No. 84-1340

In The

Supreme Court of the United States

October Term, 1984

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BRZEZINSKI, 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.

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

PETITIONERS' REPLY BRIEF

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INTRODUCTION

This Brief is submitted in reply to the Respondents' arguments, based on factual assertions drawn from their two separate Lodgings. These Lodgings were not before the Court when Petitioners' Brief was filed. Petitioners submit that Respondents' arguments erroneously seek to convert this case into something other than this employment discrimination case involving the race based layoffs of these Petitioners. Petitioners further submit that Respondents arguments are not supported by the facts of record and are contradicted by the contents of Respondents' own Lodgings.

Respondents' Lodgings consist primarily of the record before the court in the related case of *Jackson Education Association vs. Jackson Public Schools,* No. 4-72340 (E.D. Mich. 1976) [J.A. 30], hereinafter referred to as *Jackson I.* While the record in *Jackson I* was never formally submitted in its entirety to the district court below, both parties relied upon it in their motions, briefs and arguments to that court. Both parties now agree that the complete record of the proceedings in *Jackson I* is properly lodged with this Court.[1]

The record in *Jackson I* is significant because it contains the testimony of the two principal actors involved in the adoption of the racial preference (Article XII) in the 1972-73 labor contract: the then Superintendent of the school district, Dr. Lawrence Read, and the Executive Di-

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[1]In addition to the Joint Appendix and other documents of record, the record before this Court now includes a single Lodging by Petitioners and two separate Lodgings by the Respondents.

rector of the Jackson Education Association (JEA), Mr. Kirk L. Curtis.

Although the Respondents' Brief relies heavily on the record in that case, Petitioners submit that the Respondents' arguments are not supported by the record in *Jackson 1*, and indeed are contradicted by that record.[2]

I. RESPONDENTS' ARGUMENTS ARE PREMISED UPON A MISCONCEPTION OF THE RECORD EVIDENCE.

The facts advanced by Respondents in support of their arguments are based upon a misperception of the record evidence and their own Lodgings. Respondents have also advanced arguments based upon asserted facts which do not exist in the record.

In an attempt to justify the racial preferences, and without citation to the record, Respondents contend that "in the absence of Article XII the number of minority faculty in the school system would have been *drastically reduced.*" Res. Br. at 42-43, n. 32 (emphasis added). In fact, even though there were straight seniority layoffs in 1971,

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[2]*Jackson I* was brought by minority teachers and the Jackson Education Association (JEA), when the Respondent School District refused to follow Article XII when it made layoffs in 1974-75. Although the Plaintiffs specifically alleged that the School Board's hiring practices were discriminatory to minority personnel, in violation of the Constitution and 42 U.S.C. § 1981, the District Court dismissed for lack of subject matter jurisdiction because Plaintiffs' allegations were unsupported by the evidence. [J.A. 34-35, 38.]

1972 and 1973 [Res. Lodging, Curtis, pp. 18, 47, 50],[3] the percentage of minority teachers in the district actually increased during that time.[4]

Furthermore, the Respondent School Board refused to follow Article XII for tenured teachers when it made 75 layoffs in 1974,[5] but the percentage of minority teachers in the district went from 11.1% in 1974 to 11.4% in the 1974-75 school year. [J.A. 43, 108.] Accordingly, the Respondents' argument that the percentage of minority teachers would have been "drastically reduced," has no factual support in the record and is without merit.

Moreover, based on the 1981 teacher seniority list, Petitioners have demonstrated that layoffs by seniority in 1981 would have resulted in a minority faculty percentage consistent with relevant labor market figures.[6] Re-

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[3]Because Respondents have failed to number the pages of their lodgings, Petitioners references to the lodgings will cite directly to the page numbers of the testimony or to the specific exhibit. The notation "Res. Lodging" refers to the Respondents' first Lodging.

[4]The percentage of minority faculty increased from 6.1% in 1970-71, to 7.5% in 1971-72, and to 10.1% in 1972-73. [Pet. Lodging at 56-57.]

[5]The Board issued 75 layoff notices in the spring of 1974 [J.A. 43], and recalled 56 teachers in the fall. [Pet. Lodging, p. 1.]

[6]In making this calculation from the 1981 teacher seniority list, Petitioners inadvertently used the wrong figures for the number of teacher layoffs in 1981. Although 99 teachers were given layoff notices in the spring, 64 were recalled in the fall rather than 29 as stated in the brief. [Pet. Lodging, p. 1.] The net effect is 35 layoffs instead of 70. [Id.] This hardly changes the result since removing the bottom 35 teachers from the 1981 seniority list [J.A. 57-99] results in a minority faculty proportion of 11.8% (57 of 484) rather than 11%.

spondents now claim that these figures are misleading because "[t]he Board of Education took certification and special class and staffing needs into account in making lay-offs, before Article XII came into play." Res. Br. at 41-42, n. 32. Respondents do not explain, however, how these alleged special needs affected seniority layoffs. And these special "needs," if they exist, are not supported by citation to the record.

What the record does show is that Petitioners were displaced by the racial preferences in Article XII from positions that they were fully *qualified* to teach. [App. 24a.] Moreover, in *Jackson I,* Respondents' own counsel stipulated that the *only* effect of Article XII was to create a dual seniority list:

> (Mr. Susskind): I think we can stipulate to the fact that it would create a protective list or a dual list for the purpose of layoff. *That would be the only impact on it* (emphasis added).
>
> THE COURT: That is all this case is about, is it not?
>
> (Mr. Susskind): That's right. . . .
> [Res. Lodging, Curtis, p. 49.]

In a further attempt to bolster their argument that Article XII was necessary to have adequate numbers of minority teachers, Respondents assert that:

> The union members were virtually unanimous in agreeing that there was a need for more black teachers, and *Article XII was perceived as necessary to bring that about.* . . . Res. Br. at 13, n. 12 (emphasis added).

But the Respondents' supporting reference to their own Lodging contradicts this assertion. On this point, Mr. Curtis testified:

Q. Recognizing that I'm asking for an opinion but was there unanimity of your members as to the need for black teachers or increased recruitment of black teachers within the system?

A. Virtual. Virtual unanimity for the need for that. *Now, when it came to layoff, that was another matter*

[Res. Lodging, Curtis, p. 42 (emphasis added).]

Respondents compound their error in this regard by claiming that "Petitioners clearly misstate the facts when they contend that '[t]he vast majority of the teachers were opposed to racial preferences for layoffs.'" Res. Br. at 43, n. 33. According to Respondents' own Lodging, a survey of the teachers' views in the spring of 1972 showed "overwhelming" support for the existing straight seniority layoffs, not the race based system subsequently imposed by the labor contract in Article XII.[7]

In support of their argument that the racial preference for layoffs is "reasonable," Respondents and their various amici emphasize that Article XII was a fair compromise

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[7]In response to a question by Plaintiffs' counsel, the Executive Director of the JEA, Mr. Kirk Curtis, testified to the results of the teacher survey [Res. Lodging, Curtis, pp. 28-29] as follows:

Q. And your teachers at least, have indicated to you on layoff they preferred, 93% of them, a slight [sic] [straight] seniority system?

A. Well, it was overwhelming. There was no question about the attitude of the majority of the teaching staff which I—majority, I'm talking about the white teachers.

THE COURT: You did not have any difficulty persuading them how to vote?

THE WITNESS: No, none at all. . . .

solution arrived at by "experienced negotiators" at the "bargaining table." Res. Br. at 33, 43. Again, the testimony in the Respondents' own Lodging flatly contradicts this premise.

According to the School Superintendent, Dr. Read, Article XII was agreed on *"sub rosa"* before the actual negotiations began. [Res. Lodging, Read, p. 33.] This is confirmed by the Executive Director of the JEA, who testified that the deal on Article XII was cut by the leaders of the union, the school administration and several black teachers' groups in the early spring of 1972. [*Id.* pp. 34-36.] According to Mr. Curtis, this secret deal was necessary "for reasons political." [*Id.* at 36.][8]

A review of the record demonstrates that there is no support for Respondents' argument that the district needed racial preferences to attract sufficient numbers of minority teachers. Without citation to the record, Respondents claim "that from an economic position, such districts

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[8]The testimony shows that the subsequent "negotiations" at the bargaining table were nothing but a charade: "The administration was going to propose their freeze system. Both of us, I think, for reasons political, had to do that. And then, you know, at that point a couple of months down the road, it was understood that we would arrive at the proportional layoff system which had been informally worked out. And that course of events took place." [Res. Lodging, Curtis, p. 36.]

And, according to Curtis, the teachers were not very happy when they found out what was in the new union contract: "Well, there were a lot of teachers who expressed their opinions that what we had done with this particular clause we had chucked their seniority down the drain. And there were some very emotional comments about the wisdom of having done that." [Id. at 41-42.]

as Kalamazoo, Grand Rapids, Detroit, and Lansing have been able to offer their teachers higher salaries and are culturally more attractive, placing Jackson at a competitive disadvantage within the in-state sub-market." Res. Br. at 18, n. 17. Again, this statement is contradicted in Respondents' own Lodging. The Second Lodging contains a Final Report of the Quality Education Subcommittee, dated June 10, 1971, stating that: "The salary schedules are good compared to other Michigan communities."[9]

Finally, Respondents have again gone completely outside the record by making the bald assertion that Petitioners made no attempt to grieve or otherwise challenge the application of Article XII through established union procedures. Res. Br. at 32. Since the record is completely silent on this point, Petitioners submit that this unsupported statement should be disregarded.[10]

II. THE RECORD CONTRADICTS RESPONDENTS' CLAIM THAT RACE BASED LAYOFFS WERE NECESSARY TO INTEGRATE THE SCHOOL SYSTEM.

Respondents' claim that the racial preferences for layoffs were an "integral part of a comprehensive volun-

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[9]Like the First Lodging, the pages of the Second Lodging are not numbered. The Final Report of the Quality Education Subcommittee is the second item in the Second Lodging, and the statement above appears at the bottom of the tenth page of that report, under the topic "Present Status."

[10]By letter dated October 10, 1985, with a copy to the Clerk of this Court, Petitioners have asked Respondents to withdraw this erroneous statement from their brief. Attached to the letter to Respondents' counsel are copies of grievances and a letter to the Union from three of the individual Petitioners protesting Article XII.

tary effort by the Jackson Board of Education to integrate its public schools." Res. Br. at 19. They also say that Article XII was adopted "as part of a *plan* to remedy prior discrimination and to achieve the educational benefits of school integration for its students." Res. Br., Argument I, p. 17 (emphasis added). But there is no support in the record for the contention that the racial layoff preferences in Article XII were part of the plan to integrate the school system or were needed for that purpose.

At the hearing before the district court below, Respondents' counsel stated:

> (Mr. Susskind): The District had voluntarily adopted a Desegregation Plan without court intervention. That was back around the start of the 1970's.
>
> Now, that Desegregation *Plan did not include* the Affirmative Action Plan which was subsequently negotiated by the Board and the union, and ratified in each successive Agreement, including the present Agreement, which is in its third year between the parties.

[Proceedings of February 23, 1982, p. 4 (emphasis added).]

Respondents now suggest that Article XII was necessary to achieve the goal of having at least two minority teachers in each elementary school by the 1972-73 school year.[11] However, Respondents' own Lodging shows that this goal was reached in the fall of 1972, without resorting to racial preferences for layoffs, by hiring special black

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[11]Respondents' Brief at 8-9, n. 8, stating that: "The Board adopted that plan in March of 1972, see Read Dep. at 46, even though at that time there were still too few minority teachers in the system to meet that stated goal, Tr. *Jackson I*, at 27, and despite the fact that the minority teachers who were in the school district were particularly vulnerable to the seniority layoff rule then contained in the Board's collective bargaining agreement."

corrective reading teachers with federal funds under Title I. [Res. Lodging, Read, pp. 49, 53-54.] This was accomplished *before* the racial preferences were first applied to layoffs in the spring of the following year. [Res. Lodging, Curtis, pp. 47-48.]

Dr. Read testified extensively in *Jackson I* concerning the ongoing integration efforts, both before and after he was appointed superintendent in 1968. His testimony does not support Respondents' argument that race based layoffs were necessary to integrate the school system. According to Dr. Read, the Jackson School District had a fairly good record on integration even prior to 1968:

> I would say for the times and the attitudes generally in the country, that the efforts were better than average. I think as a consequence, Jackson was never particularly bothered by court action or threatened suits, because its general record in those years [prior to 1968] have been pretty good.

[Res. Lodging, Read p. 6.]

One example cited by Dr. Read concerned the opening of Parkside High School in 1963. When the new school opened, the school board drew attendance boundaries to ensure an appropriate mix of white and black students between the new school and Jackson High School. [*Id.*][12]

Similarly, when a new junior high school opened in 1969, the School District redrew attendance boundaries to

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[12]The Amicus Brief of the Jackson Education Association makes the bald statement that "[p]rior to 1960, almost all of the black students in Jackson were assigned to a few schools within the school system. . . ." Br. at 11. There is absolutely no support in the record for this statement. Indeed, the district court below specifically noted the lack of available data on student population for the years prior to 1968. [App. 9a.]

achieve "an identical racial balance in all four junior high schools. . . ." [Respondents Lodging, Read, p.7.] This assured continued integration of all secondary schools, because the junior high schools were the "feeder" schools for the high schools. [*Id.*] Indeed, Dr. Read testified that, as of 1969: "Everything from grade 7 through 12, we had achieved about as close to a perfect racial balance in the schools as you could get." [Res. Lodging, Read, p. 12.]

While an appropriate racial balance in each elementary school was apparently more difficult to attain, the elementary schools were integrated by the 1972-73 school year.[13] There was certainly no need for racial preferences in 1981, when most of the individual Petitioners were disenfranchised of their civil rights, *See, Oliver v. Kalamazoo Board of Education,* 706 F.2d 757 (6th Cir. 1983); *Arthur v. Nyquist,* 712 F.2d 816, 822 (2nd Cir. 1983) (Any relief infringing upon teacher seniority rights must be strictly "necessary to correct constitutional violations".) Based on this record, Respondents can hardly show a need for racial layoff preferences in 1981 or at any time.

III. THERE ARE NO FINDINGS OF PAST DISCRIMINATION IN THE JACKSON SCHOOL DISTRICT.

Respondents and their various amici argue that the Jackson School Board is competent to remedy its own historic discrimination and has a constitutional duty to do so. While Petitioners do not quarrel with this proposition

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[13]See, e.g., Appendix to Brief of *Amicus Jackson Education Association,* 1972-73 Table.

in the abstract, the record demonstrates that "[t]here is no history of overt past discrimination by the parties to this [labor] contract." *Jackson Education Association v. Jackson Public Schools,* (Jackson County Cir. Ct. 1979) [J.A. at 49.] Certainly, an employer cannot deprive innocent employees of their civil rights without any showing that there are *continuing* effects of past discrimination that must be remedied at their expense. See, *Regents of the University of California v. Bakke,* 438 U.S. 265, 299 (1978) (opinion of Powell, J.).

In attempting to show that the racial preferences have some redeeming remedial character, based on findings of discrimination, Respondents and their various amici place great emphasis on the fact that the Jackson branch of the NAACP filed a complaint with the Michigan Civil Rights Commission in March 1969.[14] While this Complaint makes a general allegation of discriminatory hiring practices, it dealt with only one school in the district. As Dr. Read explained in his testimony, "it dealt specifically with Frost Junior High School." [Res. Lodging, Read, p. 71.]

Furthermore, the complaint was resolved by a conciliation agreement. [*Id.*] The formal disposition of that Complaint specifically provides that the agreement to "adjust this matter and to take affirmative steps . . . do not represent admission[s] of unlawful discrimination on the

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[14]There was only one complaint. Respondents incorrectly state that a complaint was filed in April of 1969 and incorrectly identify the complaint number as 6585. Res. Br. at 4, n. 4. The actual Complaint, No. 6485, was filed on March 24, 1969. The Complaint and Notice of Disposition are attached to the *Brief of Amicus Michigan Civil Rights Commission, Michigan Department of Civil Rights.*

part of the Jackson Board of Education *nor should they be construed as a finding of discrimination by the Michigan Civil Rights Commission.*" (Emphasis added).[15] Accordingly, the Respondents' claims "of violation findings by the Michigan Civil Rights Commission concerning both student assignment and teacher hiring and assignment . . . ," Res. Br. at 42, are completely unsupported by the record.[16]

In fact, the record in *Jackson I* contains not one finding in any of the fifteen exhibits in that case that any of the schools in the Jackson School District were unconstitutionally segregated by race. [*Jackson I*, J.A. at 36] Indeed, the Redistricting Subcommittee "asked the School Board's attorney to advise them if racial integration is legally required and, if so, to what extent."[17] The Committee's report of May 6, 1970, states that: "The District is not legally required to correct a racial imbalance in the neighborhood school system which was brought about by conditions

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[15]Attachment A, *Brief of Amicus Michigan Civil Rights Commission, Michigan Department of Civil Rights.*

[16]Of course, Respondents' assertion of "violation findings" in "teacher hiring" is directly contradicted in the pleadings: "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." Complaint, ¶ 21. In the Cross Motions for Summary Judgment below, this well pleaded fact was accepted by Respondents as true. [Proceedings of February 23, 1982, p. 1.]

[17]Comments by Carl L. Breeding, attached to the Redistricting Subcommittee Report of May 1970, included in the Respondents' Lodging as Exhibit 2 in *Jackson I*. The comments by Mr. Breeding are on the sixteenth page of Exhibit 2.

not created by the School Board . . . ." [Res. Lodging, attachment to Exhibit 2, p. 3.] Apparently, the School Board's integration efforts were addressing changing racial demographics and housing patterns that were outside its control.[18]

Based upon an apparently exhaustive search of the record in *Jackson I*, one of the Respondents' amici found a single statement which they claim confirms "the existence of findings by the Board of Education that the School District was segregated. . . ."[19] The statement referred to is contained in a series of questions and answers distributed to concerned citizens. But when read in context, the answer to the question referred to simply says that segregation is illegal, which can hardly be construed as a specific finding of discrimination by any entity.[20]

In short, the Respondent Jackson School Board has not made findings of any prior discrimination in the Jack-

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[18]Consistent with the court's finding of "societal discrimination" in *Jackson Education Association v. Jackson Public Schools*, No. 77-011484 CZ (Jackson County Cir. Ct. 1979), [J.A. 39], a position paper by Carl L. Breeding attached to the subcommittee's Report states that integrating the Jackson Public Schools can only be accomplished by changing housing patterns: "Bringing about school integration rests on a far harder barrier to surmount than law—the *housing pattern* which for the most part keeps blacks in one set of schools and whites in another. Obviously, housing patterns are not going to change appreciably in a short time" (emphasis added). [Res. Lodging, attachment to Exhibit 2.]

[19]*Brief of the Lawyers Committee for Civil Rights Under Law and the American Civil Liberties Union, p. 3 n. 3.*

[20]The statement says that the right to attend a neighborhood school is "often disregarded for such reasons as special education, overcrowding, special programs, and certainly, when it is illegal, as in the case of perpetuating racially isolated schools." [Res. Lodging, Information Circulated to Jackson Citizens, April 10, 1972, Concerning School Integration Efforts, Plaintiffs' Exhibit 8, answer to question 7.]

son Public Schools.[21] Indeed, Respondents *concede* the point by emphasizing "possible prior discrimination" Res. Br. at 30, or "a plausible showing of past discrimination." Res. Br. at 42.

Therefore, there is nothing to support the explicit use of race apart from the labor contract itself. By its express terms, the labor contract requires the existing percentages of minority faculty to be maintained during layoff until there is proportional representation between the faculty and student body populations. [J.A. 13, 15.] This is nothing but a naked preference based on race without any limitation as to time, scope or effect; and is devoid of any procedural safeguards or standards for periodic re-evalu-

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[21]The Amicus Brief of the Jackson Education Association asserts that the "[t]estimony of the school superintendent shows that school officials believed that federal laws *required* these measures to desegregate the schools." JEA Brief at 15 (emphasis added). In support of this statement, they refer to the testimony of Dr. Read at pages 65-68. But Dr. Read was referring to his personal opinion that the racial preference for teacher layoffs was consistent with federal law, not that racial preferences were *required* to desegregate the school system.

Dr. Read stated that "[w]e weren't trying to do anything illegal, because there is a clause in the contract that says if anything is in conflict with the statutes of the Federal government or the State of Michigan, that the statutes would prevail." [Res. Lodging, Read, p. 67.] Dr. Read believed that Article XII would prevail because "the activist position of the courts at that time in finding in favor of minority group rights, we felt that if indeed the courts ever had to make a decision, that the Federal regulations governing equal treatment, and particularly the treatment of minority groups, probably would prevail over the State Tenure Law." [*Id.*] (The Michigan Teacher Tenure Act, MCLA 38.105 *et. seq.* would otherwise require layoffs by straight seniority.) [J.A. 44.]

ations of the "need" for the preferences.[22] As such, this explicit use of race cannot stand. "Absent findings of past discrimination by a competent body, courts cannot ascertain that the purpose of the affirmation action program is legitimate." *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir. 1981) (Upholding preferential hiring plan of *limited* duration based on judicial *and* administrative findings of discrimination.) *See* also, *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (7th Cir. 1984) (Preferential affirmative action plan could not be justified by mere findings of a statistical disparity, which was insufficient to prove past discrimination.)

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[22]The *Brief Of Amici Curiae Lawyers' Committee For Civil Rights Under Law, et al.*, contends that Article XII "has been reviewed several times since its adoption in 1972, and it is again subject to renegotiation in 1988 when the current collective bargaining agreement expires." Br. at 14. No record reference is cited for this assertion. The record shows that the Respondent School Board proposed deleting Article XII from the labor contract in 1973, but the Union insisted that it remain in the agreement. [Res. Lodging, Curtis, pp. 50-51.] Apparently, Article XII has never been reviewed since that time. According to Respondents, the Union has never proposed its deletion from the contract. Respondents' *Brief In Opposition To Petition For Writ Of Certiorari*, p. 1.

CONCLUSION

Respondents have attempted to characterize the record to suit their arguments that the race based layoffs of Petitioners were reasonable and necessary. Contrary to Respondents' assertions, there are no findings of discrimination in the record. The race based layoffs of these Petitioners were imposed without any remedial justification, and the judgment below must be reversed and the case remanded for further proceedings consistent with Petitioners' rights to equal protection of the laws.

Respectfully submitted,

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