No. 84-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

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

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan and RICHARD SURBROOK, President and DON 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

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF PETITIONERS

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QUESTION ADDRESSED

Is it constitutionally permissible for a public school board to use a teacher layoff plan containing racial and ethnic classifications where:

a. the objective of the plan is to preserve the "minority balance" of teachers as part of an effort to achieve "at least the same percentage of minority representation on each individual staff as is represented by the student population";

b. the result of the plan is that teachers who are not "Black, American Indian, Oriental or of Spanish descendancy" are deprived of employment while the employment of less senior teachers, who are "minority group personnel," is preserved;

c. the plan is not a remedy for unconstitutional segregation or unlawful employment discrimination as no court, legislative body, administrative agency or school board has found either to exist; and

d. the foundation of the plan—that there is a "vitally important" educational need of minority students for race-alike role models in a representative proportion—is not a "finding" of the school board but is an assumption, originating in the decisions below, which is unsupported by the record, legal precedent, professional literature or empirical research?

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CONSENT OF THE PARTIES

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

INTEREST OF THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Founded in 1916, the American Federation of Teachers, AFL-CIO ("AFT") is a labor organization representing more than half a million members in over 2,000 local affiliates. AFT's membership includes more than 450,000 elementary and secondary school teachers, college and university professors and others employed in public and private education. AFT teachers are of both sexes, all races and many ethnic groups. As bargaining representatives for public school teachers and staff, AFT local affiliates regularly negotiate and administer collective bargaining agreements with public school systems.

As a trade union of educators, AFT actively supports school and faculty and staff desegregation and affirmative action programs. AFT's historical commitment to the principle of equal educational opportunity has served as a philosophical foundation for both its collective bargaining and legislative activity. Beyond education, AFT has been at the forefront in the struggle to eliminate segregation and discrimination in housing, employment and public and private institutions.

Throughout its history, AFT has fought to improve the quality of education and the welfare of teachers, seeking to preclude employer use of invidious and subjective methods of distributing employment benefits. AFT seeks fairness of treatment through the application of objective, racially-neutral criteria. Assuring teachers freedom from race-based employment decisions is essential to their ability to be effective educators.

AFT is committed to full integration of our public school systems and our society. AFT does not believe this commitment is served by public employer decisions about teacher employment made on the basis of race and ethnic

background. Nor does AFT believe that public school students or teachers are entitled to a proportionally representative faculty, determined by race and ethnicity. These concepts are contrary to basic constitutional principles. All persons are entitled to be free from state classifications based on race, religion, gender or national origin.

These principles are the basis for AFT's argument for reversal of the decision below.

STATEMENT OF THE CASE

In its 1972 collective bargaining agreement with the Jackson Education Association ("Association"), the representative of Jackson public school teachers, Respondent Jackson Board of Education ("Jackson" or "Board") established a teacher layoff plan which contained racial and ethnic classifications. The agreement reads, in pertinent part:

> ARTICLE VII.D.1. The Board and the Association, in recognition of the desirability of multiethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are Black, American Indian, Oriental, or of Spanish descendancy. The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff is as represented by the student population of the Jackson Public Schools.
>
> ARTICLE VII.D.2. In order that this goal be expeditiously met, it is agreed that, for vacancies in school buildings in which this goal has not been met, the Board will actively seek, recruit, and hire qualified minority teachers for such vacancies. The Board will annually review each individual staff to ensure proper minority representation.

* * * *

> 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 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 certificated maintaining the above minority balance.

This layoff plan is contained in all later agreements between the Board and the Association, including the agreement currently in effect.

In the 1981-1982 school year, Petitioners—eight Jackson teachers—were laid off while less senior teachers were retained. Petitioners were laid off pursuant to Article XII.B.1. of the agreement. Petitioners were laid off while less senior teachers were retained because Petitioners are not "minority group personnel" as defined in Article VII.D.1. of the agreement; they are not "Black, American Indian, Oriental or of Spanish descendancy."

Petitioners sued Respondents, complaining, *inter alia*, that a layoff plan containing racial and ethnic classifications, established and implemented by a public school board, violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The District Court rejected Petitioners' claim, upholding the layoff plan as being a reasonable device to remedy "underrepresentation of minority teachers" as measured by the difference between the percentages of minority faculty and minority students. *Wygant v. Jackson Board of Education*, 546 F. Supp. 1195, 1201 (E.D. Mich. 1982). The District Court approved the plan as

serving a "vitally important aspect of the teaching profession": a need for race-alike role models in a proportionally representative number. *Id.* The Sixth Circuit Court of Appeals affirmed. *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984).

ARGUMENT

I.

Jackson's layoff plan chooses who will teach and who will not on the basis of race and ethnicity.

Jackson's plan gives preference to "minority group personnel"—to teachers who are "Black, American Indian, Oriental or of Spanish descendancy." Its objective is to preserve "minority balance."

Jackson's plan is not a remedy for unlawful employment discrimination affecting Jackson teachers or teacher applicants. No court, no legislative body, no administrative agency—and no Jackson school board—has found that Jackson engaged in unlawful employment discrimination.

Jackson's plan is not a remedy for unconstitutional segregation. No Jackson school board found that unconstitutional segregation exists. No court has found any constitutional violation in the Jackson school system.

Rather, the layoff plan is a voluntary effort to preserve "minority balance" as part of Jackson's broader objective: "to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools." Article VII.D.1. Jackson's plan pursues this objective at the expense of innocent teachers, teachers who lose their jobs because they are not "minority group personnel." *Id.*

The decisions below find a "faculty racial imbalance," largely on the basis of a single statistic: In 1971, the

year before the plan was first established, there was a difference between the percentage of Jackson's minority teachers (between 8.3 and 8.8 percent) and the percentage of Jackson's minority students (15.9 percent). 746 F.2d at 1156; 546 F. Supp. at 1197.[1] This difference, the decisions below conclude, is significant because:

> [T]eaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models.

746 F.2d at 1156; 546 F. Supp. at 1201. As there was a difference between the percentages of minority teachers and minority students, because "societal discrimination has often deprived minority children of other role models," because race-alike role models are a "vitally important aspect of the teaching profession," the decisions below hold that a public employer may use racial and ethnic classifications in employment decisions.

II.

We address the Court as *amicus curiae* to state our conviction that the foundation of the decisions below—that a need for proportionally representative race-alike role models is "one vitally important aspect of the teaching profession"—is without basis. It is unsupported in the record before this Court. It is unsupported by legal precedent, professional literature or empirical research.

The record contains nothing to justify, or even define, the race-alike role model concept. There is no evidence of the educational impact of race-alike role models or that the presence of race-alike role models in some minimum number is a "vitally important aspect of the teaching profession."

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[1] This brief uses the term "minority" as defined by Jackson, to include faculty, staff, and students who are "Black, American Indian, Oriental or of Spanish descendancy." Article VII.D.1.

Significantly, there is nothing in the record to show that the Jackson school board has ever even considered the race-alike role model concept. Jackson adopted a policy of "actively seeking minority group personnel" to achieve "at least the same percentage of minority racial representation on each individual staff as is represented by the student population" because it recognized the "desirability of multi-ethnic representation on the teaching faculty." Article VII.D.1. Recognition of the desirability of multi-ethnic representation on the teaching faculty—which, we agree, is of benefit to students of all races and ethnicity—is a far cry from the pronouncement that the need of minority students for race-alike role models in a representative proportion is such a "vitally important aspect of the teaching profession" that it warrants the termination of the employment of others on the basis of race. This "vitally important aspect" idea originated with the District Court and was endorsed by the Court of Appeals; it never was a "finding" of the Jackson school board. The race-alike role model concept is indulged by the decisions below without support in the record.

Nor is there persuasive judicial authority to support the decisions. We are aware of a number of decisions that have considered the race-alike role model concept. In seven, all school desegregation cases, parties argued that the segregation of minority faculty in predominantly minority schools is justified to provide race-alike role models for minority students.[3] Six of these decisions

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[3] *See, Diaz v. San Jose Unified School District,* 705 F.2d 1129 (9th Cir. 1983) and *Diaz v. San Jose Unified School District,* 518 F. Supp. 622 (N.D. Cal. 1981), *aff'd.,* 705 F.2d 1129, *rev'd.,* 733 F.2d 660 (9th Cir. 1984); *Reed v. Rhodes,* 607 F.2d 714 (6th Cir. 1979), *cert. denied,* 445 U.S. 935 (1980) and *Reed v. Rhodes,* 455 F. Supp. 546 (N.D. Ohio 1978); *Arthur v. Nyquist,* 415 F. Supp. 904 (W.D. N.Y. 1976), *modified,* 573 F.2d 134, *cert. denied sub nom. Manch v. Arthur,* 439 U.S. 860 (1978); *U.S. v. School District of Omaha,* 521 F.2d 530 (8th Cir.), *cert. denied,* 423 U.S. 946 (1975); *Morgan v. Kerrigan,* 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

reject this argument.[4] Two specifically observe that the logical extension of the race-alike role model concept is segregation.[5] The seventh found no evidence justifying race-based faculty assignments to provide race-alike role models.[6]

We are aware of only two decisions which justify race-based teacher layoff procedures on the need of minority students for some minimum proportion of race-alike role models. Both are in school desegregation cases in which the layoff procedures were efforts to remedy constitutional violations found to exist by courts. *Oliver* v. *Kalamazoo Board of Education*, 498 F. Supp. 732, 747-748 (W.D. Mich. 1980), *vacated*, 706 F.2d 757 (6th Cir. 1983); *Morgan v. O'Bryant*, 671 F.2d 23, 27 (1st Cir.),

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[4] *Diaz*, 518 F. Supp. at 640; *Reed*, 607 F.2d at 725; *Reed*, 455 F. Supp. at 566; *Arthur*, 415 F. Supp. at 945-946; *Omaha*, 521 F.2d at 538, n. 14; *Kerrigan*, 509 F.2d at 596.

[5] *Omaha*, 521 F.2d at 539, n. 14; *Arthur*, 415 F. Supp. at 945-946. In *Arthur*, the school board justified its race-based faculty assignments on the basis of a "sound educational rationale": "the need of black students for role models and because the black teachers and administrators have greater understanding of the black community." 415 F. Supp. at 945-946. The court observed that this rationale "if carried to its logical conclusion, supports the complete separation of races in public schools". *Id.* at 946.

[6] *Diaz*, 705 F.2d at 1132-1133. We are aware of two decisions in addition to those discussed in the text. *See Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), holding that race-based teacher assignments are permissible as part of a school desegregation remedy, which notes the desirability of race-alike role models in passing, and *Evans v. Buchanan*, 582 F.2d 750, 773 (3d Cir. 1978), *cert. denied*, 446 U.S. 923, *reh'g denied*, 447 U.S. 916 (1980), which acknowledges, but does not rely upon, the testimony of educators that the presence of race-alike role models would smooth the transition for both black and white students moved from one school to another during the initial desegregation of a school system.

cert. denied sub nom. Boston Association of School Administrators and Supervisors v. Morgan, 459 U.S. 827, *cert. denied sub nom. Local 66, Boston Teachers Union v. Boston School Committee*, 459 U.S. 881, *reh'g. denied*, 459 U.S. 1059 (1982), *reh'g. denied*, —— U.S. ——, 77 L.Ed.2d 1401 (1983). *Morgan v. O'Bryant*, like the decisions below, cites the District Court decision in *Oliver* as its sole authority for the race-alike role model concept. 671 F.2d at 27.[7] The District Court's decision in *Oliver*, the "leading" race-alike role model case, was vacated by the Sixth Circuit Court of Appeals.

The District Court's decision in *Oliver* is the only decision of which we are aware that relies on record evidence for its view that race-alike role models must be present in some minimum proportion. That evidence, the testimony of Dr. Robert Green, is summarized by the District Court, 498 F. Supp. at 748:

> As a general rule, Dr. Green stated that a school district's faculty ought to begin to approximate the percentage of minority students in the district; however, other factors must be considered, so the critical mass is not always equal to student ratios. In Kalamazoo, he said he would trust the [School] District's judgment in setting 20% as the critical mass.

The Sixth Circuit Court of Appeals reversed the District Court's approval of a race-based layoff procedure, holding that the 20% "critical mass"—endorsed by Dr. Green and based on the school district's minority student population—was arbitrary. *Oliver*, 706 F.2d at 762-763. The court held that students are not entitled to race-alike

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[7] A different decision in the same school desegregation case rejected the race-alike role model concept as a justification for the assignment of minority teachers to predominantly minority schools. *See, Morgan v. Kerrigan*, 509 F.2d 580, 596 (1st Cir. 1974), approving the lower court's finding that there is "no systematic inquiry or empirical data to support" a "need of black children for black adult role models[.]"

role models in some minimum proportion; rather "all that the students are entitled to is the 'sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practices.' " *Id.*

Despite judicial consideration of the race-alike role model concept in school desegregation cases over the last ten years, there is no persuasive support for the proposition that race-alike role models must be present in a representative proportion to cure some role model deprivation suffered by minority students. And we are aware of no persuasive support for this proposition in professional literature or empirical research.[8] The assumptions of the decisions below—that race-alike role models are "vitally important" and that they are effective in producing salutary ends only when present in some minimum number—are articles of faith, supported only by intuition.

III.

We do not minimize the utility of the role model concept as we understand it. There is no doubt that "teaching is more than just a job." Directly and indirectly, by instruction and by example, teachers influence and motivate students. Teachers impart values as well as knowl-

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[8] *See* Clague, "Voluntary Affirmative Action Plans In Public Education: Matching Faculty Race to Student Race—Anticipating a Supreme Court Decision", unpublished paper presented at the annual meeting of the American Educational Research Association, Chicago, Illinois on April 2, 1985, to be published in revised form under the same title in 14 *Journal of Law and Education* No. 3 (July, 1985). Professor Clague observes: "Systematic study, based on a role model theory, of the relationship between minority students' objectively measureable success and the race of teachers with whom they have contact, does not appear to exist." at 45. *See also Morgan v. Kerrigan,* 509 F.2d 580, 596 (1st Cir. 1974) (there is "no systematic inquiry or empirical data" to support the race-alike role model concept.)

edge. In this sense, "teachers are role models for their students." [9]

We recognize that we as teachers have great responsibility. Accordingly, we should be highly competent, knowledgeable, skilled in communication, unbiased, honest, diligent and committed to our students and profession. We should possess these and many other positive characteristics and values. Acknowledging this does not permit the conclusion that we must be, or even should be, by some representative proportion, "Black, American Indian, Oriental, or of Spanish descendancy" or white; or male or female; Christian, Jewish, or Muslim; of Polish or Italian or German or Irish descendancy; or tall, short, fat, or thin.

We, like Jackson, believe that it is educationally desirable for all students to be exposed to multi-racial and multi-ethnic role models. This is consistent with our pursuit of an integrated society. We believe that diversity among teaching faculty is culturally enriching and will foster tolerance and understanding. But there is no evidence that diversity or race-alike role models are more important—or even as important—than other factors.[10] Assuming the desirability of race-alike role models, there is no basis for concluding they must be present in some

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[9] This is consistent with our experience as teachers and "commonsense" judgment. *See, Ambach v. Norwick*, 441 U.S. 68, 79 n. 9 (1979).

[10] We believe, to paraphrase Justice Marshall, that it is better to have an excellent teacher role model of another race than a poor teacher role model of one's own race. *Ambach v. Norwick*, 441 U.S. 68, 87 (1979) (Marshall dissenting). Further, we believe that the effectiveness of a teacher is affected by a myriad of factors, including those personal characteristics listed above and others, such as student-teacher ratios, quality of textual and teaching materials, preparation time, staff and administrative support, physical facilities, parental support, etc. We know of no support for isolating race as the single controlling factor.

proportionally representative number.[11] There is no support for the idea that race-alike role models are such a

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[11] We point out that the record below establishes the substantial presence of minority faculty and staff in Jackson's schools as well as Jackson's success in recruiting minority faculty and staff.

The decisions below note that in 1953 (before *Brown v. Board of Education,* 347 U.S. 483 (1954)), there were no black teachers in Jackson schools. In 1961, 1.8 percent of Jackson's teachers were black. In 1968-1969, black teachers constituted 3.9 percent of the faculty. In 1970-1971 minority faculty was 5.5 percent. In 1971-1972 minority faculty was between 8.3 and 8.8 percent. 746 F.2d at 1156; 546 F. Supp. at 1201.

What the decisions below do not note, but the record discloses, is that by 1981-1982—the year Petitioners lost their jobs—minority teachers were 13.5 percent of the faculty. Sixth Circuit Joint Appendix ("SCJA") at 15. In that same school year, the percentage of minority administrators was 19.6, the percentage of minority faculty in coaching positions was 18.3 and the percentage of minority teacher aides was 30.1. SCJA at 7, 13 and 14. In 1982-1983, the latest statistics contained in the record, the minority percentages were: teachers—13.9; administrators—24.4; coaches—29.3; teacher aides—29.6. SCJA at 7, 13-15.

The percentages of Jackson's minority faculty and staff can be viewed in the context of the relevant labor market, the measure used to determine "conspicuous racial imbalance in traditionally segregated job categories". *Steelworkers v. Weber,* 443 U.S. 193, 209 (1979). *See Hazelwood School District v. U.S.,* 433 U.S. 299 (1977).

In *Oliver v. Kalamazoo Board of Education,* 498 F. Supp. 732, 745 (W.D. Mich. 1980), *vacated,* 706 F.2d 757 (6th Cir. 1983), the court-ordered study of the Kalamazoo, Michigan school district—located approximately 60 miles from Jackson—reported these indicators of the relevant labor market for the 1977-1978 school year: percentage of black applicants—11.7; percentage of education degree conferred on blacks in Michigan colleges and universities in 1975-1976—10; percentage of black population in Michigan—9.7; and percentage of black population in United States—11. In Jackson in 1977-1978, the minority faculty and staff percentages were: teachers—10.9; administrators—20.4; teacher aides—18.7. SCJA 13-15. These figures show there were race-alike role models for minority students in Jackson and they were present in numbers near or exceeding what might be expected from relevant labor market indicators.

"vitally important aspect of the teaching profession" that the fact that they are not present in a proportionally representative number warrants the termination of other teachers on the basis of race or ethnicity.

Jackson's layoff plan cannot be justified merely because it is well-intentioned or because it pursues desirable educational and societal objectives or because it is contained in collective bargaining agreements.[12] The layoff plan is unjustified because its premise—that race-alike teacher role models in representative proportion are "vitally important"—is unjustified and, we believe, unjustifiable.

The race-alike role model concept as employed in the decisions below is an insidious proposition. Carried to its end, it would justify the resegregation of American public schools, where students may be properly taught only by teachers of their own race. Or gender. Or religion. Or ethnic group.

Endorsed by public schools and courts, the race-alike role model concept communicates to students, teachers and the public that it is legitimate to make decisions about individuals based on race and ethnicity. This, of course, is contrary to basic constitutional principles.

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[12] Collective bargaining between employers and democratically selected trade unions is a fundamental value of free societies. But a public employer's use of race and ethnic classifications to make employment decisions is neither insulated from judicial scrutiny nor constitutionally justified because it is included in collective bargaining agreements. The constitutional propriety of a public employer's racial classifications cannot depend on employee approval. If such approval validated a public employer's use of racial classifications, many American school districts would remain segregated. Nor can an individual teacher's right to be free from employer decisions based on race be waived by fellow employees. See *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual.")

And it reenforces the very evil we are committed to eliminating.

Also, by its nature, the race-alike role model concept requires the perpetual use of racial classifications: to ensure race-alike role models in the proportion of minority students, the faculty will have to be adjusted annually by race. A permanent racial classification is not remedial. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436 (1976).

School children need teachers who are skilled, knowledgeable, and sensitive, teachers who are able to practice their profession in a fair work environment where they enjoy the minimal security and academic freedom provided by the assurance that decisions about their employment will not be made on the basis of racial and ethnic classifications.

IV.

The Sixth Circuit Court of Appeals views this as "a school case tangentially involving segregation in public schools[.]". 746 F.2d at 1154. In school cases directly involving segregation—in which courts have found constitutional violations—there is no right to be instructed by a racially balanced faculty or to be taught by race-alike role models. *See Oliver*, 706 F.2d at 762; *see also Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-25 (1971); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 433-435 (1976). Here, there is no "condition that offends the Constitution." *Swann*, 402 U.S. at 16.

The Court of Appeals also recognizes this as an employment case, applying the standards of *Steelworkers v. Weber*, 443 U.S. 193 (1979). In employment cases, the remedial use of racial classifications is appropriate to "make whole" identifiable discrimination victims, *see*

Teamsters v. United States, 431 U.S. 324 (1977), and has been held to be acceptable to address a "conspicuous racial imbalance in traditionally segregated job categories" in the private sector. *Weber*, 443 U.S. at 209. Here, there are no identifiable discrimination victims. Nor is there any "conspicuous racial imbalance" as measured by the relevant labor market, the standard used in employment cases. *See Weber*, 443 U.S. at 197; *Hazelwood School District v. U.S.*, 433 U.S. 299 (1977).[13]

Here, the only "racial imbalance" or "segregation" is that measured by a difference between the percentages of minority teachers and minority students. This difference is significant, say the decisions below, because of the "vitally important" educational need of minority students for a proportionally representative number of race-alike role models. This is without basis: it is not supported by the record, by professional literature or research or in any "finding" of the school board. The foundation of the decisions below is facile jargon and a sociological assumption expanded beyond supportable limits.

CONCLUSION

We believe that by any constitutional standard it is impermissible for a public employer to pursue "minority balance" by depriving one group of teachers of employment while preserving the employment of other teachers because some are "minority group personnel" and some are not.

We believe that under any constitutional standard, Jackson's layoff plan violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

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[13] See discussion in note 11 of this brief.

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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