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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1340

TITLE WENDY WYGANT, ET AL., Petitioners V. JACKSON BOARD OF EDUCATION, ETC., ET AL.

PLACE Washington, D. C.

DATE November 6, 1985

PAGES 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

WENDY WYGANT, ET AL.,

Petitioners

V. No. 84-1340

JACKSON BOARD OF EDUCATION, ETC., ET AL.

Washington, D.C.

Wednesday, November 6, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

K. PRESTON OADE, JR., ESQ., Golden, Colorado; on behalf of the Petitioners.

JEROME A. SUSSKIND, ESQ., Jackson, Michigan, on behalf of the Respondents.

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C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: Mr. Oade, you may proceed when you are ready.

ORAL ARGUMENT OF K. PRESTON OADE, JR., ESQ.

ON BEHALF OF THE PETITIONERS

MR. OADE: Mr. Chief Justice, and may it please the Court:

We are here today because the individual Petitioners have suffered what we deem to be constitutional injury by being laid off on numerous occasions from their employmenet as tenured public school teachers with the Jackson School District in Jackson, Michigan.

The eight individual tenured teachers have, between 1976 and the present time, been laid off on a number of occasions from periods ranging from six weeks up to three years of no employment for Petitioner Wendy Wygant. Deborah Brezezinski, another one of the individual Petitioners, has been laid off eight times, eight separate times, during the past nine years.

The reasons for these layoffs are because of a race-based system for layoff contained in a labor contract between their employer and their union.

We submit that this is an explicit use of race imposed and sponsored by the state itself, the local school board being an agent of the state, being a political subdivision of the State of Michigan, and as such we submit that it must be

justified by the state and that justification must be of the most compelling nature.

We submit to the Court that at a minimum where the state seeks to assign job benefits and burdens based upon race the burden is upon the state to show a state interest that has some remedial character and we say, number one, the state must identify an injury, identify a constitutional injury that must be remedied at the expense of the individual Petitioners.

We say, number two, the state must show that the instrument or device or means chosen to remedy that identified discrimination are properly tailored to achieve that end and no other end.

Number three, we think at a minimum the state must do this before, not after, before it resorts to the use of race for determining job benefits. If the states does not do it before the use of race is assigned to determine job rights, how are the courts to review whether the use of race is a permissible constitutional objective and responds to a proper remedial purpose?

So, the justification should not be ad hoc or ex post facto. It should be done before the use of race is adopted.

Now, we say that the use of race in this case has no remedial character and as such amounts to a naked racial preference. We say that because --

QUESTION: Mr. Farris, do you think that a school board has the right to look at its employees overall and to look at the number of black employees it has and the number of black employees available in that immediate area for employment in jobs in the school and conclude for itself that the school hasn't done as much as it should have to employ black employees and develop a program to implement some effort to hire more black employees?

MR. OADE: Justice O'Connor, we agree with that and we think that as a predicate for properly conceived affirmative action that is exactly what any employer must do.

QUESTION: Well, could it, as part of the program, adopt some kind of layoff policy like this if it felt it were necessary to complete the implementation?

MR. OADE: We think that there are some differences between affirmative action recruiting and what an employer may do to incumbent employees.

We think to take two public employees, one white and one black, and to treat them differently because of their race must, as I have said, bear a most extraordinary justification. And, whether or not such a justification would be present in the abstract, I guess, is what your question goes to.

QUESTION: Yes. Do you think it is possible under the kind of inquiry I suggested?

MR. OADE: I think, Justice O'Connor, there are, for example, school desegregation cases where the courts have found that in order to remedy on-going constitutional violations in segregated school districts and in order to have effective desegregation that it may be necessary to make layoffs by race, but only if strictly necessary to remedy constitutional violations. And, of course, there are no such constitutional violations in this case.

We say there is no balancing to be done. Individuals, says the Constitution, have a right to equal protection under the laws. If there is some injury that must be remedied or some other compelling constitutional value, then there is a balancing test to be done, but in this case before the Court, we plead in the complaint in the lower courts in paragraph 21 of our complaint that -- and I quote, "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."

QUESTION: What are you reading from?

MR. OADE: Paragraph 21 of the complaint. It is recited at page 12 of our reply brief and is also contained in our original brief, Justice White.

QUESTION: May I interrupt you with one question? You discuss the importance of remedying past wrongs, which, of course, is discussed a great deal in the cases. Would

you deny the possibility that in the total absence of any past wrong and any desire to remedy anything there might be a valid interest in the desirability of multi-ethnic representation on a teaching faculty which they cite in this collective bargaining agreement?

MR. OADE: To answer your question, Justice Stevens, I think there is and I think the Bakke case was an example of that.

QUESTION: So then it would at least be arguable -- I am not suggesting an answer -- that that kind of justification might suffice in the absence of any need to remedy anything?

MR. OADE: It might suffice, but again -- And, I think in the Bakke case there was a First Amendment interest there that the University of California Board of Regents had in an ethnically diverse student body. But, you could not deprive applicants to the medical school of equal opportunity to achieve that objective.

QUESTION: Well, put the Bakke case to one side for a minute and talk about this case. Why would it not be a permissible objective of the school board and the union to do exactly what they said in the collective bargaining agreement; that there had been trouble in the schools and they thought a possible solution to their problems would be some diversity of the faculty.

MR. OADE: We don't think the achievement of this aim was for diversity on the faculty. We go right to the collective bargaining agreement and on its face --

QUESTION: On its face it says the desirability of multi-ethnic representation on the teaching faculty.

MR. OADE: But, the goal that that is aimed at is proportional representation, Justice Stevens, between the population of minorities in the student body and the teacher population. We say that that is an impermissible constitutional objective if you can only get there by depriving tenured teachers of employment rights.

I am going to talk about why that is an impermissible objective and why in this case it is an unrealistic and unobtainable objective.

I don't think a school board should simply be able to say we desire multi-ethnic representation. The fact of the matter is the Jackson School Board has multi-ethnic representation. The Jackson School Board has consistently hired and employed minority teachers consistent with the available supply of qualified minority teachers.

QUESTION: Well, assume they had never had a black teacher before. You suggest the means are excessive and maybe you are right, maybe the remedy is wrong. Just kind of focus separately on the question whether the objective itself might in some circumstances be a legitimate, permissible objective.

MR. OADE: If they had never hired a black teacher and did not have any, I think this would be a different case and I think --

QUESTION: And there were never any available, so they didn't do it wrongfully in any sense, they just didn't happen to have any. I just want to -- If they need to be remedying something in order to have a permissible objective.

MR. OADE: I think, first of all, they do need to be remedying something. I think there it has to have some remedial character. Whenever the state resorts to the use of race for determining job rights, it must have a remedial character. You can't deprive one individual of equal protection of the law just to achieve a worthy social objective that the school board may think is worthy.

QUESTION: You would say then that if there were two people -- They had a vacancy and there were two applicants, a white and a black person, you would say the state could not choose the black just to increase the number of blacks on the faculty absent some proof of discrimination in the past?

MR. OADE: No, we do not say that, Justice White.

QUESTION: Well, you seem to.

MR. OADE: First of all, this is not a hiring case and we certainly --

QUESTION: Why would the hiring case be different

if the reason one person is hired and the other person is turned down is a racial reason and there is no proof of past discrimination?

MR. OADE: We think in the absence of any remedial effort and the absence of any work force analysis and the absence of any under-utilization of minorities in the work force and in the absence of any goals and timetables or standards, yes, that would be impermissible for an employer, simply for the sake of race, to prefer one individual over another individual.

QUESTION: But, you would say if the school board just thought the blacks were under-represented that the preference for the black would be quite all right as a hiring matter.

MR. OADE: We are saying if --

QUESTION: Even though there had been no constitutional violation in the past.

MR. OADE: No, I am not saying that. I am saying there has to be a remedial character here. There has to be a finding of discrimination. I don't think --

QUESTION: So that in my example the state could not do that absent some proof of some past discrimination that had to be remedied.

MR. OADE: That is correct, Justice White. I am sorry if I misspoke myself.

QUESTION: May I interrupt just for a minute. The discussion for the last three or four minutes has omitted

entirely what seems to me to be the issue in this case and that is the reverse discrimination against whites. In other words, people are laid off. Suppose you did have some decision below that there had been discrimination in the past. Would that justify the laying off of people to make room for the employment of others?

MR. OADE: We don't think so, Justice Powell.

QUESTION: It has not been mentioned in the recent discussion.

MR. OADE: I think that gets to whether -- even if, even if you had some findings of discrimination in the Jackson School District in the hiring of minority teachers which are not present here, that the instrument chosen here would still be impermissible, because, number one, it is not properly tailored to remedy that. It is an extremely harsh instrument. You are talking about who is going to keep their job and you are talking about making that determination on the color of one's skin. So, we think even if there were findings.

But, I want to make it very clear here --

QUESTION: Isn't it true that some of the teachers in your group got their jobs solely because of the color of their skin?

MR. OADE: No, we reject that, Justice Marshall.

QUESTION: Is there anything in the record to prove

it?

MR. OADE: There is nothing to prove --

QUESTION: Didn't you have segregated schools in Jackson?

MR. OADE: We think --

QUESTION: Didn't you?

MR. OADE: We don't believe that is correct, Justice Marshall.

QUESTION: You never had segregated schools in Jackson?

MR. OADE: The record goes back in this case to 1953 and we know one thing about the Jackson School District in 1953.

QUESTION: My phrase was ever.

MR. OADE: It --

QUESTION: Did you ever have segregated schools in Jackson?

MR. OADE: I can t answer that question, Justice Marshall. The record does not answer that.

QUESTION: But, did you look that up. Were you interested in finding out?

MR. OADE: I was very interested in finding out.

QUESTION: Well, did you find it?

MR. OADE: We have data --

QUESTION: Is the answer yes or no?

MR. OADE: The answer is the record does not show

that.

QUESTION: And, you didn't find it?

MR. OADE: And, I did not find it.

We know from two prior decisions in two related cases previous to this one which we refer to as Jackson One and Jackson Two, that there is no discrimination in the school district as to minority hire. We know that from a federal district court who made a jurisdictional finding in 1976. We know that from a county circuit court decision in 1979 where a county circuit court judge, Judge Britten, examined the history of the Jackson School District, examined the adoption of the race-based layoff system in the contract which we challenge here today, which at that time minority teachers were suing the school board to uphold the preference contained in the agreement because the Jackson School Board had refused to follow when it met laying off tenured, white, experienced teachers and retaining inexperienced, minority, probationary teachers. That happened in 1974. That lead to the lawsuits in Jackson One and Jackson Two.

In Jackson Two, the county circuit court found that there is no history of overt discrimination by the parties to this labor contract.

Now, this contract was adopted in 1972. Let's look at the situation in the Jackson School District when this contract was adopted.

Justice Marshall asked did we have segregated schools in the Jackson School District. Certainly not in '72. This school district over a period of time had made an on-going effort to keep up with changing housing patterns and had redrawn their school boundary lines and built new schools in order to effectively integegrate that school district and had achieved that prior to the time that this contract was adopted in 1972.

It had also set certain minority hiring goals in that school district and those minority goals are discussed in our brief and they concern the fact they wanted at least two minority teachers in each of the small elementary schools which had between 10 and 15 teachers each.

QUESTION: Mr. Oade, if there had been some segregation and if it was relevant, whose obligation was it to put it in the record in this case?

MR. OADE: The state's obligation, Mr. Chief Justice. We came forward and we said we are being victimized by a labor contract which exhibits on its face an intent to discriminate on the basis of race and we have suffered a constitutional injury because of it and it is the state that must come forward to justify it. And, obviously, to the extent there is no compelling justification in the record, the state loses.

I simply make the point that in 1972 the hiring goals of the school district had been met. It was a healthy situation. You had the same number of minority teachers one

would expect to find given non-discriminatory hiring.

So, this contract was not adopted as an affirmative action hiring or recruitment effort. It was adopted in 1972 in order to do one thing, to achieve proportional representation between the percentage of minorities and the student body and the percentage of minority faculty. If they had 25 percent minority students, they wanted 25 percent minority teachers.

That is what the contract says and I quote: "The goal of such policy shall be 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."

This contract says nothing about affirmative action hiring goals. It says nothing about the availability of minority teachers, the supply, if you will, who are out there to be hired. It says nothing --

QUESTION: May I just ask, I want to be sure I understand your position. Do you contend that was an impermissible goal?

MR. OADE: Yes, we do.

QUESTION: To get the same ratio of teachers and students?

MR. OADE: Yes, we do. We say and we quote, Justice Powell, from Bakke. A proportional representation is an impermissible constitutional objective and constitutes

discrimination.

QUESTION: But, the earlier hiring goal, was that permissible or impermissible?

MR. OADE: A hiring goal, we think, may be permissible if you have some finding or determination of --

QUESTION: Is it permissible to try to get the same ratio as in the employment market, but impermissible to get the same ratio as in the student body?

MR. OADE: That is correct. That is correct.

QUESTION: Would you explain why?

MR. OADE: Pardon me?

QUESTION: Would you explain why one is permissible and the other is impermissible?

MR. OADE: Well, one has a remedial character, Justice Stevens. If, in fact, you have some determination that there is a shortfall of minority teachers relative to the supply, and if that is statistically significant enough that we know it didn't happen by accident, then --

QUESTION: It is not a remedy for the benefit of any victim.

MR. OADE: No, it is not, and that issue --

QUESTION: But, nevertheless, it is permissible.

MR. OADE: I don't think the Court has to reach that question in this case as to whether it would have to be victim-specific. Certainly there are no findings,

victim-specific or otherwise. And, we think the very reason this case is before this Court is because you do not have findings of discrimination, either on an individual basis or on a group basis.

Getting back to the labor contract, the contract says nothing about hiring goals or timetables. It says nothing about the school district's employment practices or procedures.

What the contract is designed to do is achieve this racial balance and what Article XII is designed to do, as put by the district court, and again I quote -- Article XII, to be clear, is the contract provision that assigns layoffs on the basis of race.

Based on the district court's findings which are on page 32A of our appendix to the petition, "the plan is designed to either, one, retain a sufficient number of minority teachers so that the racial composition of the Jackson School District faculty will roughly approximate that of the student body; or, two, if that ratio has not yet been achieved, then at least to prevent a reduction in the minority to majority ratio."

So, what we have is a racial preference designed to achieve a racial balance and a prohibition against laying off minority teachers if that would reduce the existing percentage

Why is that an impermissible objective, which Justice Stevens has inquired previously. It is impermissible because

there is no causal nexus or relationship between the percentage of minorities in the student body or the percentage of minority teachers. They are subject to totally different influences.

There are any number of reasons why you might have a certain percentage of minorities in the student population. It might reflect change in birth rates, it might reflect housing habits, it might reflect racial demographics, it might reflect parent choice, it might reflect population movement. Any number of reasons can increase or decrease the percentage of minority students in a school district.

Now, let's look at the percentage of minority teachers. What influences the percentage of minority teachers in a school district? The first and most important thing that influences the percentage is the supply. What is the available supply of minority teachers who are available to be hired by any school district?

Taking the number, the most recent data we have, we know that in 1979 and 1980 all Michigan colleges and universities graduated a certain percentage of minorities with education degrees, whether it is a Bachelor's, whether it is a Master's, whether it is a Ph.D, and assuming that every minority that gets an education degree wants to go into teaching, we know that the available supply of minority teachers is at most 11 percent.

The school district cannot be expect to hire and

retain more minority teachers than are available out there. Yet they have an objective that says we have 27 percent minority students, we want 27 percent minority teachers, and until we get it we are going to deprive other tenured teachers of their civil rights in order to get there. That is why it is an impermissible constitutional objective.

And, again --

QUESTION: But, as applied to just hiring you wouldn't make that same argument, I take it?

MR. OADE: Well, again, I am reluctant to answer questions on hiring because we say this is not a hiring case. This layoff provision is not even designed to --

QUESTION: I know, but the Court has to be mindful of the whole picture in resolving cases, so that is kind of unrealistic to decline to answer, I think.

MR. OADE: I think to answer your question, Justice O'Connor, I can tell you what the practice is in this country today. Whether it is under the Office of Federal Contract Compliance, or whether it is under the EEOC guidelines, every Fortune 500 company in this country hires according to race. They all do it.

QUESTION: Well, is it unconstitutional to do that?

MR. OADE: We think -- Well, the Constitution, of course, does not govern the private sector. They do that, however --

QUESTION: Within the public sector is what we are talking about.

MR. OADE: That is correct. They do that under the Office of Federal Contract Compliance -- the regulations, and it is 41 CFR, Part 60, tells these employers you must have an utilization analysis. In other words, you must look at your work force. You must see if your supply of black engineers is equivalent to the number of black engineers you could hire given the supply available. And, if there is a disparity in your work force and if it is a significant disparity, then you must adopt goals and timetables.

And, employers do that and they hire according to race to reach those goals and objectives.

This plan before this Court could not meet the standard in the private sector under the OFCCP. Why not? It uses race to determine and assign job rights without any utilization analysis of its work force, without any determination that they are not hiring or retaining minorities according to the available supply, without any goals and timetables to place some kind of appropriate limit on what is being done here.

So, to answer your question, we can say what is being done in the private sector under OFCCP, and, ostensibly, under this Court's holding in the Weber case.

QUESTION: Counsel, this was caused by a contract, wasn't it?

MR. OADE: Yes, it was.

QUESTION: This whole problem is the contract.

MR. OADE: It is in a labor agreement between the Petitioners' employer and their union, Justice Marshall.

QUESTION: And, the union is 80 percent white.

MR. OADE: That is correct more or less.

QUESTION: And, that is what you are complaining about.

MR. OADE: Well, the fact of the matter is we don't think you should look at the race of a union. We think you should look at whether or not people are voting their economic self-interest. That is what a collective bargaining agreement is all about. And, to say that this -- or suggest that this is somehow proper because the majority of the union members voted to ratify it after it was put in there without their knowledge, to suggest it is constitutional for that reason, we reject that suggestion.

We say that the United State Constitution guarantees individuals equal rights under law and the constitutional guarantee does not depend on whether one has enough clout to negotiate for it at the bargaining table.

QUESTION: Well, I don't see how much clout 20 have over 80 percent. I have great difficulty in finding that clout.

MR. OADE: They have no clout to protect their individua

rights, Justice Marshall, and that is why we are before this Court.

QUESTION: You are saying that the 20 percent of the union should not have the rights that were negotiated by that union.

MR. OADE: I am saying that --

QUESTION: Is that what you are saying?

MR. OADE: No. I am saying that regardless of what the employer and the union do, regardless of what they do, Justice Marshall, the Constitution says you shall have equal protection under law. The collective bargaining process is not competent to determine someone's constitutional rights and we think that is simply a given. We would cite to the Court the case of Alexander versus Gardner-Denver, which is a 1974 decision of this Court, which I believe is 415 U.S. 36. That was a Title VII case and the issue in that case was can a union and an employer weigh an employee's Title VII rights. Of course, that can't weigh it.

QUESTION: Counsel, that goes all the way back to Tonstall and Steele back in the 40's. That is when that was determined, that a union and employer could not --

MR. OADE: You are correct, Justice Marshall, thank you.

QUESTION: There is nothing new about that, but that doesn't apply to this. This is where the union contract

was carefully negotiated and agreed upon and you want to upset it.

MR. OADE: Justice Marshall, first of all, we want to upset it because it is unconstitutional and it deprives the Petitioners before this Court of their constitutional rights and we object to any characterization that this was carefully negotiated.

QUESTION: Well, whether it was carefully negotiated or not, if it violates the Constitution, your position is that it can't stand even if it is 100 percent correct.

MR. OADE: That is correct. Even if the process was entirely good and you had an entirely above-board process by which this was arrived, it still violates the Constitution.

CHIEF JUSTICE BURGER: Your time has expired now, Mr. Oade.

MR. OADE: Thank you.

CHIEF JUSTICE BURGER: Mr. Susskind?

ORAL ARGUMENT OF JEROME A. SUSSKIND, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. SUSSKIND: Mr. Chief Justice, and may it please the Court:

By 1972, this Court had charged school boards to step up to their Fourteenth Amendment duties to end discrimination and integrate their schools, advising boards to evaluate the total facts and to review a wide range of factors.

This is exactly what the Jackson Board did as a part of a comprehensive, four-year study.

The Board knew that the district had discriminated against students and faculty. The Jackson Board further knew minority teachers would be necessary for faculty integration and were educationally essential to aid students who will live in the society.

The educational policy was sound and the governmental interest was compelling.

Article XII was but a part of total integration. It was arrived at bilaterally. All the teachers' views were represented. It is clearly designed so that the gains made would not be in vain and destroyed in the event of a decline in total student enrollment.

Article XII did not place the burden on any one group. It was believed by all the parties to be applicable. All parties' interests were represented. The collective bargaining process itself was a significant safeguard because of its adversary nature.

Article XII, which is part of the overall layoff language, takes race into account, however, it is the one part of a layoff clause which takes into account as well curriculum and program.

Now, no animus on the part of the Board or the union has been alleged by the Petitioners. There has been no

allegation that this language was enacted to harm these Petitioners in particular or whites in general, this is part clearly of a remedial effort to cure the vestiges of discriminatio and to enhance the educational opportunities of Jackson students.

Now, the rights of employees were balanced against the needs of a sound educational system and were enacted by responsible parties.

QUESTION: Mr. Susskind, before you proceed, did I understand you to say that the Board in 1972 knew it had been discriminating against minority teachers?

MR. SUSSKIND: It certainly did.

QUESTION: Did it take that position in the litigation before the district court in the first case? It denied it at that time.

MR. SUSSKIND: Certainly it did and in the first case --

QUESTION: It did deny in that case it had discriminated?

MR. SUSSKIND: In Jackson One that is correct.

QUESTION: Yes.

MR. SUSSKIND: Now, Jackson One, bear in mind, however -- Judge DeMascio, I think, makes this very clear in his --

QUESTION: The same parties as in this case?

MR. SUSSKIND: Different issues, however.

QUESTION: The discrimination issue wasn't different,

was it?

MR. SUSSKIND: Justice Powell, first of all, when this case was tried before Judge DeMascio it wasn't a question of whether or not Jackson was going to integrate its schools. I think Judge DeMascio made it very clear, there was no effort made and no proofs put in to prove a Fourteenth Amendment claim.

The Plaintiffs in that case, don't forget, were the union and the black teachers simply attempting to enforce the labor agreement.

QUESTION: Well, whatever the issue the Board claimed it had not discriminated.

MR. SUSSKIND: Your Honor, not only did Jackson --

QUESTION: Is that correct?

MR. SUSSKIND: That is certainly correct. Jackson had not only voluntarily integrated and when we were sued here -- very frankly the Jackson Board at that point didn't want to open itself up if it didn't need to to that type of an admission and the possibility of other lawsuits.

QUESTION: While I am interrupting you, let me ask you this question. Has there ever been any judicial decision of discrimination by the Board?

MR. SUSSKIND: No judicial by the Board. The Board, I think --

QUESTION: Has there ever been any judicial decision?

MR. SUSSKIND: You have, of course, the NAACP.

QUESTION: The answer with respect to this Board is no, isn't it?

MR. SUSSKIND: Your Honor, there has been no judicial determination and it was a voluntary effort to integrate and there was no reason for a trial.

QUESTION: So, there has been no judicial determination?

MR. SUSSKIND: That is correct for those reasons. Now, let me also say as to the facts and the stipulated record, Justice Powell, that Jackson surely knew what was going on there, but didn't want to flail itself publicly either -- Frankly, when we were establishing the stipulated record for this case and certainly not in the matter before Judge DeMascio. In that issue, it wasn't a question of asking the federal court to write this contract language. The contract language existed.

The characterization that because Jackson One occurred is somehow supportive to the Petitioners, I think, is in error. And, a reading of Judge DeMascio's opinion, I think, will support it.

One, no -- As I say, they weren't attempting -- The Plaintiffs in that case weren't attempting to prove a Fourteenth Amendment claim. They didn't have to prove a Fourteent Amendment claim. No one was asking the court to rewrite this

type of language. They already had it.

The only issue there raised by the Board -- In fact, I think Mr. Oade kind of mentions it here himself -- is the question between tenured teachers and non-tentured. Now, that was resolved in the state court under Michigan state law. The following year all the minority teachers, in fact, had tenure and the Board didn't take that position. Even though that litigation was pending, the labor agreement, collective bargained, was followed. So, I think that is, with all due respect, a red herring on that particular issue.

It seems to me that the Board, having been told by this Court -- I am not saying that you told Jackson specifically -- but it seems to me the clear word that was sort of getting out, particularly after Brown Two and Swann. I don't mean to be paraphrasing perhaps what was going on here, but it seems that the Court had perhaps had it with some of the cases that kept coming up here with the same issues being raised.

We certainly felt that you would have to look where do you have your students placed, what kind of faculty do you have, and if you are going to integrate, this just wasn't one issue you would look at, you would look at where the students are, where the faculty is, and I certainly find it -- And, one of the things we should have done, and, indeed, look at is as long as we were doing all of these things under

our Fourteenth Amendment duties, should we not, after all, this being an educational institution, understand what it might do for us educationally and culturally. And, I think the decision --

Once you had, as an example, the stipulated to NAACP complaint in 1969, I think everybody got looking at this and said, gee, you know, this is not only the right thing to do, but it is the right thing to do educationally, let's have a culturally, ethnically diverse faculty. No one seems to quarrel with the competency of the Board to do that and no one seems to have suggested that there is anything the matter with it.

So, I guess the main fault we seem to have here is that because we don't have a really good record is because we voluntarily integrated. Now, had we been like Dayton or like Columbus or Detroit and refused to integrated, did not obey this Court's order until somebody sued us and made us do it, we would have the record you would want. But, Jackson voluntarily integrated and, therefore, it doesn't have the record. So, we are sort of in a Catch-22 situation on that. We either seemed to do what this Court wanted us to do and integrate and evaulate all those factors. You know, this wasn't some hasty decision. It was done over a four-year period and it wasn't just the Board. It was the Jackson Board, it was a blue-ribbon committee, it was an ad hoc committee

of faculty and administrators, it was the Minority Affairs Office, you had had the NAACP's complaints. It seems to me that in four years one could make this sort of determination.

Now, I agree with Mr. Oade. It is not a hiring case. Article VII are goals, simple goals of what they thought would be nice. It is Article XII that tells you how you layoff.

QUESTION: Mr. Susskind?

MR. SUSSKIND: Yes, Justice O'Connor.

QUESTION: Normally classifications based on race are constitutionally suspect. I suppose you would agree with that.

MR. SUSSKIND: I would certainly want to look at all the facts of the remedial nature.

QUESTION: They are suspect, right?

MR. SUSSKIND: They should be looked at.

QUESTION: Classifications based on race?

MR. SUSSKIND: As the district court, of course, did.

QUESTION: And, normally I guess the court would look to see whether the government can demonstrate a compelling state interest to justify such a classification if it made one. Now, what is the compelling interest that the School Board asserts here? Is it to maintain a faculty/student ratio or is it some other purpose? What do you rely on today?

MR. SUSSKIND: Your Honor, let me make it very clear

that what Jackson was looking at, both in 1972 -- and I will be glad to answer that further if the Court should desire.

QUESTION: Well, just a short answer in response to the question.

MR. SUSSKIND: Certainly. It was looking at the fact it had to integrate, to look at the faculty and the students. I am talking about the students by placement and the need for integration and where the faculty was placed and what they would have to address on that issue. But, at the same time, at the same time they were dealing with the question of integration, they also were dealing with the issue of educational soundness, for a diversified faculty, and dealing with that problem.

Now, if you are asking me which is more important, they were both equally important.

QUESTION: So, the Board does rely essentially on faculty/student ratio and the role model rationale.

MR. SUSSKIND: Justice O'Connor, I didn't say that and I didn't mean that. I think what I was looking at specifically was was it their duty to integrate, how to go about that integration, and certainly at the same time -- and we make no apology for it -- educationally --

QUESTION: Integrate in hiring. You are talking about hiring employees, integrate hiring?

MR. SUSSKIND: May I would just like to, if I may

for you, lay out some facts that I think the Court should be looking at in carrying on this discussion.

You know, before 1954 there was not one minority teacher in the Jackson public schools. Two hundred and fifty teachers were hired during the 50's. One of them was a minority teacher.

Now, during that period -- let's take 1953 and 1954 -- you had 9,966 students, 355 teachers, and one of them was black.

In 1961, you had 12,611 students, 515 teachers, and ten of them were minority. Now, by 1971, and this is stipulated to in the record, they went on an intensive recruitment program to bring teachers in.

Now, in 1972, okay, you actually had the integration plan which now went to busing and went to the allocation of the faculty. You just had those hiring gains. Now, the reason it is addressed in Article XII is if you are not going to do something about layoffs is it going to be considered by the public as a good faith effort to integrate.

QUESTION: Maybe I can't get an answer, but I really would like to know what the compelling state interest is that you are relying on for this particular layoff provision in a nutshell.

MR. SUSSKIND: We have just dismantled a segregated system. We have just moved to a unitary system instead of

a dual system and to protect the gains made that was going to allow us to do that as we looked at what we certainly thought were some of the factors we ought to be looking at like faculty and wanting a diverse ethnic faculty, to protect that we had to have Article XII. It is the only place --

QUESTION: To preserve a faculty/student ratio that the Board thought was appropriate?

MR. SUSSKIND: At that point in time, Justice O'Connor, when you look at the number of schools we had and the number of minority teachers we had, about the first time you were going to get a layoff -- We had just gone through this hiring effort to bring in these teachers. If you are not going to protect them in a layoff, you are really going through an exercise in futility in hiring in the first place. We wanted them there. We had to have a method of protecting them.

And, you know, everybody is concerned about fairness. Jackson, having nothing else to do with its time, had to run around just simply discriminating against whites at random. When we decided why this layoff program was needed, we knew that minority teachers at a minimum had at least five years less seniority. If you are going to apply straight "inverse orders to minorities," those gains were going to be long gone pretty quickly.

QUESTION: Well, it is a knotty problem and it leads to the next question which is what means can be used to achieve

a compelling state interest if you find that there is one for a race-based provision.

MR. SUSSKIND: Certainly it is part of integration. I think the courts, obviously after this Court decided -- We were integrating that district. I don't think there is any mystic in this record after all those four years and everything that district went to -- By the way, it was certainly not welcomed with open arms by everyone in Jackson, but it did integrate and this is one of the things that was involved in integration.

That is what the compelling state interest was from that standpoint. The education interest is equally important to the Board. I can't separate them for you, because we couldn't separate them for you and the people involved here, kids, is what was good for these children in this educational program, but it is what the Board was concerned with, not whether or not Teacher X or Teacher Y was laid off.

And, these teachers -- Let me tell you this and I think it has been highly responsible -- because they have subordinated seniority, not only -- That is why I don't want to have some belief here that the only thing we are talking about is Article XII. It is subordinated to protect programs, it is subordinated to take care of such things as elementary art, music, and the like. It is subordinated to take care of curriculum. And, if one of these teachers had been laid

off because we had to protect Latin, we certainly wouldn't be here. No one would say that because these teachers who bargained to subordinate seniority for the good of the program or for the good of the kids' education, that some how there was a constitutional violation.

But, for heaven's sake, in this case to have diverse faculty, we also mentioned the nasty word "race." So, if one of them happens to be laid off for that reason, now we are here constitutionally.

Yet, to deal with the issues presented to the district of what do you do about integrating and looking at your faculty and having a diverse faculty, you have to address it somewhere in the layoff clause or you would be right back to where you started from in short order. I don't know where else you would address it but in layoff.

Now, you know, Article VII is, indeed, a goal. It is a hiring policy. It is not a term and condition of employment. It has to be bargained about. Layoffs do happen to be collectively bargained and they were. These parties reviewed it in 1977. This contract had been ratified eight times.

QUESTION: Mr. Susskind, can I ask you a background question?

MR. SUSSKIND: Yes, sir.

QUESTION: At the time the layoff started -- and

as I understand it, they went on for a period of several years where the people were hired and put back and laid off again. But, at the beginning of the problem when you had to decrease the total number of teachers, what is the maximum seniority of the people who were laid off? How seriously did you affect them?

MR. SUSSKIND: Justice Stevens, I regret to tell you --

QUESTION: Does the record tell us that?

MR. SUSSKIND: I can't honestly tell you. I can tell you that the majority teachers certainly had about -- or the minority teachers have an average of five years or less seniority.

You see, the problem is a lot of this applies to what program. You can have a many-year teacher end up being laid off without any regard to the racial question.

QUESTION: Because she was teaching the wrong subject or something like that.

MR. SUSSKIND: Right.

QUESTION: Yes.

MR. SUSSKIND: That is right. If they were going to lay off, for instance, ten people in the high school, it may turn out that your ten less senior is your math department or your entire foreign language department. That is why you have to really look to the makeup of that particular layoff.

It may end up with somebody with ten years' seniority, as an example, ends up getting laid off without any relationship to the question that brings us before this Court today.

That is why it is really impossible without sitting down and laying that all out at any point in time and say this is why it happened because that really may not be why it happened at all.

You know, when these parties looked at this issue, I think they very clearly recognized what is going to happen when you subordinate your seniority. Not only in 1972, but each time they looked at the contract and certainly in 1977 -- And, by the way, by the time you get to 1977 these layoffs are now getting chronic because you are having a rather significant decline.

Here you are looking at, first of all, what is needed in the building, what is needed in a particular program, elementary music, elementary art, so these parties certainly knew what they were doing and the language from Article XII really hasn't changed the principle at all. It was certainly there.

Now, all the teachers involved we are discussing are all qualified. No one has ever suggested they weren't hired in an individualized way.

Merit isn't involved. You know, one of the issues certainly this Court has focused on in reviewing this problem is somebody is stigmatized.

QUESTION: Merit isn't involved, but race is.

MR. SUSSKIND: So are a variety of other factors, Justice White.

QUESTION: Not in these layoffs.

MR. SUSSKIND: Well, you know, I have to tell you that I don't think that is absolutely correct, sir. All of the other factors --

QUESTION: The case wouldn't be here if it weren't, I wouldn't think.

MR. SUSSKIND: That is true, but all I am saying is when you are looking at the total layoffs, Justice White, you are looking at all of these other reasons. Now, quite frankly you have got to recognize this, if some of these other problems, for instance, protection of some of these other programs, hadn't been what they were, that teacher might have been laid off. So, to suggest very honestly that the only reason was that, I think, is inappropriate and inappropriate in the record.

Now, you know, there isn't anything in Article XII at all that indicates there is any tie between Article XII and the minority student population. Article VII, as I have said, is a goal. And, when Moses came down with the Ten Commandments, they were commandments. This is a goal and it doesn't have anything to do with Article XII. Sure, it is a hiring position. We have a non-discrimination clause

in that labor agreement also and this is what we would like to have. You know, we are never probably going to get it because of what the goal is because of the decline in teachers, but when go to the layoff clause, all it does it protect against elimination. It limits not numerically but by a percentage against this minimal number with less seniority from being eliminated. It doesn't say anything in there that you can't lay them off. White teachers and minority teachers are both laid off. They are not immunitized by this by any means.

So, I think the attempt to take Article VII and say, well, this is going to be here forever for this reason would not be a proper interpretation respectfully of that labor agreement.

Now, let me suggest that no bad faith from anyone against either the union or the Board. I think the Court is well aware of that as has been alleged.

This is a question of diversity for the benefit of the students. So, as we are looking at it from an educational standpoint, and I suggest there is no compelling state interest. To end a discriminatory system does not seem to be in keeping with what this Court had been saying in the 70's and certainly up to the time when Jackson was first integrated. You know, this is not a situation -- These parties were reviewing this on a regular basis. It has a definite life span as does anything else in a labor agreement.

To suggest sort of in a whisper that somehow there is something wrong with the process -- and I am not saying the Court ought to yield to constitutional questions to a labor agreement necessarily -- but I would rather expect that we know it is part of integration, we know it is part of that plan, and you know why you have done it; that rather than a whisper that perhaps there is some impropriety in that process, there would be some real allegations and some real proof and the Petitioners never put in anything in this case, including the pleadings.

In the sad history of really what occurred after Brown Two, Jackson, I think recognizing the time to come, elected to obey this Court's decisions and the law by voluntarily integrating. In doing so it didn't wait to be sued, only obey the law when it knew it had to obey it.

Now, the language under attack here certainly arises, as we have already discussed perhaps longer than we should have, from a compelling governmental interest and one which we say certainly is educationally sound.

Now, I think this Court has indicated that school boards have a specialized ability to perhaps deal with these educational issues.

We furnish students with an ethenically diverse faculty so they can learn to live in a pluralistic society and that certainly is one of the goals and it is certainly

still true today.

Now, through education the time is going to come when society will be able to be truly colorblind and judge people as I think this Court would want it to without regard to race. This is not, however, we would suggest to move back 20 years. It is the time to move forward where these issues that you have here aren't going to be before this Court. Certainly the best place for this matter to be dealt with are in your educational halls. How are you going to deal with that if we aren't going to have this type of diverse ethnic faculty to work.

And, is the Board going to be second guessed in its good faith effort when it was supposed to be looking at whether or not it should integrate, when it did so over a four-year period, and it attempted to address the problem through the layoff clause not unilaterally, but with its teachers through the adversary process of collective bargaining.

This is really a situation that is a little bit different. This wasn't a court ordered integration case and it certainly wasn't court-imposed language. These parties not only agreed to it in 1972, but these competent teachers, all of whom are well degreed, have felt it a good idea to continue this right through to the present date. They are aware of this case too.

Now, it is necessary to say you ought to yield to

them, but I would certainly suggest in a constitutional review of the issue that there are some pretty strong process considerations that these people, indeed, have not been abused.

You have a good faith effort of competent parties, designed to protect the gains made, not to harm these Petitioners or anybody else. We would suggest on that basis that the language of Article XII found so offensive by the Petitioners should not be found offensive to the Fourteenth Amendment.

As you know, this case at bar here was presented on stipulated facts, stipulated to the district court, no factual question was ever raised before the Sixth Circuit. We believe the governmental interest is compelling, so is the educational interest.

We would ask this Court to affirm the opinion of the Sixth Circuit Court of Appeals.

Thank you.

QUESTION: May I just ask you what may be a frivolous question?

MR. SUSSKIND: Yes, sir.

QUESTION: I was interested in the fact that minorities described in the collective bargaining agreement include blacks, American Indians, Orientals, or persons of Spanish decendency. How in the world would you determine who is a person of Spanish decendency?

MR. SUSSKIND: Well, I didn't write that.

QUESTION: Pardon me?

MR. SUSSKIND: I didn't write that. Hispanics may have been a better term. I guess we just didn't think about it, Justice Powell, at that point. I think we were looking at having Hispanic people.

QUESTION: I will ask you one more question.

MR. SUSSKIND: Certainly, sir.

QUESTION: Would Asian students think that American Indians would be a role model?

MR. SUSSKIND: You know -- Let me say one thing about this role model question if I may and which I think will give you an answer to your question.

Now, we weren't hiring black teachers that could teach blacks. We had that problem. That is exactly why we -- We wouldn't hire an American Indian to each Indians either. What if we wanted an Oriental or American Indian. That is part of a diverse faculty. And, if you want people to exist here in this ethnic scheme, in this pluralistic scheme that I think we have -- If you had an all white district and you wanted to have some black teachers, I think that might be a very good idea. In Michigan, with the competition we have with the Japanese, let me tell you, I think it might be a real good idea, except for the fact we might be sued by someone who got laid off, if we might not get some Japanese.

So far I will admit that we haven't been under attack

by the Indians other than perhaps by these Petitioners, but I really think that -- An ethnic diverse faculty we think is a very good idea and we would ask this Court to allow us to continue to do that.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:57 a.m., the case in the above-entitled matter was submitted.)

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BY Paul A. Richardson

(REPORTER)