No. 84-1340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

WENDY WYGANT, *et al.*,
Petitioners,

v.

JACKSON BOARD OF EDUCATION, *et al.*,
Respondents

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

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BRIEF AMICUS CURIAE OF CONGRESSIONAL COALITION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the fourteenth amendment permits a school board and a teachers' association to agree to a provision in a collective bargaining agreement, designed to combat substantial underrepresentation of minority schoolteachers, which provides that in a layoff the percentage of minority teachers among teachers laid off shall not exceed the percentage of minority teachers then employed.

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ON WRIT OF CERTIORARI TO THE
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BRIEF AMICUS CURIAE OF CONGRESSIONAL COALITION IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE */

Amicus curiae are a bipartisan coalition comprised of the following

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*/ Consents of the parties to the filing of this brief have been obtained, and letters reflecting such consents are on file in the Office of the Clerk.

Members of Congress: The Honorable Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary; The Honorable Augustus F. Hawkins, Chairman of the Committee on Education and Labor; The Honorable James M. Jeffords, Ranking Minority Member of the Committee on Education and Labor; The Honorable John Conyers, Chairman of the Subcommittee on Criminal Justice of the Committee on the Judiciary; The Honorable Patricia Schroeder, Chair of the Subcommittee on Civil Service of the Committee on Post Office and Civil Service and Co-Chair of the Congressional Caucus for Women's Issues; The Honorable Pat Williams, Chairman of the Subcommittee on Select Education of the Committee on Education and Labor; The Honorable Barney Frank, Chairman of the Subcommittee on Employment and Housing of the Committee on Government Operations;

The Honorable Cardiss Collins, Chair of the Subcommittee on Government Activities and Transportation of the Committee on Government Operations; and The Honorable Norman Y. Mineta, Committee on Public Works and Transportation. The various congressional committees and subcommittees on which these Members serve are concerned with protecting civil rights and eliminating discrimination.

The issue in this case -- whether the fourteenth amendment permits the race-conscious remedial action taken by respondents -- is of vital interest to Congress. The fourteenth amendment expressly charges Congress with the duty and power to enforce the amendment. For more than a century Congress has sought to enforce the amendment and eliminate the tragic legacy of race discrimination by enacting effective remedial legislation. The use of appropriate

race-conscious legislation to combat race discrimination has proved to be effective and necessary.

Although this case does not directly address Congress' authority to remedy race discrimination, the manner in which this Court decides it may impinge upon Congress' ability to enforce the fourteenth amendment. We believe that to eliminate race discrimination -- one of the most serious social issues of our time -- a full range of remedies, including appropriate race-conscious actions, must remain available. We further believe that voluntary affirmative action by public, as well as private, employers is both constitutional and essential. In view of Congress' specific mandate to enforce the fourteenth amendment, the Coalition believes that its views will be of assistance to the Court in this case.

STATEMENT OF THE CASE

Amicus curiae adopt the facts as presented in the Brief for Jackson Education Association as Amicus Curiae Supporting Respondents at pages 4-23, and Respondents' Statement of the Case.

SUMMARY OF ARGUMENT

Public employers and unions, like their private counterparts, may engage voluntarily in race-conscious affirmative action without violating the Constitution. This Court should therefore affirm the Sixth Circuit's ruling that Article XII, the race-conscious layoff provision adopted by the Jackson Board of Education and the Jackson Education Association as part of a collective bargaining agreement, is permissible

under the fourteenth amendment. However, if the Court reverses the judgment of the Sixth Circuit, we urge it to frame its instructions to the court below in a manner that does not constrict Congress' power to enforce the fourteenth amendment through appropriate race-conscious legislation.

In United Steelworkers of America v. Weber, this Court held that a voluntary, race-conscious affirmative action plan entered into by a private employer and the bargaining representative of the potentially affected employees did not violate Title VII. Although the employer in this case is public and thus subject to the fourteenth amendment as well as to Title VII, the Court should reach the same result here. Like the plan in Weber, Article XII is the product of collective bargaining, is a voluntary departure from the ordinary workings of

seniority, is designed to remedy the effects of the exclusion of blacks from a desirable occupation, and is both temporary and narrowly tailored.

To apply different standards to voluntary affirmative action undertaken by private and public employers would frustrate the clearly expressed intent of Congress. Congress extended the coverage of Title VII to the public sector in 1972, in part as an exercise of its fourteenth amendment powers. The legislative history of these amendments firmly establishes both Congress' approval of the use of race-conscious remedies subsequent to the passage of Title VII and its intent that the same principles and standards apply to private and public employers under Title VII. The Constitution does not require a different outcome.

This Court has upheld under the equal protection clause voluntary race-conscious affirmative action plans intended to remedy the present effects of past discrimination. Although the Court has not articulated an absolute constitutional standard to be applied to affirmative action efforts, Article XII passes constitutional muster even under strict scrutiny. Article XII was necessary to preserve the results of the Jackson school district's efforts to recruit and retain minority teachers -- efforts undertaken in response to the Board of Education's determination that blacks had been chronically underrepresented on the school district's teaching force. As part of a collective bargaining agreement subject to renegotiation, the provision is necessarily temporary. Since it was the result of the collective bargaining process, it does not interfere with the

settled expectations of affected white employees. Finally, its impact upon whites has been relatively light. Thus, Article XII is lawful under both Title VII and the fourteenth amendment.

Should this Court conclude that Article XII is not constitutionally permissible under the fourteenth amendment, however, we urge it to frame its ruling narrowly so as not to impair Congress' ability to attack through legislation the evils which the fourteenth amendment was designed to eradicate. Because of the number and diversity of its members, the broad scope of its fact-finding procedures and the relative absence of time pressures, Congress is well suited to engage in the complex social balancing that is required in this area. Moreover, because Congress is not bound to the case-specific inquiries characteristic of

the courts, it may conduct general fact-finding and enact remedies that reach beyond those available to a court adjudicating a particular controversy. It is these very characteristics that give rise to Congress' concern about the scope of the Court's ruling. A decision in this case that the fourteenth amendment requires findings of intentional discrimination or the identification of specific victims as a prerequisite to race-conscious remedial action would cripple Congress' ability to combat race discrimination.

Congress must be permitted to continue to draw appropriate inferences from the results of its own fact-finding process and to devise appropriate remedies based on these inferences. This Court has recognized that Congress' enforcement powers under section five of the fourteenth amendment are broad. For

more than a century Congress has enacted, pursuant to those powers, race-conscious remedies to redress race discrimination. This Court has repeatedly upheld such efforts, emphasizing that Congress' power to enact race-specific remedies exceeds that of the courts. Race-conscious legislation has made a significant difference in alleviating the consequences of race discrimination. However, the task is far from complete. We urge the Court to decide this case in a manner that preserves both the federal programs now in place and Congress' constitutional authority to resort to race-conscious remedial legislation in the future.

ARGUMENT

One hundred twenty years after the abolition of slavery, race discrimination remains widespread. The cost of

continued racial isolation, in terms of lost talents, broken spirits and social strife, is intolerably high. This case presents the Court with the opportunity to decide whether public employers, like private employers, may adopt voluntary, race-conscious, affirmative remedies for past discrimination consistent with the Constitution. Because the use of such remedies is in accordance with congressional intent and the constitutional principles articulated in previous decisions of this Court, we believe the Court should uphold the race-conscious layoff provision jointly adopted by the Jackson Board of Education and the Jackson Education Association and affirm the decision of the Sixth Circuit in this case.

If the Court reverses the decision below, however, we urge the Court to

remain cognizant of the possible implications for Congress of any rulings concerning the scope of affirmative action permissible under the fourteenth amendment. That amendment charges Congress with the duty and power to enact appropriate legislation to combat race discrimination, and the broad discretion the amendment affords is essential to creating effective remedies for a problem which requires such complex social balancing. Therefore, we urge the Court, should it reverse, to narrowly tailor its ruling so as not to impair Congress' ability to enact race-conscious remedies pursuant to its fourteenth amendment powers.

Section One of this brief discusses the constitutionality of affirmative action by public employers and of the particular race-conscious layoff provision at issue in this case.

Section Two addresses Congress' fourteenth amendment powers, the characteristics which make Congress well suited to develop remedies in this area and Congress' particular interest in the scope of the Court's ruling in this case.

I. JACKSON'S RACE-CONSCIOUS LAYOFF PROVISION IS LAWFUL

A. Congress Intended that the Same Legal Standards Should Apply to Voluntary Affirmative Action Undertaken by Public and Private Employers and this Intent Is in Accordance with the Constitution

This Court has recognized that when Congress extended Title VII[1/] coverage to public employers in 1972,[2/] it "expressly indicated the intent that the same Title VII principles be applied to governmental and private employers

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1/ 42 U.S.C. §§ 2000e et seq. (1982).

2/ Pub. L. No. 92-261 (1972).

alike."[3/] At the time these amendments were enacted, Congress expressed its approval of the race-conscious affirmative action remedies devised by the courts.[4/] Congress also rejected

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3/ Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1977). See also Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir.), cert. denied, 446 U.S. 917 (1979).

4/ Both the House and Senate reports cited with approval judicial decisions upholding affirmative action. See S. Rep. No. 415, 92d Cong., 1st Sess. 8 n.4 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 5 n.1 (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2141. The House report explicitly stated that "[a]ffirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination." Id. at 16, 1972 U.S. Code Cong. & Ad. News at 2151.

Affirmative action guidelines issued by the Equal Employment Opportunity Commission recognize "the clear Congressional intent to encourage voluntary affirmative action" and reiterate the Commission's belief "that by the enactment of Title VII Congress did not intend to expose those who comply

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amendments to Title VII which would have precluded the use of race-conscious measures under Executive Order 11246 or the 1964 Civil Rights Act.[5/] This clearly expressed intent of Congress in favor of affirmative action by public as well as private employers would be frustrated if the Court holds that more stringent standards apply to public employers under Title VII and the fourteenth amendment than apply to

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(Footnote 4 continued)

with the Act to charges that they are violating the very statute they are seeking to implement." 29 C.F.R. § 1608.1 (1984). This Court has noted that the EEOC Guidelines, as the administrative interpretation of Title VII by the enforcing agency, are "entitled to great deference." Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)).

5/ See 118 Cong. Rec. 4918 (1972).

private employers under Title VII alone.[6/]

In United Steelworkers of America v. Weber,[7/] this Court upheld under Title VII a voluntary, race-conscious affirmative action plan collectively bargained by a private

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6/ Courts confronting the range of race-conscious remedial action undertaken by public employers have concluded, expressly or impliedly, that a public employer which adopts a voluntary affirmative action plan valid under Weber will be insulated from Title VII liability. See, e.g., Johnson v. Transportation Agency, 36 Fair Empl. Prac. Cas. (BNA) 725, 729 (9th Cir. 1984); Kromnick v. School District, 739 F.2d 894, 911-12 (3d Cir. 1984), cert. denied, 105 S. Ct. 782 (1985); Bratton v. City of Detroit, 704 F.2d 878, 884 (6th Cir. 1983), cert. denied, 104 S. Ct. 703 (1984).

Voluntary affirmative action by public employers has also been upheld against challenges based on the equal protection clause of the fourteenth amendment. See, e.g., Kromnick v. School District, 739 F.2d at 908-09; Valentine v. Smith, 654 F.2d 503, 511 (8th Cir.), cert. denied, 454 U.S. 1124 (1981).

7/ 443 U.S. 193 (1979).

employer and the bargaining representative of the potentially affected employees. The objective of the plan was to increase the level of black representation in the employer's craft force until it equalled the percentage of blacks in the labor force. The method used to achieve this objective was to reserve for blacks one-half of the places in a special training program. Although seniority was a factor in the allocation of places in the training program, separate lists of black and white workers were maintained. As a result, some white workers denied admission to the program had more seniority than some of the black workers admitted. Recognizing that the plan was adopted "to eliminate traditional patterns of racial segregation,"[8/] the Court concluded that Title VII

8/ Id. at 201.

permits employers and unions to agree to such temporary measures to eliminate manifest racial imbalances in traditionally segregated job categories.[9/]

Practical and equitable considerations played a primary role in the Court's decision in Weber. The result was necessary to insure the effective operation of Title VII, with its emphasis on voluntary action without litigation. It was also necessary to shield employers from the dilemma of choosing between liability to blacks for past discrimination on the one hand, and liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks on the other.[10/]

9/ Id. at 207.

10/ See id. at 209-10 (Blackmun, J., concurring).

The Court's recent decision in Firefighters Local Union No. 1784 v.

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Many of the characteristics and purposes of the Kaiser-USWA plan upheld in Weber are similar to those of Article XII, the layoff provision challenged in this case.[11/] The Kaiser-USWA plan, like

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(Footnote 10 continued)

Stotts, 104 S. Ct. 2576 (1984), does not overrule Weber. Stotts simply extended the Court's holding in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) -- that a court may award competitive seniority only to individual victims of past discrimination -- to judicial modification of a consent decree to require race-conscious layoffs over the objections of a union. Stotts has no application to voluntary affirmative action which is the product of a negotiated agreement between an employer and a union.

11/ This layoff provision was first adopted by the parties in Article XII of their 1972 collective bargaining agreement. For clarity, it is referred to throughout this brief as Article XII.

Article XII, was the product of collective bargaining.[12] Both plans deviated from the ordinary workings of seniority.[13] Both plans were designed to remedy the effects of the exclusion of blacks from desirable occupations.[14] Just as minority employees had no absolute right to advancement under the Kaiser-USWA plan, minority teachers have no absolute right to protection from layoffs under Article XII.[15] Finally,

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12/ See Weber, 443 U.S. at 197-99; Wygant v. Jackson Board of Education, 746 F.2d 1152, 1158 (6th Cir. 1984).

13/ See Weber, 443 U.S. at 199; Wygant, 746 F.2d at 1154.

14/ See Weber, 443 U.S. at 198 & n.1; Wygant, 746 F.2d at 1156-57.

The Jackson plan had the additional purpose of retaining black teachers in active service in order to benefit students in the Jackson public schools. See 746 F.2d at 1157.

15/ See Weber, 443 U.S. at 208; Wygant, 746 F.2d at 1154.

both were narrowly tailored, temporary measures. In Weber, the race-conscious selection of black trainees for the craft training program was to cease when the level of blacks in skilled crafts was comparable to black availability in the labor force.[16/] In this case, Article XII is a temporary response to the dislocation caused by a period of fiscal austerity. As the district court found, Article XII is "part of a collectively-bargained contract of limited duration" which is "subject to change whenever the contract is renegotiated."[17/]

There is a significant difference between the plan at issue in Weber and Article XII, however. Weber involved a private employer and was decided solely

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16/ See Weber, 443 U.S. at 208-09.

17/ Wygant, 546 F. Supp. 1195, 1202 (E.D. Mich. 1982).

under Title VII. The Jackson Board of Education is a public employer; consequently, both the equal protection clause of the Constitution and Title VII are implicated in this case. Nonetheless, Article XII, like the Kaiser-USWA plan, is lawful.

As noted above, in amending Title VII in 1972 to extend coverage to public employers, Congress intended that the same legal standards apply to affirmative action undertaken by public and private employers.[18/] At least in this case, the Constitution requires no different result. Consistent with the principles set forth in this Court's earlier decisions, race-conscious remedial measures like Article XII are permissible under the Constitution.

18/ See notes 1-3 supra and accompanying text.

In Fullilove v. Klutznick, seven members of the Court recognized that the equal protection clause permits voluntary, race-conscious[19/] affirmative

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19/ The argument advanced by the Solicitor General that the equal protection clause has always been strictly color-blind, see Brief for the United States as Amicus Curiae Supporting Petitioners at 7-21, simply cannot be squared with the history of the fourteenth amendment. As Dean Ely has explained:

> [T]he express preoccupation of the framers of the [fourteenth] amendment was with discrimination against Blacks, that is, with making sure that Whites would not, despite the thirteenth amendment, continue to confine Blacks to an inferior position. That this is the amendment's history surely cannot conclude the matter; given the historical context, discrimination against Blacks is all the framers would have been concerned about, and the equal

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action to remedy present effects of past discrimination.[20/] Remedying the present

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(Footnote 19 continued)

> protection clause has rightly been construed to protect other minorities. But at the same time, the amendment cannot be applied without a sense of its historical meaning and function.

Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 728 (1974) (footnotes omitted).

This Court has recognized, in the public school setting, that "color-blindness" can be exploited as a pretext to justify continued discrimination. See North Carolina State Board of Education v. Swann, 402 U.S. 43, 45-46 (1971).

20/ 448 U.S. 448, 482 (1980) (Burger, C.J.) (citing Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18-21 (1971)); Fullilove, 448 U.S. at 519-21 (Marshall, J., concurring in judgment); id. at 548 (Stevens, J., dissenting). Cf. Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982) (O'Connor, J.) (gender classifications are permissible under fourteenth amendment).

(Continued)

effects of past race discrimination, like "making whole" identified victims of discrimination, is a constitutionally permissible objective of state action.[21/]

(Footnote 20 continued)

Although Fullilove considered the validity of congressional action and therefore turned on the Court's analysis of this action under the equal protection component of the fifth amendment, 448 U.S. at 473, its constitutional analysis is fully applicable to state action under the fourteenth amendment. See Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam); Regents of the University of California v. Bakke, 438 U.S. 265, 367-69 (1978) (Brennan, White, Marshall, Blackmun, JJ.) (same equal protection standards should apply to states as apply to Congress).

21/ Fullilove, 448 U.S. at 477 (Burger, C.J.) (citing South Carolina v. Katzenbach, 383 U.S. 301 (1966)); see also United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Stotts, 104 S. Ct. at 2606 (Blackmun, J., dissenting) ("Because the discrimination sought to be alleviated by race-conscious relief is the classwide effects of past discrimination, rather than discrimination against identified members of the class, such relief is provided to the class as a whole rather than to its individual members.").

Such relief is not limited to remedying adjudicated constitutional violations.[22] It may impinge upon the settled expectations of "innocent parties" whether or not the affected whites oppose the remedy.[23] The whites affected need not themselves have been guilty of discrimination.[24] In fact, it may reasonably be assumed that some or all of those adversely affected by the remedial action previously benefited from their non-minority status.[25]

22/ Fullilove, 448 U.S. at 477 (Burger, C.J.) (citing Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966)); see also Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 16.

23/ See Fullilove, 448 U.S. at 484 (Burger, C.J.).

24/ See id. at 484-85.

25/ See id. at 485.

The Court has not articulated absolute standards for assessing the validity of racial classifications utilized by public employers as part of race-conscious affirmative action plans intended to remedy past discrimination.[26/] However, whether the standard to be applied is the "strict scrutiny" applied to invidious racial classifications or something less, the constitutionality of race-conscious state action is to be determined by a two-step analysis.[27/] First, it must be decided whether the objective of the action -- in this case, remedying past discrimination[28/] -- is constitutionally

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26/ See id. at 498 (Powell, J., concurring).

27/ See id. at 473 (Burger, C.J.).

28/ A formal judicial or administrative "finding" of discrimination is not required before such a classification can be employed. Id. at 477, 478 (Burger,

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permissible. The second step is to determine whether the means chosen to

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(Footnote 28 continued)

C.J.) (citing Katzenbach v. Morgan, 384 U.S. at 652-53) (upholding benign racial classification employed by Congress because "the Court could perceive a basis upon which Congress could reasonably predicate a judgment" that discrimination had occurred)). Stotts does not alter the application of that rule to this case. In Stotts, the Court held that under Title VII a district court modifying a consent decree may not alter a bona fide seniority system to require race-conscious layoffs without a finding or admission that each beneficiary has been a victim of past discrimination. 104 S. Ct. at 2590. That holding does not reach voluntary affirmative action efforts jointly agreed upon by the same employer and union which established the seniority principles to be modified. Nor is a specific finding required as to intent. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The requirement that there be a judicial or administrative finding of discrimination before a public employer can adopt a race-conscious remedy would, as in the private setting, undermine the administration of the anti-discrimination laws, which are predicated on voluntary settlement short of litigation. See, e.g., Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). See also 29 C.F.R. § 1608.1 (1984).

attain the objective -- here, a race-conscious layoff provision -- are constitutional. There are, of course, constitutional limitations on the power of a public employer to engage in voluntary affirmative action employing racial classifications. Any such race-conscious programs must, as in the private setting, be temporary,[29/] narrowly tailored, and designed to eliminate racial imbalances rather than to maintain racial balance.[30/]

29/ See Fullilove, 448 U.S. at 463 (Burger, C.J.) (Affirmative action will be needed until society delivers upon "the century-old promise of equality of economic opportunity."); see also Regents v. Bakke, 438 U.S. at 405 (Blackmun, J., dissenting) (noting the tension between the fourteenth amendment's "original intended purposes" of aiding blacks and "idealistic equality" for all, which will remain "until complete equality is achieved"); Ely, supra note 19, at 738-39; cf. A. Bickel, The Least Dangerous Branch 64-65 (1962).

30/ See Weber, 443 U.S. at 209.

B. Article XII Is a Constitutionally Permissible Racial Classification

Analyzed in light of these principles, Article XII is constitutional. First, the purpose of Article XII was to preserve the results of recent efforts to recruit and retain minority teachers in the Jackson schools. These efforts were undertaken in response to the Board of Education's determination that blacks had been chronically underrepresented on the school district's teaching force.[31/] In the face of

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31/ See 746 F.2d at 1156. The statistics relied upon by the Board of Education led both lower courts in this case to conclude that "minority teachers were 'substantially' and 'chronically' underrepresented on the Jackson School District faculty in the years preceding the adoption of the affirmative action plan." Id.

layoffs which would otherwise be conducted according to ordinary seniority rules, there is no way to preserve the results of affirmative action hiring efforts without adopting a race-conscious layoff plan;[32/] Article XII was therefore necessary. A finding that Article XII is unconstitutional would mean that fiscal austerity would prevail over voluntary affirmative action despite the willingness of the teachers' association and the Board of Education temporarily to deviate from normal seniority principles in order

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32/ See generally Arthur v. Nyquist, 712 F.2d 816 (2d Cir. 1983) (approving race-conscious layoff plans designed to preserve gains made pursuant to court-ordered affirmative action), cert. denied, 104 S. Ct. 1907 (1984); accord Morgan v. O'Bryant, 671 F.2d 23 (1st Cir.), cert. denied, 459 U.S. 827 (1982).

to preserve the essential gains derived from affirmative action.[33/]

Second, the interests of non-minority teachers have not been unreasonably trammelled by the workings of Article XII. Although at least one white teacher laid off because of the challenged provision would not have been laid off in its absence,[34/] the impact of Article XII on whites can fairly be characterized as "relatively light."[35/] This

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33/ Despite the ambiguity of the opinion of the district court on this point, see 546 F. Supp. at 1202, Article XII does not seek to establish or maintain any particular ratio between the number of minority teachers and the number of minority students.

34/ See Wygant, 746 F.2d at 1157.

35/ See Fullilove, 448 U.S. at 484 (Burger, C.J.).

Moreover, the layoff provision is not an absolute shield against minority layoffs. So long as minority representation among teachers laid off does not exceed minority representation on the

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Court has recognized that, "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible."[36/]

Third, Article XII is an appropriately temporary measure. It does not provide indefinite protection for minority teachers at the expense of non-minority teachers; rather, it operates solely to preserve the gains of recent hiring of minority teachers in the face of economically mandated layoffs. It is part of a collective bargaining agreement subject to renegotiation. There is good

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(Footnote 35 continued)

faculty, minorities and whites share the impact of fiscal austerity. See Arthur v. Nyquist, 712 F.2d at 823-24.

36/ Fullilove, 448 U.S. at 484 (Burger, C.J.) (citations omitted).

reason to believe that neither the teachers' association nor the school board would propose to include Article XII in future collective bargaining agreements once the minority hiring gains are substantial enough and extend far enough back in time that they can no longer be eroded easily by layoffs.

Additional factors weigh in favor of affirmance. First, because Article XII was collectively bargained by the public employer and the bargaining representative of all the potentially affected employees, it does not interfere with the settled expectations of non-minority employees.[37/] Moreover, the seniority rights of teachers adversely affected by the operation of Article XII, while valuable and important,[38/] are not

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37/ Cf. Stotts, 104 S. Ct. 2576 (1984).

38/ See id. at 2583 n.4.

sacrosanct. Like other assets and economic interests they are subject to the give and take of collective bargaining.[39] The Ninth Circuit has held that Title VII is not violated when an employer and a union voluntarily agree to a layoff provision that favors minority employees in order to preserve recent gains made in minority hiring.[40] The same reasoning should apply in this case.

Finally, it is significant that the public employer in this case is a public school board. As the Court noted in Brown v. Board of Education,[41] "education is perhaps the most important

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39/ See Ford Motor Co. v. Huffman, 345 U.S. 330, 342 (1953).

40/ Tangren v. Wackenhut Services, Inc., 26 Fair Empl. Prac. Cas. (BNA) 1647 (9th Cir. 1981), cert. denied, 456 U.S. 916 (1982).

41/ 347 U.S. 483 (1954).

function of state and local governments."[42/] This special importance of public education has led the Court repeatedly to acknowledge the competence

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42/ Id. at 493. Congress has also recognized the critical place of public education among local government functions. The House report on the 1972 amendments to Title VII noted:

> The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated.

H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971) (emphasis added), reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2153. See also S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971) (declaring that the exclusion of minorities from effective participation in state and local employment "not only promotes ignorance of minority problems in the particular community, but also creates mistrust, alienation, and all too often hostility towards the entire process of government").

of public educational authorities to engage in appropriate race-conscious affirmative action in the furtherance of educational policy.[43/]

43/ See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); McDaniel v. Barresi, 402 U.S. 39, 41 (1971); North Carolina State Board of Education v. Swann, 402 U.S. 43, 45 (1971). In Swann a unanimous Court, through the Chief Justice, stated that public school authorities may consider race in the assignment of faculty and students in the exercise of their "broad power to formulate and implement educational policy." 402 U.S. at 16. The Court further noted that the "discretionary" power of school boards to take such race-conscious steps greatly exceeds the authority of the courts to implement similar measures; courts can do so only after the finding of a constitutional violation. Id. Cf. Regents v. Bakke, 438 U.S. at 310-11 (Powell, J.) (the governmental interest in providing health care to disadvantaged communities may justify race-conscious admissions program at state medical school); NAACP v. Beecher, 679 F.2d 965, 977 (1st Cir. 1982), vacated on other grounds, 461 U.S. 477 (1983) (effective police protection

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II. IF THE COURT REVERSES THE SIXTH CIRCUIT, THE FOURTEENTH AMENDMENT SHOULD NOT BE INTERPRETED IN A WAY THAT WOULD CONSTRICT CONGRESS' POWER TO ENFORCE THE EQUAL PROTECTION CLAUSE

Although this case does not directly address Congress' authority, if the Court reverses the Sixth Circuit's ruling the decision may nonetheless

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(Footnote 43 continued)

requires racially balanced police force); accord Detroit Police Officers' Association v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981).

Contrary to the argument of the United States, Brief of the United States as Amicus Curiae Supporting Petitioners at 29-30, Fullilove does not hold that Congress is the only governmental body constitutionally competent to make a finding that justifies the use of racial classifications for remedial purposes. Not only does this argument disregard decisions of this Court such as Swann v. Charlotte-Mecklenburg, but, as a practical matter, such a reading of Fullilove would virtually extinguish voluntary affirmative action by school boards and the many other state and local

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affect Congress' ability to confront creatively the evils that the fourteenth amendment was designed to eradicate. For example, a holding that the use of race-conscious remedies under the fourteenth amendment must be predicated on victim-specific findings of discrimination would severely curtail the power of Congress to combat race discrimination, since the legislative process is not well suited to engage in such individualized determinations.

(Footnote 43 continued)

government entities. For example, in 1982 there were nearly 15,000 school districts in the United States. Statistical Abstract of the United States 283 (105th ed. 1985). Congress cannot alone undertake all of the race-conscious actions which may be needed to remedy past discrimination in these thousands of school districts, thereby averting litigation.

We, the legislators who write here as amicus curiae, believe that Article XII is a constitutionally permissible use of a race-conscious remedy, consistent with the goals of both the equal protection clause and federal equal opportunity laws. If this Court concludes, however, that Article XII is impermissible under the fourteenth amendment, we urge the Court to circumscribe its ruling to the facts of this case so as not to impair Congress' enforcement powers under section five of the amendment.

A. The Court Has Interpreted Section Five of the Fourteenth Amendment as a Broad Grant of Plenary Power

Section five of the fourteenth amendment confers upon Congress the power to enforce the provisions of the amendment "by appropriate legislation." The

Court has held that this enabling clause gives Congress the same broad powers recognized under the necessary and proper clause of the Constitution[44/] to enforce the amendment's prohibitions against race discrimination.[45/] In Fullilove v. Klutznick,[46/] the Court upheld congressional authority to enact a race-conscious minority set-aside provision and reaffirmed that section five is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the

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44/ See Katzenbach v. Morgan, 384 U.S. at 650 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

45/ Oregon v. Mitchell, 400 U.S. 112, 127 (1970) ("To fulfill their goal of ending racial discrimination . . . the Framers gave Congress power to enforce each of the Civil War Amendments. These enforcement powers are broad.").

46/ 448 U.S. 448 (1980).

guarantees of the fourteenth amendment."[47/]

B. Congress Has Repeatedly Enacted Race-Conscious Remedies Pursuant to Its Powers Under Section Five and the Court Has Found These Enactments to Be Constitutional

For more than a century Congress has been committed to combatting race discrimination through the use of race-conscious legislation. The legislative history of the fourteenth amendment indicates that the amendment's framers envisioned just such a role for Congress.[48/] Prior to consideration of the fourteenth amendment, the same Congress that proposed the amendment

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47/ Id. at 476 (quoting Katzenbach v. Morgan, 384 U.S. at 651).

48/ See generally Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 1 (1985).

passed a series of race-specific social welfare programs. Of even greater significance, Congress passed the most comprehensive of these statutes, the Freedmen's Bureau Act of 1866,[49] just one month after it approved the fourteenth amendment.[50]

The 1866 Freedmen's Bureau Act is a good example of race-conscious remedial legislation. The Act provided for educational programs expressly limited to "freedmen."[51] In the earliest of the Freedmen's Bureau Acts, the 1864 Act, the House defined the beneficiaries

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49/ Act of July 16, 1866, ch. 200, 14 Stat. 173, 174-76.

50/ The House approved Senate changes to the amendment on June 13, 1866 and voted it into law. Cong. Globe, 39th Cong., 1st Sess. 3149 (1866). The Conference Report on the Freedmen's Bureau Act was accepted on July 2 and 3, 1866. Id. at 3562.

51/ 14 Stat. 174-76.

of the bill as "persons of African descent,"[52/] while the Senate referred to "such persons as would have once been slaves."[53/] Many of the Act's provisions were aimed at black farmers, the most important group of minority entrepreneurs at the time. It is not likely that the 39th Congress intended the fourteenth amendment, enacted in July 1866, to invalidate race-conscious remedial action when the same Congress passed the Freedmen's Bureau Acts in February and July 1866.

In recent decades Congress has continued to enact race-conscious legislation aimed at eradicating race discrimination and its consequences. In

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52/ Cong. Globe, 38th Cong., 1st Sess. 2801 (1864).

53/ Id. at 2798.

Fullilove v. Klutznick,[54] this Court recognized such legislation to be consistent with the requirements of the equal protection clause.

Plaintiffs in Fullilove challenged the constitutionality of the Minority Business Enterprise (MBE) provisions of the Public Works Employment Act of 1977,[55] which requires state and local recipients of federal grants for local public works projects to use at least ten percent of these funds to purchase supplies or services from minority-owned businesses. Six members of the Court held that the use of racial and ethnic criteria constituted a valid means of enforcing the fourteenth amendment.[56]

54/ 448 U.S. 448 (1980).

55/ 42 U.S.C. §§ 6701 et seq. (1982).

56/ Justices White and Powell joined in the majority opinion authored by Chief

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The Chief Justice, joined by Justices White and Powell, expressly "reject[ed] the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."[57/] The Chief Justice further noted that the Court had repeatedly refused to deny the lower courts the power to employ race-conscious factors in fashioning equitable remedies for unconstitutional race discrimination or violations of federal anti-discrimination statutes.[58/]

(Footnote 56 continued)

Justice Burger. Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment, concluding that the challenged legislation was "plainly constitutional." 448 U.S. at 519.

57/ Id. at 482.

58/ In the school desegregation area, for example, the Court has observed that because of the race-related nature of the initial violation, race must be considered in devising any meaningful remedy. See North Carolina State Board of

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In Fullilove the Court upheld the constitutionality of the use of race-specific remedies by the judicial and legislative branches. In this regard the Chief Justice noted that Congress, as the branch entrusted with enforcement of the fourteenth amendment, has even more far-reaching power than the courts to remedy discrimination:

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in

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(Footnote 58 continued)

Education v. Swann, 402 U.S. at 46 (Burger, C.J.) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."); McDaniel v. Baressi, 402 U.S. 39, 41 (1971).

> Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.59/

In addition to the MBE provision upheld in Fullilove, Congress has enacted a host of other legislation, pursuant to its authority to enforce the fourteenth amendment, that is either expressly race-conscious or that is applied through race-conscious administrative regulations.60/ Title VII of

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59/ 448 U.S. at 483.

60/ See, e.g., Small Business Act, 15 U.S.C. § 637(d)(1982), and accompanying regulations, 13 C.F.R. §§ 124.1-1 to .3-1 (1985) (setting eligibility requirements for participation in program regarding contracts for federal agencies); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1982), and accompanying regulations, 29 C.F.R. §§ 1607.11, 1607.13, 1607.17 (1984) (employers may be required to use race-conscious affirmative measures to eliminate discrimination); Energy Conservation and Production Act of 1974, 42 U.S.C. § 6870 (1982), and accompanying regulations, 10 C.F.R. § 1040.7(a),

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the Civil Rights Act of 1964[61/] is a vivid example. In 1972 Congress comprehensively revised Title VII[62/] and extended its coverage to state and local governments in part as an exercise of its powers under section five.[63/] The

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(Footnote 60 continued)

(c)(3) (1985) (grant recipients to take remedial steps to eliminate effects of discrimination arising from former policies); Cable Communications Policy Act of 1984, 47 U.S.C.A. § 554(c) (1985 Supp.) (imposing obligation to execute positive, continuing program of affirmative action).

61/ 42 U.S.C. §§ 2000e et seq. (1982).

62/ Pub. L. No. 98-549, 98 Stat. 2779 (1984).

63/ Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), recognized that Congress' power to enact the race-conscious amendments to Title VII in 1972 derived from section five of the fourteenth amendment:

> There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised

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legislative history of these amendments evidences congressional approval of affirmative action programs and

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(Footnote 63 continued)

> its power under § 5 of the Fourteenth Amendment.

Id. at 453 n.9.

The legislative history also indicates that Congress was invoking its power under section five when it passed the 1972 amendments. The Senate report accompanying the bill that eventually became the amendments states:

> The last sentence of the Fourteenth Amendment enabling Congress to enforce the Amendment's guarantees by appropriate legislation is frequently overlooked, and the plain meaning of the Constitution allowed to lapse. The inclusion of State and local government employees within the jurisdiction of Title VII guarantees and protections will fulfill the Congressional duty to enact the "appropriate legislation" to insure that all citizens are treated equally in this country.

S. Rep. No. 415, 92d Cong., 1st Sess. 11 (1971).

congressional intent that such programs would be used to combat discrimination.[64/] Congress recently reaffirmed its commitment to race-conscious affirmative action when it passed the Cable Communications Policy Act, which was signed into law by President Reagan in October 1984.[65/] This Act contains comprehensive equal employment opportunity requirements and provides specific obligations that will be imposed on the

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64/ The House report accompanying the bill that became the 1972 amendments states:

> [A]ffirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination.

H.R. Rep. No. 238, 92d Cong., 1st Sess. 16 (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2151.

65/ Pub. L. No. 98-549, 47 U.S.C. §§ 521 et seq. (1982).

cable industry to "execute a positive continuing program of specific practices" to affirmatively recruit, hire and promote women and minorities.[66/]

All the statutes discussed above have in common the race-based nature of their remedies. Each reflects the studied judgment of Congress as to how to respond most effectively to the particular problem addressed. Congress' mission to rectify past discrimination through such tailored remedies could be severely hampered if the Court unduly narrows the range of remedies permissible under the fourteenth amendment.

66/ 47 U.S.C.A. § 554(c) (Supp. 1985).

C. Congress Is the Branch Entrusted with Enforcing the Fourteenth Amendment and Is Well Equipped to Combat Discrimination

The framers of the fourteenth amendment "were primarily interested in augmenting the power of Congress, rather than the judiciary."[67/] Indeed, as the Chief Justice observed in Fullilove, the authority of Congress to employ race-conscious remedies exceeds that of the judicial branch.[68/]

When Congress contemplates enactment of a remedy, it is not subject to the same time pressures that the courts face. This is an extremely important consideration where race

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67/ Katzenbach v. Morgan, 384 U.S. 641, 648 n.7 (1966).

68/ 448 U.S. at 483. See also Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 16.

discrimination remedies are concerned because of the intricate social balances involved. Meaningful remedies for race discrimination often create corresponding burdens. Congress, as a representative body, is ideally situated to make such determinations. The Court has noted that Congress can avail itself of certain fact-finding procedures that are not available to the courts.[69/] As former Solicitor General Archibald Cox has observed:

> [T]he legislature is, or at least can be a better fact-finding body than an appellate court. The greater number of members and their varied backgrounds and experience make it virtually certain that the typical legislature will command wider knowledge and keener appreciation of current social and economic conditions

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69/ See Bush v. Lucas, 462 U.S. 367, 389 (1983).

than will the typical court.70/

In sum, not only does the fourteenth amendment charge Congress with enforcing the amendment, but, as a practical matter, Congress is particularly well suited to undertake this task. It is therefore critical that if the Court reverses the decision below, it refrain from deciding this case in a way that would impair Congress' power to implement the equal protection clause.

D. Congress' Authority Under Section Five Would Be Nullified if the Fourteenth Amendment Were Interpreted to Require Individualized Determinations of Past Discrimination

In addition to the essential differences between Congress and the

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70/ Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199, 209 (1971).

judiciary discussed above, there is another key distinction: Congress acts on a level of generality, rather than on the case-specific basis characteristic of the judiciary. Consequently, Congress may conduct general fact-finding and enact legislation that reaches substantially beyond what a court would do when faced with a particular controversy. These differences in the scope of congressional and judicial remedies are grounded in the constitutional definitions of the roles of each branch.

In light of these inherent differences, a decision by the Court that the fourteenth amendment requires specific findings of discrimination and the singling out of identifiable "victims" before race-conscious remedies can be implemented would cripple the legislature's ability to combat race

discrimination.[71] Congress is not equipped to make victim-specific findings of discrimination. Rather, Congress can take into account judicial principles, and the results of its own fact-finding processes, and draw inferences of its own from such evidence as statistical disparity or racial imbalance. Congress should be permitted ample latitude to confront the evils of race discrimination in order to fulfill its constitutional obligation to enforce the equal protection clause.

71/ The United States in its brief as amicus curiae suggests that the Court should construe Fullilove to permit the use of race-conscious remedies only to provide specific relief to identified victims of discrimination. See Brief for United States as Amicus Curiae Supporting Petitioners at 30. As the foregoing discussion demonstrates, that reading of Fullilove misinterprets the Court's decision. Such an interpretation would effectively overrule that decision and tie Congress' hands in its attempts to enforce the equal protection clause.

E. Although Congress Has Made Progress Toward Achieving the Goals of the Equal Protection Clause, Much Remains to Be Done

Although the ultimate goal of the fourteenth amendment is indeed a color-blind Constitution, it has long been recognized that race-conscious remedial action is necessary to achieve equal opportunity. Although significant gains have been achieved in recent decades, much more must be accomplished before the 120 year-old promise of equal protection is fulfilled. A report published in 1984 by The Potomac Institute,[72/] after an extensive study of the patterns of minority and female employment in the 1970's, concluded that "both

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72/ The Potomac Institute, A Decade of New Opportunity: Affirmative Action in the 1970s (1984). The report was written by Herbert Hammerman, formerly Chief of the Employment Surveys Division of the Equal Employment Opportunity Commission.

minorities and women had greater employment in higher-paid jobs, where they traditionally had been under-represented . . . . [T]he gains . . . for the first time represent a good start in the direction of equal employment opportunity."[73/] Significantly, the study determined that affirmative action was instrumental in bringing about these gains.[74/]

The progress achieved thus far in no way suggests that the time has come to eliminate the use of race-conscious remedial programs. As the Potomac Institute Report concluded, "the achievements of equal employment opportunity have not yet neared the levels that would justify the dismantling of the governmental

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73/ Id. at 5.

74/ Id.

machinery that made them possible."[75/] In every category of the study, including income, unemployment rates and educational levels, members of minority groups did not fare as well as whites. This is of grave concern to Congress, which, as representative of all the people, is charged with ensuring the general welfare.

We as members of Congress consider race discrimination to be one of the most serious social issues of our time. Race-conscious legislation has made a difference in alleviating the consequences of discrimination. Nevertheless, we cannot in good conscience conclude that Congress' task has been completed. We urge the Court to decide this case in a way that preserves both the statutory framework now in place and

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75/ Id.

Congress' constitutional authority to resort to race-conscious remedial legislation in the future.

CONCLUSION

For the reasons discussed in Section One of this brief, the Court should uphold the constitutionality of Article XII and affirm the decision of the Sixth Circuit. However, if the Court reverses the decision below, we as legislators urge the Court to frame its opinion and instructions to the court below in a manner that does not impair

Congress' power to legislate race-conscious remedies pursuant to section five of the fourteenth amendment.

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