant and the other individual Petitioners before this Court are dedicated teachers who encourage and work well with their minority students. And let us further assume that these minority students will inevitably know that Wendy Wygant and

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[38]Indeed, one study that measured the change in self-esteem of a group of black children and white children over a three-year period found that, on the general self-esteem measure, black children "demonstrated a larger number of changes that were positive than did the white group." Hare, *Stability and Change in Self-Perception and Achievement Among Black Adolescents: A Longitudinal Study*, 11 Journal Of Black Psychology, 29, 31 (1985) (the study was based on the Champaigne, Illinois school system where twenty-three percent of the school children are black). Another recent study also challenges the view that inter-city black adolescents have negative self-concepts. Ford, *Self-Concept and Perception of School Atmosphere Among Urban Junior High School Students*, 54 Journal Of Negro Education, 82 (1985).

[39]Hare, *American Journal of Psychiatry*, *supra* at n. 38.

[40]Brief of B'nai B'rith, *supra*, at page 22. The Brief refers to the findings of Professor Eric Hanushek in *Education and Race* (Heath, 1972); and Hanushek, *Throwing Money at Schools*, 1 Journal of Policy Analysis and Management 19 (1981).

the others were selected for layoff just because they are white. This surely must teach school children of all races the wrong lesson. It teaches the Jackson School children that achieving the benefits of society depends more on one's race than on individual effort, merit and performance.

V. PETITIONERS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION CANNOT BE DETERMINED BY A MAJORITY VOTE ON A LABOR CONTRACT THAT REQUIRES ASSIGNMENT OF JOB RIGHTS BASED UPON RACE.

This Court has never hesitated to strike down restrictive or discriminatory provisions in collective bargaining agreements. *See e.g., Corning Glass Works v. Brennan,* 417 U.S. 188 (1974) (holding that when an employer violated the Equal Pay Act, such violation was not cured by a collective bargaining agreement, since the agreement itself perpetuated the discrimination); *See also, Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed* 404 U.S. 1006 (1971) (Title VII rights cannot be bargained away by a union, and if a discriminatory provision is acceded to, the union as well as the employer will be held liable). Accordingly, a collective bargaining agreement is no shield for employer violations of constitutional or statutory rights.

Underlying the opinions below is the notion that the use of race that burdens comparatively few non-minority employees must be reasonable simply because the employer and union agree to it. The district court obviously held this view. It said:

> [I]t is undeniable that the contract, and thus the challenged layoff provision, was collectively bargained. It is difficult for the Court to conceive how a plan which

> has been voluntarily adopted by the membership of the JEA (Jackson Education Association) can invidiously trammel the interests of white teachers, a majority of the JEA.

[App. 33a].

This reasoning stereotypes white teachers as sharing identical interests simply because they are white. Wendy Wygant *et al.*, are the Petitioners here, not "white teachers" or the "white race." The question before the Court is whether the individual Petitioners have been discriminated against on the basis of their race, not whether "whites" as a group have been disadvantaged. *See, Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (Fourteenth Amendment rights are personal rights guaranteed to individuals.)

In any event, when it comes to ratifying a proposed contract, each member can be expected to vote his or her *economic self-interest*, regardless of race. The district court's stereotyping simply misses the fact that union members typically have a wide diversity of interests. In this case, the majority of Jackson School District teachers in the bargaining unit have enough seniority to be immune from layoff. One cannot expect them to vote against an economic contract package just because it also calls for minority layoff preferences that will adversely affect a small number of teachers in the bargaining unit.[41] But this Court cannot permit the guarantees of the Equal Protection clause to turn on the outcome of a contract vote.

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[41]The 1981 teacher seniority list (J.A. 57-100) shows that a substantial majority of the teachers employed in 1981 had more than twelve (12) years seniority. Of the 517 teachers on the 1981 seniority list, 314 were hired before 1969. And 92 of the teachers, or 8%, had over 20 years seniority.

CONCLUSION

The Petitioners' constitutional rights to Equal Protection of the laws have been violated by the Respondents' racial preferences, which do not have a proper remedial purpose. The judgment below must therefore be reversed and the case remanded for a determination of damages, costs, and attorneys' fees as may be authorized by law.

Respectfully submitted,

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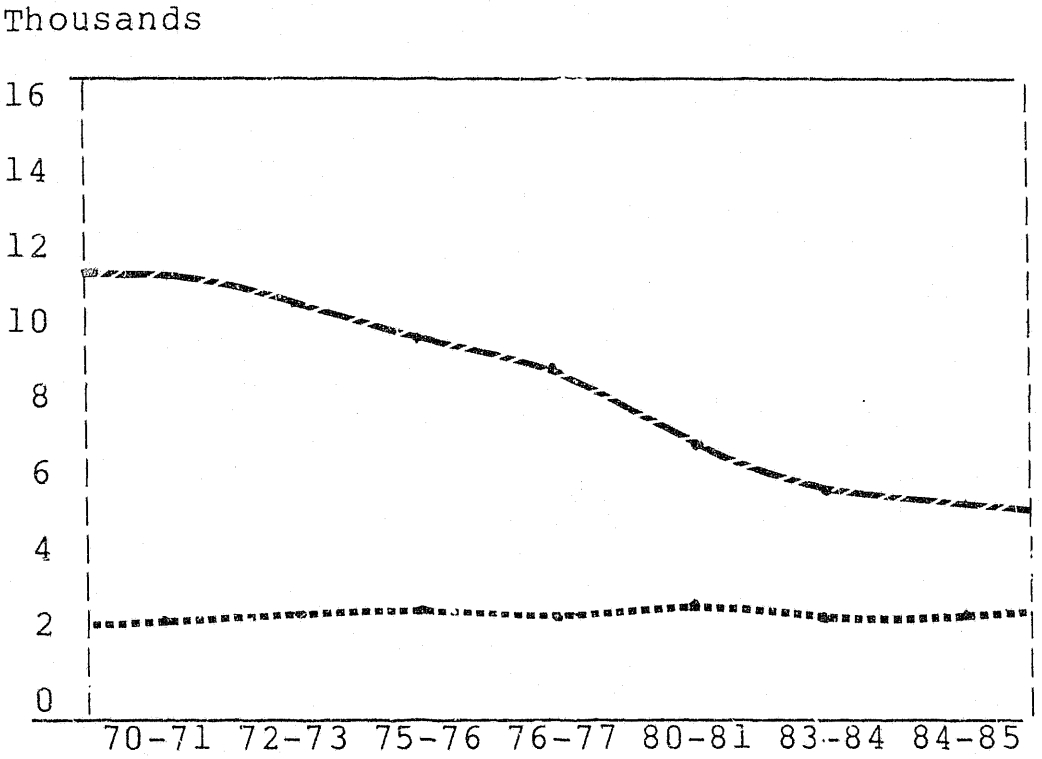
Dated: June 24, 1985

TABLE A

MINORITY AND WHITE STUDENTS
IN THE JACKSON SCHOOL DISTRICT
FOR SELECTED SCHOOL YEARS



School	Minority		White	
1970-71**	2,199	(16.2%)	11,379	(83.8%)
1972-73**	2,271	(17.4%)	10,793	(82.6%)
1975-76*	2,353	(19.9%)	9,463	(80.1%)
1976-77*	2,290	(20.6%)	8,830	(79.4%)
1980-81*	2,419	(26.4%)	6,739	(73.6%)
1983-84**	2,285	(29.1%)	5,583	(70.9%)
1984-85**	2,323	(30.0%)	5,425	(70.0%)

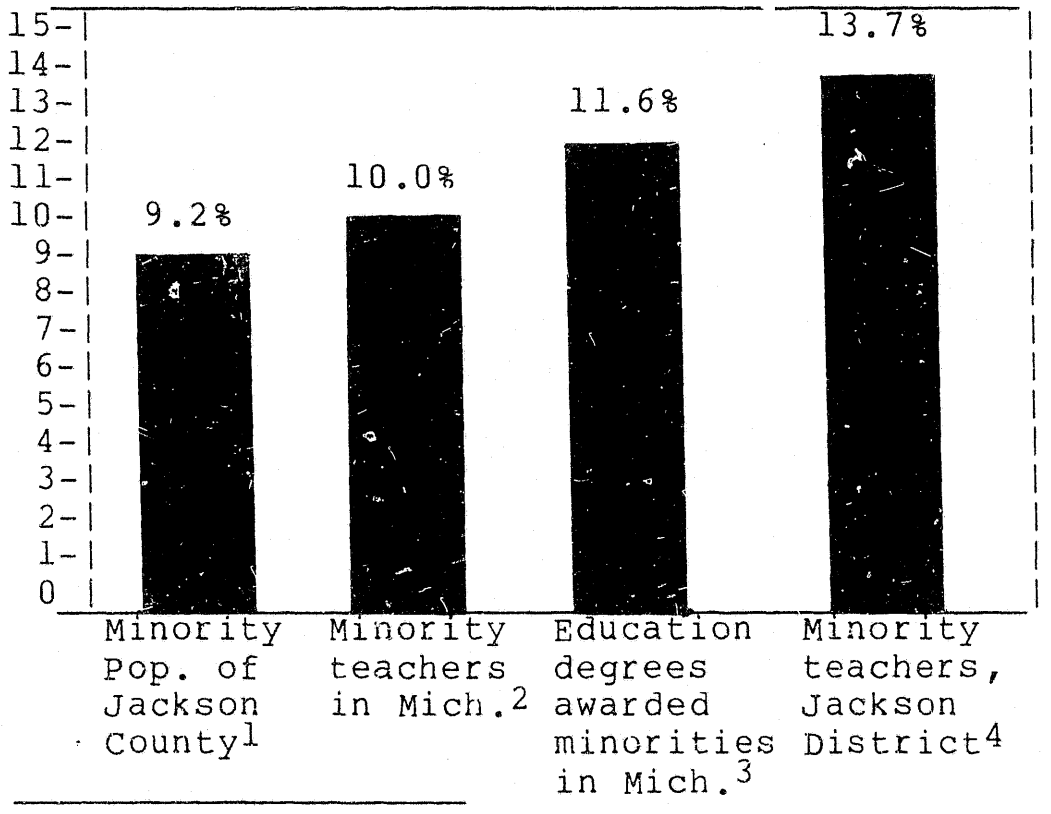
Sources:

* JA at p. 104.

** Petitioners' Lodging at pp. 56-62.

TABLE B

LABOR MARKET INDICATORS FOR 1979-80



Sources: (Petitioner's Lodging)

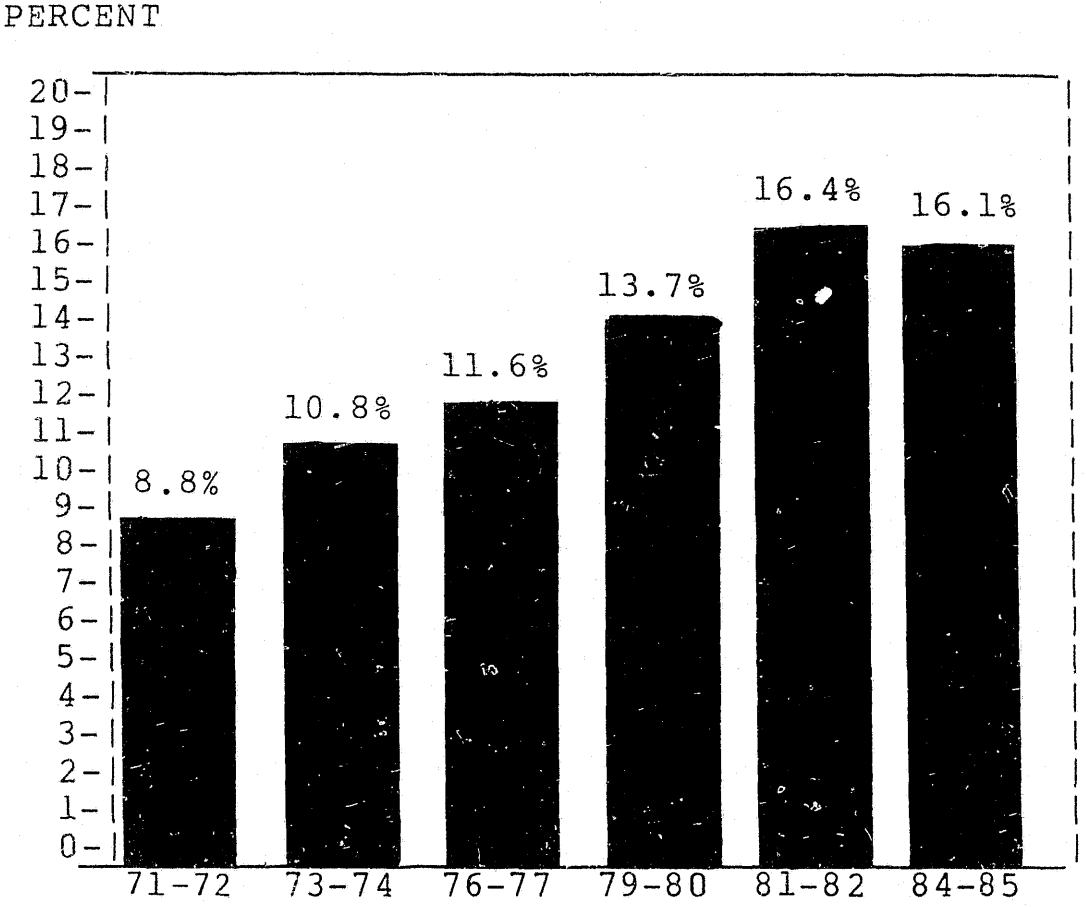
1 U.S. Census Bureau, Summary Table File 3A, (Mich. Dept. of Civil Rights, Research Evaluation and Data System Bureau).

2 EEOC Equal Opportunity Reports - 1979, Minorities and Women in Public Elementary & Secondary Schools, Table I, p. 102 (Mich. Elementary and Secondary Teachers).

3 U.S. Dept. of Educ./Office for Civil Rights, Data on Earned Degrees Conferred by Institutions of Higher Education by Race, Ethnicity, and Sex, Academic Year 1978-79, Vol. I, Table 7, p. 1260.

4 Mich. Dept. of Educ., Racial Ethnic Census by Building, 1979-80 School Year, Jackson Public Schools District Totals, p. 345.

TABLE C
PERCENTAGES OF MINORITY TEACHERS
IN THE JACKSON SCHOOL DISTRICT
FOR SELECTED SCHOOL YEARS



Sources:

Mich. Dept. of Educ./Racial, Ethnic Census, Petitioners' Lodging at pp. 56-62