To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Brennan**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-999

UNITED STATES, PETITIONER *v.* PHILLIP PARADISE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[December ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

The question we must decide is whether relief awarded in this case, in the form of a one-black-for-one-white promotion quota to be applied as an interim measure to state trooper promotions in the Alabama Department of Public Safety (the Department), is permissible under the Equal Protection guarantee of the Fourteenth Amendment.

In 1972 the United States District Court for the Middle District of Alabama held that the Department had systematically excluded blacks from employment in violation of the Fourteenth Amendment. Some eleven years later, confronted with the Department's failure to develop promotion procedures that did not have an adverse impact on blacks, the District Court ordered the promotion of one black trooper for each white trooper elevated in rank, as long as qualified black candidates were available, until the Department implemented an acceptable promotion procedure. The United States challenges the constitutionality of this order.[1]

[1] The Department and its director, Colonel Byron Prescott, and the intervenors, a class of white applicants for promotion within the Department, have filed briefs in support of the United States, but they did not themselves petition for certiorari.

1514, 1533 (CA5 1985) (quoting *Paradise* v. *Prescott*, 585 F. Supp., at 75). In addition, the relief awarded was deemed to "exten[d] no further than necessary to accomplish the objective of remedying the 'egregious' and long-standing racial imbalances in the upper ranks of the Department." *Id.*, at 1532–1533.

We granted certiorari. —— U. S. —— (1986). We affirm.

II

The United States maintains that the race-conscious relief ordered in this case violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.[15]

It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of groups historically subject to discrimination. See *Sheet Metal Workers* v. *EEOC*, 478 U. S. ——, —— (1986), and cases cited therein. See also *Wygant* v. *Jackson Board of Education*, 476 U. S. ——, —— (1986) ("The Court is in agreement that . . . remedying past discrimination is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program") (O'CONNOR, J., concurring). But although this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach

[15] The Government framed the issue presented as "[w]hether the one-black-for-one-white promotion quota adopted by the district court . . . is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution." Brief for Petitioner 1. Because the reach of the equal protection guarantee of the Fifth Amendment is co-extensive with that of the Fourteenth, we need not decide whether the race-conscious relief ordered in this case would violate the former as well as the latter constitutional provision.

consensus on the appropriate constitutional analysis.[16] We need not do so in this case, however, because we conclude that the relief ordered in this case survives even strict scrutiny analysis: it is "narrowly tailored" to serve a "compelling governmental purpose." *Id.*, at —— (opinion of POWELL, J.).

The government unquestionably has a compelling interest in remedying past and present discrimination by a state actor. See *Wygant*, *supra*, at —— (opinion of POWELL, J.); *id.*, at —— (O'CONNOR, J., concurring); *Sheet Metal Workers*, *supra*, at —— (opinion of BRENNAN, J.). See also *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 763 (1976) (prevention and remedying of racial discrimination and its effects is a national policy of "highest priority"). In 1972 the District Court found, and the Court of Appeals affirmed, that for almost four decades the Department had excluded blacks from all positions, including jobs in the upper ranks. Such egregious discriminatory conduct was "unquestionably a violation of the Fourteenth Amendment." *NAACP* v. *Allen*, 340 F. Supp., at 705. As the United States concedes, Brief for Petitioner 21, the pervasive, systematic, and obstinate discriminatory conduct of the Department created a profound need and a firm justification for the race-conscious re-

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[16] See *Wygant* v. *Jackson Board of Education*, 476 U. S. ——, —— (1986) (opinion of POWELL, J.) (the means chosen must be "narrowly tailored" to achieve a "compelling government interest"); *id.*, at —— (O'CONNOR, J., concurring) (same); *id.*, at —— (MARSHALL, J., dissenting, joined by BRENNAN, J. and BLACKMUN, J.) (remedial use of race permissible if it serves "important governmental objectives" and is "substantially related to achievement of those objectives") (quoting *University of California Regents* v. *Bakke*, 438 U. S. 265, 359 (1978)); *id.*, at —— (STEVENS, J., dissenting) (both public interest served by racial classification and means employed must justify adverse effects on the disadvantaged group); *Fullilove* v. *Klutznick*, 448 U. S. 448, 507 (1980) (POWELL, J., concurring) (expressing concern first articulated in *Bakke*, *supra*, at 362, that review not be "'strict' in theory and fatal in fact").