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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, *et al.*,

Petitioners,

VS.

JACKSON BOARD OF EDUCATION, *et al.*,

Respondents.

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

**BRIEF OF MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND, AMICUS
CURIAE, IN SUPPORT OF RESPONDENTS**

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QUESTIONS PRESENTED

1. Is a collectively bargained layoff provision which does not immunize minority employees from layoff but rather corrects the disparate impact of strict seniority a racial preference?

2. Does the Fourteenth Amendment require public employers to adhere to a last-hired, first-fired system for selecting employees for layoff?

3. Does the Fourteenth Amendment permit a union and public employer voluntarily to adopt a collective bargaining agreement which requires racially proportional layoffs

where, absent such a provision, layoffs could be expected to have a substantial disparate impact on minority employees?

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SUPPORT OF RESPONDENTS

CONSENT OF THE PARTIES

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

INTEREST OF AMICUS CURIAE

The Mexican American Legal Defense and Educational Fund, Inc. ("MALDEF") is a national civil rights organization established in 1967. Its principal objective is to secure the civil rights of Hispanics living in the United States, through litigation and education. MALDEF believes that the Fourteenth Amendment should and must apply with equal force to members of all racial and ethnic groups. MALDEF also believes, however, that public and private employers are permitted under the Fourteenth Amendment to take reasonable voluntary measures to correct historical underrepresentation of racial and ethnic minorities in the workforce. In support of these principles and goals, MALDEF

has participated as amicus curiae and as counsel of record in numerous cases before the Court. Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___, 104 S.Ct. 2576 (1984); Fullilove v. Klutznick, 448 U.S. 448 (1980); Bryant v. California Brewers Ass'n., 444 U.S. 598 (1980); United Steelworkers of America v. Weber, 443 U.S. 193 (1969); Chicano Police Officers Ass'n. v. Stover, 426 U.S. 944 (1976), 624 F.2d 127 (10th Cir. 1980); Rodriguez v. East Texas Motor Freight Sys., Inc., 431 U.S. 395 (1977).

SUMMARY OF ARGUMENT

The Fourteenth Amendment does not require employers and unions to adopt a strict last-hired, first-fired

seniority system for layoff. An employer could constitutionally decide to lay teachers off by lot.

Article XII, although race conscious, does not create a preference based on race. It achieves the same result in racial terms as selecting employees for layoff by lot. It does not immunize minorities from layoff, nor does it require that minority teachers be laid off slower than non-minority teachers.

Article XII is a constitutional means of correcting the disparate impact of a layoff on the School District's minority employees. The record establishes that minority teachers in the Jackson School District have

significantly less seniority than non-minority teachers. A layoff based strictly on seniority would have a severe disparate impact on minority teachers. The means adopted to correct that disparate impact are constitutional. Because seniority is not a measure of individual worth, adjustments to a seniority system to ameliorate a layoff's disparate impact on minorities does not suggest that minority teachers lack the ability to succeed on their own.

One of the fundamental purposes of Title VII of the Civil Rights Act of 1964 is to correct employment practices which have a disparate impact on minorities but cannot be justified by business necessity. Article XII achieves this purpose. The immunity in

Section 703(h) of Title VII for bona fide seniority systems does not prevent a union and employer from voluntarily agreeing through collective bargaining to modify a seniority system to correct its disparate impact on minorities. The rationale behind Section 703(h) -- to accord deference to the results of collective bargaining -- and the underlying policy of Title VII to eliminate employment practices with disparate impacts on minorities are both served by allowing implementation of Article XII.

STATEMENT OF THE CASE

Although MALDEF generally concurs in the Statement of the Case in Respondents' Brief, MALDEF believes that its emphasis on this case as a school

desegregation case is somewhat misplaced. This case involves a more general problem experienced by many public and private employers. Whether as a result of efforts to correct past discrimination in the workplace, or as a result of changes over time in the racial and ethnic makeup of the employer's workforce or the available labor market, many public and private employers find that their minority employees on the whole have significantly less seniority than their non-minority employees. When such an employer faces a layoff, application of a strict last-hired, first-fired seniority system for selecting employees for layoff often has a significant disparate impact on minority employees and substantially reduces the percentage of minorities in the employer's workforce.

The fundamental issue presented by this case is whether, when a public employer is involved, the Fourteenth Amendment permits the employer and union to take voluntary steps to correct the disparate impact of a layoff on minority employees.

The Jackson School District is a good example of this problem. From 1950 to 1980, the minority population of Jackson County approximately doubled from 4.7 percent to 9.2 percent.^{1/} The

^{1/} United States Department of Commerce, Census of Population: 1950, Vol. II, Characteristics of the Population, Part 22 Michigan, p. 22-46 (Table 12) (showing 4.7% non-white population); id. 1980 Census of Population, Michigan STF 3A (showing 9.212% minority population). This Court may take judicial notice of census figures. Rose v. Mitchell, 443 U.S. 547, 571 n.11 (1979); Castaneda v. Partida, 430 U.S. 482, 486 n.6 (1977); Hernandez v. Texas, 347 U.S. 475, 480 n.12 (1954).

percentage of minority teachers in the Jackson School District also grew. In 1953 there were no black teachers. By 1961, 1.8 percent of the faculty was minority. By 1968-69, minority faculty constituted 3.9 percent of the total teaching staff. By 1971-72, the period when Article XII was added to the collective bargaining agreement, minority faculty members had increased to approximately 8 percent.^{2/} By 1981, the time of the layoffs giving rise to the present action, minority teachers represented 13.1 percent of the faculty.^{3/}

^{2/} Pet. App. 30a.

^{3/} J.A. 57-100 (68 of 518 teachers on 1981 seniority list are minority).

The record also indicates that minorities were historically underrepresented as teachers in the Jackson School District and that this underrepresentation was the result of discriminatory employment practices. In 1970-71, for example, minority teachers represented only 6.1 percent of the teachers in the Jackson School District,^{4/} even though neighboring Wayne County had 21.6 percent minority teachers^{5/} and the

^{4/} Pet. Lodging, 56-62; Michigan Department of Education, Racial Ethnic Census for 1970-1971, Jackson Public Schools.

^{5/} Department of Commerce, Census of Population: 1970, Characteristics of the Population for Michigan ("1970 Census"), Tables 122, 127 & 132, at pp. 564, 587 & 602.

Ann-Arbor/Detroit Combined Standard Metropolitan Statistical Area from which teachers could easily have been recruited had 12.5 percent minority teachers.^{6/} Discriminatory practices included the assignment of black teachers to virtually all-black schools.^{7/}

Because minorities were historically underrepresented as teachers

^{6/} 1970 Census, note 5 supra, Tables 86, 93 & 99, at pp. 331, 387 & 435.

^{7/} The preliminary investigatory report dated June 16, 1969, prepared by the Michigan Civil Rights Commission in response to Complaint No. 6585 of the NAACP revealed that eight of the nine all-white schools had all-white facilities, while half of the black teachers were concentrated in just two schools which were 81% and 91% black.

in the Jackson School District, and most minority teachers were recent hires, minority teachers on the whole had significantly less seniority than non-minority teachers. An analysis of the 1981 seniority list -- the only seniority list in the record -- shows a striking disparity in minority and non-minority seniority.

Of the 518 teachers on the 1981 seniority list, 68 (13.1%) are indicated as minority employees and 450 (86.9%) are indicated as non-minority. The median seniority date for non-minority teachers is July 19, 1967. In other words, half of the non-minority teachers on the seniority list were hired before July 19, 1967 and half were hired after that date. The median

seniority date for the minority teachers is August 29, 1972. Simply put, minority teachers on the average had approximately five years less seniority than non-minority teachers. This is a significant disparity, particularly in light of the fact that, had the layoff in 1981 of 70 teachers been based strictly on seniority, it would have resulted in the layoff of teachers with approximately five years or less of seniority.^{8/}

Other methods of statistical analysis reveal a significant disparity

^{8/} Pet. Lodging, 1-2; Pet. Brief p. 31 n.27; J.A. 94-100 (employee 70th from end of March 1, 1981 seniority list had seniority date of January 13, 1976).

between the seniority of minority and non-minority teachers. Of the most senior third of the teachers on the seniority list, for example, only six out of 173 (3.5%) are minority. Of the least senior third of the teachers on the seniority list, 48 out of 173 (27.7%) are minority.^{9/}

Had the Jackson School Board laid off the fifty least senior teachers in 1981, sixteen (32%) would have been minority. In other words, the percentage of minorities in the group of employees laid off would have been more than double the percentage of minorities

^{9/} J.A. 57-100.

in the teacher population as a whole (13%). The minority percentage of the workforce would have declined from 13.1 percent before the layoff to 11.1 percent after the layoff.^{10/}

The attention by petitioners on the actual layoff which occurred in 1981-1982 obscures the fact that, when the School Board and the union first agreed to Article XII in 1972, they did not know when layoffs would occur, how severe they would be, and what the rate of minority employment would be up to the date of layoff. What is relevant is

^{10/} J.A. 95-100. Respondents correctly point out that the collective bargaining agreement did not require application of strict seniority, even apart from Article XII.

not simply the actual layoff which occurred in 1981-82, but the layoffs which could reasonably have been anticipated in 1971-72 when the School Board and union negotiated and ultimately agreed on Article XII. The record indicates that the potential for a layoff with a severely disparate impact on minority employees was quite substantial in 1972. Thus, had the School Board on September 1, 1972 laid off the twenty-five least senior teachers, thirteen of the twenty-five (52%) would have been minorities.11/

11/ J.A. 86-88. Because the record does not contain a 1972 seniority list, the preceding calculation is based on the 1981 seniority list which, of course, does not reflect teachers who left the employ of the School Board between 1972 and 1981.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE EMPLOYERS AND UNIONS TO ADOPT A STRICT LAST-HIRED, FIRST-FIRED SENIORITY SYSTEM TO SELECT EMPLOYEES FOR LAYOFF.

Petitioners appear to suggest in their brief that the Constitution somehow forces the School Board and the union to adopt a last-hired, first-fired seniority system to select employees for layoff. After assuming that a last-hired, first-fired seniority system is a constitutional given, petitioners then treat any race conscious alteration of such a system as a racial preference, thereby invoking the Fourteenth Amendment. Both steps in petitioners' argument are flawed.

We start with the obvious premise that the Constitution does not require public or private employers to

have any kind of seniority system to select employees for layoff. An employer and union could agree, for example, that an employer could select employees for layoff based on the employer's subjective evaluation of which employees are best able to perform the remaining work. Alternatively, the employer and union could agree that the employer would administer validated, job-related competency tests and select those employees with the lowest scores for layoff. The employer and union could also agree to select employees to be laid off by lot -- for example, by pulling names out of a hat.

This Court's precedents also make it clear that, if an employer and union agree on a particular contractual

provision governing selection of employees for layoff, they nevertheless remain free to revise or eliminate that provision in subsequent contracts. Franks v. Bowman Transportation Co., 424 U.S. 747, 778-79 (1976); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Aeronautical Industrial District Lodge 727 v. Campbell, 337 U.S. 521 (1949). The employee has no vested property interest in a particular seniority system. As one leading labor law commentator has stated:

"Thus, seniority rights provided for in a collective bargaining agreement may be modified or eliminated by agreement of the union and the employer so long as they act in good faith, and this change may be effected without the consent - indeed, against

the wishes - of the individual employee."^{12/}

While seniority systems are widespread in our economy, it is important to bear in mind that they are frequently inequitable in their application. Under a standard last-hired, first-fired system, for example, a worker with twenty years' experience who was hired by a particular employer a year ago would be laid off before

^{12/} B. Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv.L.Rev. 1532, 1533-34 (1962). See also Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953); Franks v. Bowman Transportation Co., 424 U.S. 747, 778 (1976); Whitfield v. United Steelworkers of America, 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959).

an employee who was hired by the employer two years ago, with no previous experience. In the school context, a highly gifted teacher employed for four years would be laid off before a less competent teacher employed for six years. Seniority not only does not necessarily equate to merit; seniority does not even necessarily equate to experience. And yet, the mechanical nature of seniority is one of its chief advantages. A merit system for selecting employees for layoff would involve inherently subjective evaluations of employees' relative ability. A simple last-hired, first-fired seniority system, by contrast, allows employees to be selected for layoff from a list by reference to one arbitrarily selected criteria -- date of hire.

In our complex industrial society, seniority and layoff provisions assume an almost infinite variety. Seniority preference may be determined on a geographical or district basis, or on a plant, departmental or craft basis. The employees who are laid off from a particular job may have complex rights to bump back to other, low-paying jobs, thereby forcing the layoff of other employees.^{13/} It has never been seriously suggested that the Constitution forces public or private employers and unions to adopt any particular form of seniority or layoff provisions in their collective bargaining agreements, or indeed to have any such provisions at all.

^{13/} See generally B. Aaron, note 12 supra, at 1534-35.

II. WHILE ARTICLE XII IS RACE CONSCIOUS, IT DOES NOT CREATE A PREFERENCE BASED ON RACE.

Article XII does not impose a preference based on race. True, it is race conscious in that it ameliorates the disparate impact on minority employees of strict seniority by requiring that employees be selected for layoff in the same proportion as their percentages in the employer's current workforce. That result, however, creates no preference for any racial group. Article XII achieves the very same result in terms of racial makeup of employees selected for layoff as would be achieved by selecting employees for layoff by lot, a procedure which the School Board and union clearly have the constitutional power to adopt in order to avoid the disparate impact on minorities of a

strict seniority layoff system. Thus, if the School Board selected employees for layoff by lot, the laws of probability would dictate that the employees selected for layoff would have approximately the same racial makeup as the then-current teacher workforce. Selecting employees for layoff by lot would eliminate the disparity resulting from the fact that minorities are not evenly distributed in terms of hire date. In terms of racial impact, Article XII achieves the same result as would be achieved by a purely colorblind, neutral system of selecting employees for layoff by lot. As such, it does not create any racial preference.

Viewed in this light, Article XII can best be characterized as an

amalgam of two racially neutral methods of selecting employees for layoff -- strict seniority and random selection. It avoids the disparate impact of strict seniority by achieving the same racial distribution as would be achieved by a random selection method. It then uses seniority to determine which individual employees will be laid off to achieve that result. It does not create a preference for any racial group. Employees are selected for layoff from all racial groups in direct proportion to their percentage representation in the current workforce. No immunity from layoff is granted to members of any racial or ethnic classification.

While petitioners are unquestionably correct in asserting that each

individual employee has the right to assert the protections of the Fourteenth Amendment, petitioners are wrong in suggesting that the union and School Board violated the rights of petitioners simply because petitioners were selected for layoff under Article XII and would not have been selected for layoff had strict seniority been the only layoff criteria. As noted earlier, the union and School Board, consistent with the Fourteenth Amendment, could have rejected seniority altogether and agreed to select employees for layoff by lot in order to avoid the disparate impact on minorities of a pure seniority system. Had they done so, the employees so selected would clearly have no basis for contending that their rights under the Fourteenth Amendment had been violated.

Two different facially neutral methods of selecting employees for layoff (random selection and seniority) will result in the selection of different individual employees in a given instance. Yet each method would be constitutional, and the changeover from one method to another would also be constitutional.

III. THE FOURTEENTH AMENDMENT PERMITS THE VOLUNTARY ADOPTION OF A COLLECTIVE BARGAINING AGREEMENT WHICH REQUIRES RACIALLY PROPORTIONAL LAYOFFS WHERE, ABSENT SUCH A PROVISION, LAYOFFS COULD BE EXPECTED TO HAVE A SUBSTANTIAL DISPARATE IMPACT ON MINORITY EMPLOYEES.

A. Article XII Is a Constitutional Means of Correcting the Disparate Impact of a Layoff On The School District's Minority Employees.

Whatever its other weaknesses, the record in this case clearly demonstrates that application of a strict seniority method to select employees for

layoff would have a substantial disparate impact on minority employees. As noted earlier, had the school district laid off the twenty-five least senior teachers at the start of the 1972 school year (when Article XII was adopted), thirteen or 52 percent of the laid off teachers would have been minorities, even though minorities represented only approximately 8 percent of the teachers at the time. Had the fifty least senior teachers been laid off in 1981, sixteen (32%) would have been minorities even though only 13 percent of the total teacher population was then minority.^{14/} The School Board and union adopted a constitutional means for ameliorating this adverse impact.

^{14/} See pp. 10-13, supra.

To begin with, Article XII does not simply purport to seek racial balance for the sake of racial balance or in order to remedy perceived societal discrimination against minorities. See Regents of University of California v. Bakke ("Bakke"), 438 U.S. 265, 290 (1978); United Steelworkers of America v. Weber, 443 U.S. 193, 238-39 (1979) (Rehnquist, J., dissenting). As Respondents' Brief makes clear, Article XII is part of a broader voluntary effort, including affirmative action in hiring, to correct a history of underrepresentation of black teachers in the school district. The hiring aspect of the affirmative action program was not challenged below and is not at issue here. Moreover, the record does not allow the Court to evaluate the constitutionality

of the hiring aspect of the affirmative action program. There is no record, for example, as to what methods were used by the School Board to meet its goal of increased minority hiring, and there is nothing in the record to suggest that the School Board used a quota system which gave preference to a black applicant over an equally qualified or more qualified white applicant based solely on race.

The purpose and operation of Article XII is, in contrast, clear from the record. Article XII was not designed to rectify past societal discrimination. Rather, it was rooted in the fact that a strict seniority layoff would have a substantial present or future disparate impact on minorities given this employer's seniority list.

Second, the means adopted by Article XII are far different from the racial quota held unconstitutional by a majority of the Court in Bakke. The special admissions procedure attacked in Bakke created an arbitrary preferential quota for minority students and resulted in a more qualified non-minority applicant being rejected in favor of a less qualified minority applicant.^{15/}

^{15/} In Bakke, 16 out of 100 spaces in the entering class were reserved for applicants to the special admissions program. The only applicants to the special admissions program selected for one of the 16 slots were minorities. For the 1974 entering class, 3,737 applicants were submitted for 100 seats, of which only 84 were available to whites. Thus, a white applicant's chance of admission was $84/3,737$ or 2.2%. In 1974, 456 minorities vied for the 16 spaces in the special admissions program so that 3.5% of all minority applicants were accepted under the special admissions program -- in addition to minorities accepted through the regular admissions program. Bakke, 438 U.S. at 273 n.2 and 275 n.5.

Here, in contrast, Article XII does not create any preferential immunity from layoffs for minority employees. Minority and non-minority teachers are laid off in direct proportion to their percentage in the current teacher workforce. Furthermore, neither the pure seniority system advocated by petitioners nor the modified seniority system adopted by respondents results in the retention of less qualified teachers at the expense of more qualified teachers. All current teachers are qualified. Individualized evaluations of relative merit and qualifications are ignored by both systems in favor of mechanical means of selecting teachers for layoff.

Indeed, the same considerations which underlay Justice Powell's

approval in Bakke of the Harvard College Admissions Program should lead to approval of Article XII here. Harvard College's Admission Program rejected the use of a single criterion of scholarly excellence to select from the pool of qualified candidates, based on the conclusion that "diversity adds an essential ingredient to the education process." 438 U.S. at 321-322. In the present case, the union and School Board have rejected the use of a single criterion -- seniority -- to select from the pool of qualified teachers those who will be retained. Instead, they have added a second criterion -- preservation of ethnic and racial diversity. The nature of the layoff selection process is necessarily very different from the process of selecting from a pool of college

applicants, and is different from the process of selecting from a pool of teacher job applicants. The individualized consideration in the Harvard College Admissions Program which the Court lauded in Bakke cannot realistically be applied in the layoff context. Yet there is a fundamental shared premise of both Article XII and the Harvard College Admissions Program -- that racial and ethnic diversity can legitimately be added as a criterion in the selection process.

The mechanism adopted by Article XII is a reasonable means to achieve the goal of racial and ethnic diversity in a layoff context where individualized consideration of individual merit is not feasible, yet the record

demonstrates that a pure seniority system will have a severe disparate impact on current levels of minority employment. Fullilove v. Klutznick, 448 U.S. 448 (1980).

The race conscious adjustment of a seniority system does not bring into play many of the concerns expressed over race conscious adjustments to employer decisions which are normally based solely on merit. In Bakke, for example, Justice Powell expressed the concern that preferential programs for members of racial or ethnic groups

"may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." Bakke, 438 U.S. at 298.

See also DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

These concerns are unwarranted here. A last-hired, first-fired seniority system does not select employees for layoff based on factors having a direct relationship to individual worth. As noted earlier, seniority does not measure ability or worth, nor is it even a direct measure of experience. Adjusting a seniority system to ameliorate the disparate impact of a layoff based strictly on seniority does not in any way suggest that minority employees lack the ability, talent or drive to "make it" on their own.

The fact that there was no formal administrative or judicial determination that the Jackson School District discriminated against minority teachers should not change the result. Under the Court's judgment in Bakke, Harvard College can administer its admittedly race conscious admissions program even though no court or administrative body has ever found that the college discriminates against minority applicants. Race conscious remedies have been approved where no judicial findings of discrimination have been made. McDaniel v. Barresi, 402 U.S. 39 (1971); United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977). See Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351

(1974). See also Katzenbach v. Morgan,
384 U.S. 641 (1966).

- B. One of the Fundamental Purposes of the Civil Rights Act of 1964 Is To Correct Employment Practices Which Have a Disparate Impact On Minorities But Cannot Be Justified By Business Necessity.

In Griggs v. Duke Power Co.,
401 U.S. 424 (1971), the Court unani-
mously held that Title VII of the Civil
Rights Act of 1964, 42 U.S.C. § 2000e et
seq., must be interpreted not only to
reach intentional discrimination, but
also to prohibit facially neutral em-
ployment practices which have a dispa-
rate impact on minorities.

"Congress directed the
thrust of the Act to the
consequences of employ-
ment practices, not sim-
ply the motivation."
Griggs v. Duke Power Co.,
401 U.S. at 432. (Em-
phasis in original.)

See also Albermarle Paper Co. v. Moody,
422 U.S. 405, 422-23 (1975).

In Griggs, the Court held that Title VII forbids the use of any employment or promotion criterion which is discriminatory in effect, unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S. at 432.

A showing by an employer that an employment or promotion criterion is job related is not sufficient, however. The employer must also show that the criterion is justified by business necessity -- that is, the employer must show that there are no other selection

devices, without a similarly undesirable racial effect, which would serve the employer's legitimate interest in an efficient, competent workforce. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-02 (1973); Albermarle Paper Co. v. Moody, 422 U.S. at 425.

As the Court has summarized in International Brotherhood of Teamsters v. United States ("Teamsters"), 431 U.S. 324 (1977), under a disparate impact theory, Title VII generally prohibits "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Teamsters, 431 U.S. at 335 n.15. Thus, there is a strong public policy, reflected in Title VII, that employers correct

those employment practices which, though neutral on their face, have a significant disparate impact on minority employees and cannot be justified by business necessity.

C. The Immunity Provided In Section 703(h) of Title VII Does Not Prevent Employers and Unions From Voluntarily Agreeing To Correct the Disparate Impact of a Layoff.

In Teamsters, the Court recognized that seniority systems appeared to be one kind of practice which could be attacked under Title VII as "fair in form, but discriminatory in operation." Teamsters, 431 U.S. at 349. Seniority systems, moreover, cannot satisfy the "business necessity" test as there are other selection methods which would serve the employer's legitimate interest

in reducing the workforce without the undesirable disparate racial impact. The Court concluded, however, that Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), was intended by Congress to immunize bona fide seniority systems from judicial attack under Title VII even though they have a disparate impact on minority employees, may tend to perpetuate into the present the effects of past discrimination, and cannot satisfy the "business necessity" test. Nowhere in Teamsters, however, does the Court suggest that employers and unions are forced to accept the disparate impact of strict seniority systems on minority employees. Nowhere in the legislative history relied upon in Teamsters did Congress indicate that employers and

unions were forced to accept that disparate impact.^{16/} Section 703(h) of

^{16/} In dissent in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), the Chief Justice has argued that the legislative history does indicate that Congress intended to prohibit voluntary race conscious adjustment of seniority systems. 443 U.S. at 240 (Burger, C.J., dissenting). The Chief Justice relied on remarks in an interpretative memorandum by Senators Clark and Case which stated that, even if an employer discriminated in the past

"'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.' Ibid. (emphasis added)." Ibid.

(footnote continued on following page)

Title VII may well have immunized strict seniority from judicial attack if adopted in good faith by an employer and union. But Section 703(h) does not require the collective bargaining agreement to follow strict seniority, nor does it prohibit a collective bargaining

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We respectfully suggest that the comments of Senators Clark and Case could also be read in a more limited manner to mean only that an employer unilaterally could not rely on Title VII to give special seniority rights to blacks contrary to a collective bargaining agreement. The Senators' remarks do not go so far as to suggest that an employer and union cannot revise a seniority system to ameliorate its disparate impact on minorities. See also United Steelworkers of America v. Weber, 443 U.S. at 207 n.7 (construing remarks of Senators Clark and Case in light of subsequent adoption of Section 703(j), 42 U.S.C. § 2000e-2(j)).

agreement from mitigating the disparate impact on minorities of a seniority system.

In American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), the Court again acknowledged that collectively bargained seniority systems would seem to fall under the Griggs rationale prohibiting policies and practices which are neutral on their face but nevertheless discriminate in effect against a particular group. The Court reaffirmed, however, that Section 703(h) was designed to immunize a collectively bargained seniority system from a judicial finding of liability under Title VII. The Court's rationale did not go so far as to prohibit an employer and union from agreeing to modify the seniority system

to ameliorate its disparate impact. To the contrary, the Court reasoned in American Tobacco that, when Congress enacted Section 703(h), it struck a balance between two conflicting policies -- the policy to eliminate discrimination in employment and "the policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements." American Tobacco Co. v. Patterson, supra, 456 U.S. at 76-77. See also California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980).

In the present case, neither Congress nor the courts need choose between conflicting policies. Here, the parties have voluntarily modified their collective bargaining agreement themselves to serve one of the principal

purposes of Title VII -- prohibiting practices that, while neutral on their face and intent, have a disparate impact on particular racial or ethnic groups and cannot be justified by business necessity. The policies of Title VII and the policy of minimal supervision by the courts over the substantive terms of collective bargaining are both served by allowing Article XII to operate pursuant to its terms.17/

17/ Thus, affirming the judgment of the Court of Appeals is fully consistent with this Court's decision in Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___, 104 S.Ct. 2576 (1984). There, the Court held that a district court may not modify a consent decree "to disregard a seniority system" simply because proposed layoffs would have an adverse effect on minority employees.

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In United Steelworkers of America v. Weber, 443 U.S. 193 (1979), the Court held that an employer and union may voluntarily agree to a race-conscious affirmative action plan which modified seniority rights to favor minorities for places in a training program. Minorities were historically

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The Court did not reach the issue of whether the City, as a public employer, could have disregarded the seniority system. ___ U.S. at ___, 104 S.Ct. at 2590. See also id., ___ U.S. at ___, 104 S.Ct. at 2592-93 (O'Connor, J., concurring) (emphasizing that the union did not participate in the negotiation of the consent decree). See also Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 486-489 (6th Cir. 1985) (distinguishing voluntarily adopted provisions from the court-ordered abandonment of seniority at issue in Stotts).

underrepresented in the various crafts at issue. The contract provision involved in Weber was preferential to blacks in a very real sense. It reserved 50 percent of the openings for black applicants, even though the local workforce was only 39 percent black. The Court's opinion in Weber established that employers and unions may take voluntary action to correct practices which have had or will have disparate impacts on minority employees, regardless of whether a court could invalidate the practice:

"Further since the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act." 443 U.S. at 200.

Weber, of course, was a Title VII case, and the Court noted that it

was not deciding whether the plan would have been constitutional under the Fourteenth Amendment if adopted by a public employer. 443 U.S. at 200. In the present case as well, this Court need not reach the thorny issue of whether the Fourteenth Amendment prohibits a public employer from negotiating a collective bargaining agreement which grants preferential treatment to minority employees. Article XII does not prefer blacks over whites like the plans at issue in Weber or Bakke. It does not immunize blacks from layoff. It does not provide that blacks will be laid off at a slower rate than whites. It simply provides that minority employees can be laid off in no greater percentages than their percentage in the workforce. It is a race-conscious remedy which is race-neutral in impact.

The Court should be particularly solicitous of voluntary measures by employers and unions to deal in their collective bargaining agreements with possible layoffs. While it is easy in hindsight to calculate the effect of alternative layoff provisions on a given layoff, the union and School Board did not have the benefit of a crystal ball when they negotiated Article XII. They could not know when layoffs would occur, how many teachers would be laid off, which particular schools would experience the most severe declines in enrollment, and what the precise racial mix would be on the date of layoff. They did know, however, that blacks on the average had significantly less seniority than whites and that a strict seniority

system would have a significant disparate effect on black teachers. The seniority gap between whites and minorities persisted after the initial adoption of Article XII, and continues to this day, warranting continuation of Article XII in subsequent contracts.

Article XII is well designed to deal with the potential disparate impact of an uncertain future layoff on black employees. It does not require that layoffs be disproportional in favor of blacks or otherwise set quotas for white and black layoffs. It does not require even that the racial makeup of individual schools be frozen. Article XII simply requires generally that a

layoff not have a district-wide disparate impact on any minority group.

Here, the employer and union had a legitimate concern not simply to correct past underrepresentation of blacks, but also not to engage in future practices which would have a substantial disparate impact on blacks. This Court has never held or suggested that public or private employers are powerless to modify employment practices which have severe disparate impacts on minority employees. It should not do so now.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests that

this Honorable Court affirm the judgment
of the Court of Appeals.

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