No. _______

In the

Supreme Court of the United States

WILLIAM E. SHEA,

Petitioner,

v.

JOHN F. KERRY, Secretary of State, in his official capacity,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), an employer may only use racial preferences to "remedy a manifest imbalance in a traditionally segregated job category." In this case, the State Department adopted a race-based Affirmative Action Plan that allowed only racial minorities to bypass the entry-levels in the Foreign Service and apply directly for mid-level grades, even though there is no evidence of a racial imbalance at that level. The only evidence the Department assembled showed a racial imbalance in the Senior Foreign Service, a distinct job category. Although qualified for a mid-level grade, William Shea, a white male, was hired as an entry-level Foreign Service officer because only minorities were eligible for mid-level grades through the race-based plan. He sued under Section 717 of Title VII of the Civil Rights Act of 1964, arguing that the Affirmative Action plan could not satisfy *Weber*. The D.C. Circuit Court of Appeals held that the evidence of a racial imbalance in the Senior Foreign Service justified race-based action targeted at the mid-levels of the Foreign Service. The questions presented are:

1. Does Section 717's command that all covered federal employees shall be "free from any discrimination based on . . . race" forbid the federal government from adopting race-based affirmative action plans?

2. If not, may an employer use a race-based affirmative action plan for a job category that is not racially imbalanced based on evidence of an imbalance in an entirely different job category?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION AT ISSUE 1

INTRODUCTION 2

STATEMENT OF THE CASE 6

A. The Department of State's Race-Based Affirmative Action Plan 6

B. Proceedings Below 9

REASONS FOR GRANTING THE WRIT 10

I. THIS COURT SHOULD DECIDE WHETHER TITLE VII PERMITS THE FEDERAL GOVERNMENT TO DISCRIMINATE ON THE BASIS OF RACE PURSUANT TO AN AFFIRMATIVE ACTION PLAN 11

A. The Decision Below Reads Section 717 Contrary To Its Explicit Text 12

B. The Decision Below Creates an Unneccessary Conflict Between Section 717 and the Constitution 17

C. The Decision Below Conflicts With This Court's Decision in *Ricci v. DeStefano* 22

TABLE OF CONTENTS—Continued

Page

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW RADICALLY INCREASES THE NUMBER OF RACE-BASED AFFIRMATIVE ACTION PLANS PUBLIC AND PRIVATE EMPLOYERS CAN ADOPT 25

CONCLUSION 28

APPENDIX

Opinion of the Court of Appeals A-1

Judgment of the Court of Appeals B-1

Order Withholding Issuance of Mandate C-1

District Court Memorandum Opinion D-1

42 U.S.C. § 2000e-16 . . . . E-1

TABLE OF AUTHORITIES

Page

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 4, 18

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 14

Brown v. Gen. Servs. Admin.,
425 U.S. 820 (1976) 13

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 14, 18, 27

Clark v. Martinez, 543 U.S. 371 (2005) 21-22

Clegg v. Arkansas Dep't of Correction,
496 F.3d 922 (8th Cir. 2007) 15

Doe v. Kamehameha Schools/
Bernice Pauahi Bishop Estate,
470 F.3d 827 (9th Cir. 2006) 26, 28

Duncan v. Walker, 533 U.S. 167 (2001) 14

Fisher v. Univ. of Tex. at Austin,
133 S. Ct. 2411 (2013) 18, 20

Freeman v. Pitts, 503 U.S. 467 (1992) 22

Gratz v. Bollinger, 539 U.S. 244 (2003) 3

Grutter v. Bollinger, 539 U.S. 306 (2003) 27

Harding v. Gray,
9 F.3d 150 (D.C. Cir. 1993) 19

Harrison v. PPG Industries, Inc.,
446 U.S. 578 (1980) 14

TABLE OF AUTHORITIES—Continued

Page

Higgins v. City of Vallejo,
823 F.2d 351 (9th Cir. 1987) 26

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) 13

Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616 (1987) . . . . passim

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 18-19

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) 13

Olmstead v. L.C. ex rel. Zimring,
527 U.S. 581 (1999) 13

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) 27

Phelan v. City of Chicago,
347 F.3d 679 (7th Cir. 2003) 19-20

Pierce v. Commonwealth Life Ins. Co.,
40 F.3d 796 (6th Cir. 1994) 21

Regents of Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) 14

Ricci v. DeStefano,
557 U.S. 557 (2009) 4, 9-10, 20, 22-24

Shea v. Clinton, No. 08-5491,
2009 WL 1153448 (D.C. Cir. Apr. 2, 2009) 9

Shea v. Kerry,
796 F.3d 42 (D.C. Cir. 2015) 1, 10

TABLE OF AUTHORITIES—Continued

Page

Shea v. Kerry,
961 F. Supp. 2d 17 (D.D.C. 2013) 1, 9

Shea v. Rice, 409 F.3d 448 (D.C. Cir. 2005) 9

Stuart v. Roache,
951 F.2d 446 (1st Cir. 1991) 26

Taken v. Okla. Corp. Comm'n,
125 F.3d 1366 (10th Cir. 1997) 19

United States v. Gonzales, 520 U.S. 1 (1997) 14

United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979) . . . . passim

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986) 14

Federal Statutes

5 U.S.C. § 7201(c) 7

22 U.S.C. § 3901, *et seq*. 27-28

§ 3945 28

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e-2(a) 12

§ 2000e-2(j) 16

§ 2000e-16(a) 2-3, 6, 11, 13

Pub. L. 99-93,
99 Stat. 405, Title I, § 152(a) 6-7

Pub. L. 100-204,
101 Stat. 1331, Title I, § 183(b) 7

TABLE OF AUTHORITIES—Continued

Page

Rule of Court

Sup. Ct. R. 10(c) 4, 10

Miscellaneous

McGinley, Ann C., *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 Ariz. L. Rev. 1003 (1997) 26

Sullivan, Charles A., *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 Wm. & Mary L. Rev. 1031 (2004) 21

PETITION FOR WRIT OF CERTIORARI

Petitioner William E. Shea respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 796 F.3d 42 and is reproduced in the Appendix (App.) at A-1-48. The opinion of the United States District Court for the District of Columbia is reported at 961 F. Supp. 2d 17 and is reproduced at App. at D-1-81.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit rendered its decision on August 7, 2015. App. B-1-2. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AT ISSUE

Title VII of the Civil Rights Act of 1964 provides in relevant part:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies

> as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-16(a).

INTRODUCTION

On September 1, 1990, Petitioner William E. Shea (Shea), a white male, applied to become a Foreign Service officer with the United States Department of State (Department). App. A-3. The Department had no authority to hire Shea in a mid-level grade under the mandates of its race-based Mid-Level Affirmative Action Plan (Affirmative Action Plan). App. A-3-6. Instead, on May 31, 1992, the Department offered Shea an entry-level[1] Foreign Service officer grade,

[1] At the time he was hired, the Foreign Service career ladder had six levels ranging from FS-06 (entry-level) to FS-01 (upper-level). App. A-3. FS-06, FS-05, and FS-04 are entry-level grades. FS-03 (continued...)

which he accepted. App. A-3. Other members of Shea's introductory class with similar qualifications who self-identified as racial minorities were hired directly into mid-level grades under the Affirmative Action Plan. App. D-6. Shea was ready and able to apply and would have applied for a mid-level grade, if it had been open to him on a race-neutral footing. App. A-11. Shea brought suit challenging the Department's discriminatory personnel action under Section 717 of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-16(a); *see also Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (individual has Article III standing to challenge a race-based program which denied "the opportunity to compete . . . on an equal basis").

Unlike Title VII's Section 703—which applies to private employers—Section 717 only applies to personnel actions taken by the federal government. Although the language of the prohibitions on race-based discrimination in the two statutes is different, the D.C. Circuit held that Section 717 claims of intentional discrimination by the federal government are analyzed under the Section 703 framework that this Court established for claims of intentional discrimination by private employers. App. A-21. Under Section 703, the standard of review depends on the race of the plaintiff and the "type" of discrimination alleged. Because Shea is a white male challenging intentional discrimination required by an affirmative action plan, the lower court held that he must prove that the Department's discrimination was not undertaken to remedy a "manifest imbalance" in a

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[1] (...continued)
and FS-02 are mid-level grades. FS-01 is the lone upper-level grade. Shea was hired into an FS-05 level. App. A-3.

"traditionally segregated job category." App. A-25; *see also United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 207 n.7 (1979) (white males challenging race-based affirmative action under Section 703 must prove that the employer's discrimination was not targeted at remedying a manifest imbalance in a traditionally segregated job category); *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 631, 637-38 (1987) (same). Under that standard, the D.C. Circuit held that the Affirmative Action Plan did not violate Title VII, because it was designed to remedy a manifest racial imbalance in the Senior Foreign Service. App. A-28-32.

The Court should grant the petition for certiorari because this case raises two important questions of federal law that have not been, but should be, settled by this Court. Sup. Ct. R. 10(c). First, this Court has never held that Section 717 allows the federal government to discriminate on the basis of race pursuant to an affirmative action plan. Unlike Section 703, Section 717 unambiguously forbids race-based personnel actions. Moreover, reading Section 717 to require different standards of review, based on the race of the individual discriminated against would cause that statute to conflict with the Fifth Amendment's Due Process Clause. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (Due Process Clause prohibits the federal government from discriminating based on race). The D.C. Circuit's decision also conflicts with this Court's decision in *Ricci v. DeStefano*, 557 U.S. 557, 582-85 (2009), holding that all governmental race-based discrimination presumptively violates Title VII and can only survive if the *government employer* proves its actions were necessary.

Second, even if the Section 703 cases of *Johnson* and *Weber* apply to intentional discrimination claims brought by white plaintiffs under Section 717, the Court should grant certiorari to reverse the D.C. Circuit's radical expansion of *Johnson* and *Weber*. Until the decision below, no court had ever held that an employer's race-based affirmative action plan may be justified by a manifest imbalance in a job category separate from the one receiving the preference. Here, the D.C. Circuit agreed with Shea that there was no manifest imbalance in the mid-levels of the Foreign Service where the Department's race-based plan was targeted. App. A-27-28. Nevertheless, the court upheld the Department's discriminatory personnel decision because it found a manifest imbalance in the Senior Foreign Service. App. A-28-32. The D.C. Circuit's decision would permit all employers subject to Title VII—public or private—to indefinitely continue race-based discrimination throughout all of the employer's job categories so long as a single job category remained "out of balance."

This case illustrates the problem with the D.C. Circuit's radical extension of *Johnson* and *Weber*. There exist a myriad of requirements to become a Senior Foreign Service officer, and the promotion path to the Senior Foreign Service officer is not just long, but highly uncertain and subjective. Most Foreign Service officers never reach the Senior Foreign Service, and it is sheer speculation whether beginning at a mid-level grade—without the benefit of years of professional development in entry-level grades—helps or hurts the quest for promotion into the Senior Foreign Service. And, of course, the Department has produced no evidence suggesting it forecast 15 or 20 years into the future to see whether minority groups

targeted by the Affirmative Action Plan would still be underrepresented in the Senior Foreign Service when those hires might be expected to be considered for promotion.

If Section 717 means what it plainly says, the Department's Affirmative Action Plan is illegal. It is a "personnel action" that "affects" Shea, an "employee" and former "applicant for employment," and it "discriminated" against him "based on race." 42 U.S.C. § 2000e-16(a). Yet, the D.C. Circuit read Section 717 to allow the federal government to engage in this overt and intentional discrimination. Worse, the D.C. Circuit's decision radically constricts Title VII's protections for individuals subjected to intentional discrimination by their public or private employer. This Court should grant the petition and review the D.C. Circuit's decision.

STATEMENT OF THE CASE

A. The Department of State's Race-Based Affirmative Action Plan

The Foreign Relations Authorization Act, Fiscal Years 1986-1987 (1986-87 Foreign Relations Act) directed the Department of State to "increase significantly the number of members of minority groups and women in the Foreign Service." Pub. L. 99-93, 99 Stat. 405, Title I, § 152(a). The 1986-87 Foreign Relations Act did not require the Department to adopt race-based means of increasing minority representation in the Foreign Service, *id.*, nor are racial preferences required by any other statute. To the contrary, Congress directed the Department to engage

in "recruitment" efforts to increase the members of minority groups in the foreign service. *See id.* (citing 5 U.S.C. § 7201(c). Section 7201 explicitly disclaims discrimination on the basis of race.

On January 1, 1987, the Department instituted the Affirmative Action Plan, under its more general Mid-Level Foreign Service Career Candidate Program. App. A-3-6. The Mid-Level Foreign Service Career Candidate Program authorized the Department to hire candidates directly into mid-level Foreign Service grades if it obtained a "certification of need," a document demonstrating that the Department needed an individual at a mid-level grade with specific qualifications. App. D-5. The Affirmative Action Plan eliminated the certificate of need requirement for minority applicants. App. D-5. The Department produced no evidence in this case showing racial disparities in the mid-levels of the Foreign Service at the time the Affirmative Action Plan was adopted. App. A-5. Nor did the Department produce any evidence showing racial disparities in the mid-levels of the Foreign Service at any time throughout the life of the Affirmative Action Plan. A-29. Without referencing the Affirmative Action Plan, the Foreign Relations Authorization Act, Fiscal Years 1988-1989, demanded efforts to increase minority representation in the senior levels of the Foreign Service. Pub. L. 100-204, 101 Stat. 1331, Title I, § 183(b). However, the Department made no substantive revisions to the Affirmative Action Plan as a result of the 1988-89 Foreign Relations Act.

In 1989, the Secretary of State commissioned a report on Foreign Service personnel. App. D-34. In June of 1989, the General Accounting Office (GAO)

issued a report titled, *State Department: Minorities and Women Are Underrepresented in the Foreign Service*. App. D-35. According to the GAO Report, the only minority males who were underrepresented in the mid-levels of the Foreign Service were males identifying as Asian/Pacific Islanders. App. A-5. Black males, Hispanic males, and Indian/Alaskan males were fully represented in the mid-levels of the Foreign Service. App. A-5. The GAO Report also explains that the Affirmative Action Plan was not designed to increase minority representation in the senior levels of the Foreign Service. App. A-6.

A subsequent Multi-Year Report issued in 1990 maintained the status quo—all non-white individuals were still eligible for the preference—though it purported to establish "goals" to increase minority participation in positions where the Department had documented racial underrepresentation. App. D-40. However, as noted above, the data in the Multi-Year Report failed to show any imbalance—much less a manifest one—in the mid-levels of the Foreign Service. Indeed, Black males, Hispanic males, and Asian-American males were vastly *over*-represented in the mid-levels of the Foreign Service. App. D-56-57. Moreover the "goals" created by the Multi-Year Report were illusory. The goals did nothing to cabin Affirmative Action Plan-eligibility for non-white individuals from fully represented racial groups. App. D-24. Indeed, it is unclear what effect, if any, the goals had on the Affirmative Action Plan. The Department continued to give preferential treatment to all individuals from minority groups identified in the Affirmative Action Plan, and continued to disfavor white males. App. D-24.

B. Proceedings Below

On July 11, 2001, Shea filed a grievance with the Department asserting that he was being discriminated against on the basis of his race in violation of Title VII. App. A-8. The Department failed to resolve the grievance within 90 days, after which Shea filed the grievance with the Foreign Service Grievance Board. App. A-8. On January 30, 2002, the Board dismissed Shea's grievance for lack of jurisdiction. Having exhausted his administrative remedies, Shea filed suit in the United States District Court for the District of Columbia on March 26, 2002. App. A-8.

The D.C. Circuit twice reversed district court decisions dismissing Shea's suit on procedural grounds. *See Shea v. Rice*, 409 F.3d 448, 456 (D.C. Cir. 2005); *Shea v. Clinton*, No. 08-5491, 2009 WL 1153448, at *1 (D.C. Cir. Apr. 2, 2009). Back in the district court for the third time, the parties filed cross-motions for summary judgment. App. D-8. After full briefing, the lower court granted the Department's motion for summary judgment and denied Shea's motion. *Shea v. Kerry*, 961 F. Supp. 2d 17, 55 (D.D.C. 2013). District Court Judge Lamberth questioned the continuing validity of *Weber* and *Johnson* in light of this Court's decision in *Ricci*, but felt compelled to apply the earlier cases absent a clear decision from this Court. *Id.* at 55 n.17.

Shea timely appealed the district court's decision dismissing his case. App. B-1. Shea argued that *Ricci* clarified that in Title VII cases where the government overtly and intentionally discriminates on the basis of race, the burden is on the employer—and not the individual discriminated against—to prove the lawfulness of its discrimination. In addition, Shea

argued that even under *Weber* and *Johnson*, the Department failed to prove that its Affirmative Action Plan was designed to remedy a "manifest imbalance" of minorities in a "traditionally segregated job category." App. D-56.

The court of appeals affirmed the district court's ruling. App. B-1-2; *Shea v. Kerry*, 796 F.3d 42, 65 (D.C. Cir. 2015). It held that *Ricci* does not govern cases of intentional discrimination where the government employer's discriminatory conduct is designed to "expand job opportunities for minorities and women." *Id.* at 55. In addition, the court held that the Department is not required to prove a "manifest imbalance" in the job category offering the racially preferential treatment, *i.e.* mid-level grades. Instead, the court upheld the Mid-Level Affirmative Action Plan because it found a "manifest imbalance" in the Senior Foreign Service. *Id.* at 58-60. Judge Williams filed a concurring opinion expressing his belief that the terms "manifest imbalance," "traditionally segregated job category," and "unnecessarily trammels the rights" from *Weber* and *Johnson* are amorphous and uncertain. *Id.* at 65 (Williams, J., concurring).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the D.C. Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

I

THIS COURT SHOULD DECIDE WHETHER TITLE VII PERMITS THE FEDERAL GOVERNMENT TO DISCRIMINATE ON THE BASIS OF RACE PURSUANT TO AN AFFIRMATIVE ACTION PLAN

Section 717 of Title VII explicitly prohibits federal governmental discrimination: "*All* personnel actions affecting employees or applicants for employment . . . in executive agencies . . . shall be made free from *any* discrimination based on race." 42 U.S.C. § 2000e-16(a) (emphasis added). This statute covers the actions taken by the Department here. The Department made a personnel decision that affected William Shea—an applicant for employment—and that personnel decision was race-based and discriminatory. Put simply, had Shea identified himself as belonging to any of the Department's preferred races, he would have been eligible to apply for a mid-level placement through the Affirmative Action Plan. As a white male, the opportunity was closed to him.

The court below held that Section 717's prohibition on racial discrimination by the federal government should be analyzed using the same framework as Section 703's prohibition on discrimination by private and municipal employers.[2]

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[2] The text of Section 703's prohibition on racial discrimination reads in pertinent part that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

(continued...)

App. A-8-9. Therefore, because the Department's race-based discrimination was undertaken in accordance with an affirmative action plan, the lower court analyzed the Department's discriminatory personnel actions under the framework this Court laid forth in *Johnson*, 480 U.S. 616, and *Weber*, 443 U.S. 193.

Under *Johnson* and *Weber*, a non-minority plaintiff bears the burden of proving that the employer's race-based discrimination was illegal. A challenger to a race-based affirmative action plan must show that the discriminatory employment decision was not undertaken in response to a "manifest imbalance in a traditionally segregated job category," or that the decision "unnecessarily trammeled" the rights of non-minorities. *Johnson*, 480 U.S. at 631, 637-38. In this case, the lower court reasoned that Shea bore the burden of proving that the Department's Affirmative Action Plan did not remedy a manifest imbalance in a traditionally segregated job category, or, alternatively, that the plan unnecessarily trammeled the rights of non-minorities like him. App. A-22. By applying *Johnson* and *Weber* to claims arising under Section 717, the lower court radically extends those cases to permit previously illegal and unconstitutional race-based discrimination by the federal government.

A. The Decision Below Reads Section 717 Contrary To Its Explicit Text

Section 717 of Title VII provides an important protection against race-based discrimination by the

[2] (...continued)
privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

federal government. Before Section 717 was added to Title VII, federal employees—and applicants for federal employment like William Shea—had difficulty securing judicial relief from federal government discrimination. *See Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 825-26 (1976). Congress added Section 717 to create "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 829. By reading Section 717 contrary to its explicit text, the D.C. Circuit's decision returns federal law to a time when thousands of federal employees lacked adequate judicial relief for federal government discrimination. Only this Court can return Section 717 to its plain meaning, and provide adequate remedies against discrimination for individuals of all races.

Section 717 prohibits "any discrimination" on the basis of race by the federal government when it undertakes a "personnel action." 42 U.S.C. § 2000e-16(a). The text is clear and unambiguous. In interpreting statutory text, this Court has repeatedly held that "discrimination" means "less favorable treatment." *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 n.22 (1983) (interpreting "discrimination" in Title VII); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (under Title IX "discrimination" means "being subjected to differential treatment"; *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring in the judgment) ("[T]he normal definition of discrimination [means the] differential treatment of similarly situated groups."). Moreover, this Court has long understood that race-based affirmative action may constitute discrimination against individuals not entitled to the

racially preferential treatment. *See, e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., op.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality op.) (a race-based layoff preference for minority teachers discriminated against non-minority teachers); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989) (racial preference for minority contractors discriminated against non-minority contractors).

While this Court has interpreted Section 703's prohibition on discrimination to permit certain race-based discrimination by employers when the discrimination is intended to alleviate "manifest racial imbalance in traditionally segregated job categories," *Weber*, 443 U.S. at 207 n.7, the text of Section 703 differs from Section 717 in important respects. First, unlike Section 703, Section 717 prohibits "any" discrimination based on race. To the extent that remedial race-based action is permissible under Section 703 because it only prohibits "discrimination," Section 717's prohibition against "any discrimination" goes further. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-21 (2008) (use of the word "any" in statutory text has an expansive meaning); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (Congress's use of "any" leaves "no basis in the text for limiting" the modified phrase); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980) (use of "any" as a modifying phrase leaves no room for uncertainty); *cf. Duncan v. Walker*, 533 U.S. 167, 174 (2001) (noting the Court's reluctance "to treat statutory terms as surplusage in any setting") (quotation marks omitted). It prohibits the federal

government from discriminating at all. Second, whereas Section 703(a) lists the specific personnel decisions that must be free from racial discrimination, Section 717(a) explicitly prohibits "all personnel actions affecting employees or applicants for employment." *See Clegg v. Arkansas Dep't of Correction*, 496 F.3d 922, 928 (8th Cir. 2007) (Under Section 703, "[a]n employer's denial of a training request, without something more, is not itself an adverse employment action."). There can be little doubt that Congress intended Section 717's prohibition on racial discrimination to be further reaching than the prohibition in Section 703.

This Court touched on these distinctions in *Weber*, disagreeing over whether the text of Section 703 prohibited *any* racial discrimination or just *non-remedial* racial discrimination. *Compare Weber*, 443 U.S. at 207 ("Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action."), *with id.* at 216 (Blackmun, J., dissenting) ("I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute."). The majority read Section 703 to permit certain race-based discrimination for two reasons. First, the Court was persuaded that Congress never intended to prohibit *private employers* from enacting voluntary race-conscious affirmative action programs. *See Weber*, 443 U.S. at 207 (holding that Congress desired to "avoid undue federal regulation of private businesses."). The *Weber* Court's desire to avoid undue interference with private business has no purchase when it comes to Section 717, which only applies to the federal government.

Second, the *Weber* Court read Section 703(j)[3] as an indication that Congress intended for private businesses to have the flexibility to enact affirmative action plans. Section 703(j), which clarifies that Section 703 shall not "be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the[ir] race," has no analog in Section 717. 42 U.S.C. § 2000e-2(j). The *Weber* Court found that Congress would have written Section 703(j) differently had it intended for private businesses to be prohibited from enacting voluntary affirmative action programs. *See Weber*, 443 U.S. at 204-07. While the Court's "natural inference" is debatable,[4] no similar inference can be made with

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[3] Section 703(j) reads: "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." 42 U.S.C. § 2000e-2(j).

[4] *See Weber*, 443 U.S. at 217 (Burger, C.J., dissenting) ("One need not even resort to the legislative history to recognize what is apparent from the face of Title VII—that it is specious to suggest that § 703(j) contains a negative pregnant that permits employers to do what §§ 703(a) and (d) unambiguously and unequivocally forbid employers from doing.").

respect to Section 717, which contains no such provision or inference.

The text of Section 717 unmistakably prohibits federal executive agencies—the Department of State here—from choosing to adopt race-based affirmative action plans. However, the D.C. Circuit's decision below created a broad exception to this clear and unambiguous non-discrimination statute. This Court should grant the petition for certiorari in order to prevent this far-reaching opinion from infecting the federal government, and allowing it to violate federal employees' rights to nondiscrimination guaranteed by Title VII.

B. The Decision Below Creates an Unneccessary Conflict Between Section 717 and the Constitution

By holding that Section 717 permits race-based intentional discrimination by the federal government, the D.C. Circuit's decision renders Section 717 unconstitutional. And because the D.C. Circuit's decision applies to all actions taken by the federal government across the United States, the decision below eliminates an important protection against federal government discrimination for individuals nationwide. This constitutional conflict can be easily avoided, however, by reading Section 717 according to its plain text. Review is needed to avoid this constitutional conflict and ensure that individuals applying for, or working for, the federal government enjoy Title VII's full protections against racial discrimination.

The Due Process Clause of the Fifth Amendment requires the federal government to treat all individuals

equally with respect to race. *See Adarand*, 515 U.S. at 227. The Due Process Clause is "congruent" with the Fourteenth Amendment's Equal Protection Clause; it demands "skepticism" of all race-based distinctions, and "'is not dependent on the race of those burdened or benefitted by a particular classification.'" *Id.* at 224 (quoting *Croson*, 488 U.S. at 494). Accordingly, "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

By contrast, the standard under which courts evaluate claims under Section 703 depends upon a plaintiff's race. Indeed, this Court has established two different tests for private employers who are alleged to violate Title VII. In the case of a minority plaintiff, Section 703(a) claims are analyzed under the burden-shifting rules of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Under *McDonnell Douglas*, a plaintiff's *prima facie* case must demonstrate that: (1) he belongs to a member of a protected class; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open, and the employer continued to seek applicants from persons with the complainant's qualifications. *Id.* at 802. Once a *prima facie* case is established, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the applicant's rejection. *Id.* If the employer is able to articulate such a legitimate, non-discriminatory reason, the burden shifts back to the applicant to prove

that the employer's non-discriminatory reason "was in fact pretext." *Id.* at 804.

However, where the plaintiff is a non-minority discriminated against pursuant to a race-based affirmative action program, the standard is markedly different. The employer is no longer required to offer a non-discriminatory reason for its action. *See Johnson*, 480 U.S. at 626. The mere "existence of an affirmative action plan" satisfies the employer's burden of production, and the burden shifts immediately to the applicant to prove the plan violates Title VII. *Id.* To prove that an affirmative action plan violates Title VII, an applicant must prove either the absence of a "manifest . . . imbalance" of minorities in "traditionally segregated job categories," or that the plan "unnecessarily trammel[s]" the interests of non-minorities. *Weber*, 443 U.S. at 208-09.

All circuits that have addressed the issue have held that non-minority plaintiffs must meet a higher burden of proof under Section 703 than their minority counterparts. *See*, *e.g.*, *Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1369 (10th Cir. 1997). According to the D.C. Circuit, for example, an inference of discrimination arises in Title VII cases when the plaintiff is a member of a minority group. *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993). But "[n]o such inference arises when . . . the plaintiff is a white man." *Id.* The Seventh Circuit has similarly imposed additional requirements on white plaintiffs in lawsuits involving Title VII. *Phelan v. City of Chicago*, 347 F.3d 679, 684 (7th Cir. 2003). Unlike minority plaintiffs, white plaintiffs must "show background circumstances demonstrating that a particular employer has reason or inclination to discriminate invidiously against

whites or evidence that there is something 'fishy' about the facts at hand." *Id.* (citations and quotations omitted).

Unlike Section 703, however, Section 717 applies solely to personnel actions taken by the federal government. Because the Fifth Amendment's Due Process Clause prevents federal government action that classifies on the basis of race, a changing standard of review based on the race of the plaintiff—or the type of discrimination alleged to cause harm—would violate that Clause. And placing the burden of proof on a non-minority plaintiff to demonstrate that the federal government's facially race-based program violates Title VII runs counter to this Court's command that the government always bears the "ultimate burden" of demonstrating the need for racial discrimination. *See Fisher*, 133 S. Ct. at 2419-20; *see also Ricci*, 557 U.S. at 579-80 (employer bears the burden of showing why a race-based employment action was necessary).

The due process conflict created by applying *Johnson* and *Weber* to claims arising under Section 717 is clearly presented in this case. Despite the absence of evidence demonstrating an imbalance in mid-levels of the Foreign Service when Shea was hired, he bore the burden of proving that the Department's race-based Affirmative Action Plan was illegal. Indeed, the district court recognized this conflict:

> The Court wonders why it is harder to challenge an affirmative action plan under Title VII than under the Constitution. When challenging affirmative action under the Equal Protection Clause, strict scrutiny applies and the defendant has the ultimate burden of explaining why it was necessary to

> treat people differently based on their race. But when the challenge is under Title VII, we make the plaintiff ultimately prove that race-based discrimination is illegal.

App. D-77. The district court is not alone; other courts and commentators have recognized the conflict between the *Weber-Johnson* standard and equal protection. *See*, *e.g.*, *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n.7 (6th Cir. 1994) ("We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts."); Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 Wm. & Mary L. Rev. 1031, 1135 (2004) ("[I]t is unconstitutional to apply different proof requirements for claims by whites, as opposed to those by African Americans and other racial minorities.").

Shea should not have to bear the burden of proving the illegality of the Department's race-based conduct. This Court need not overrule *Weber* and *Johnson* to reach such a result. Those two cases can be narrowed to situations where a private employer voluntarily decides to engage in an affirmative action plan. After all, that is precisely what the *Weber* Court intended. *See* 443 U.S. at 207 (explaining that Section 703 permits voluntary race-conscious action undertaken by private business). By limiting *Johnson* and *Weber* in this sensible manner, the constitutional problem created here is easily avoided. *See Clark v. Martinez*, 543 U.S. 371, 380 (2005) (explaining the constitutional avoidance canon). Because Section 717 *only* applies to the federal government, this Court

should grant certiorari and hold that Section 717 requires the federal government to prove the necessity of its race-based conduct before it imposes any racially discriminatory measures.

C. The Decision Below Conflicts With This Court's Decision in *Ricci v. DeStefano*

Ricci v. DeStefano clarified that race-based employment decisions are generally "impermissible" by government under Title VII. 557 U.S. 557, 563 (2009). In the very limited circumstances where they are permitted,[5] the justification for governmental race-based employment discrimination neither turns on the race of the individual discriminated against, nor the "benevolence" or good intentions of the government employer. *Id.* at 579-80. Equal protection principles—which presumptively prohibit race-based classifications by the government—must guide a government employer before it decides to engage in a race-based employment decision. *Id.* at 582-85.

In *Ricci*, this Court was confronted with the tension inherent between Section 703's disparate treatment provisions and its disparate impact provisions. In resolving the statutory tension, this Court held "that race-based action . . . is impermissible under Title VII unless the employer can demonstrate

[5] Title VII permits an employer to use race if it has a strong basis in evidence of a disparate impact violation. *Ricci*, 557 U.S. at 585. Although never addressed by this Court, Title VII may also permit race-based affirmative action if necessary to remedy the effects of past intentional discrimination. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (allowing race-based action under the Equal Protection Clause to remedy the past effects of intentional discrimination).

a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." *Ricci*, 557 U.S. at 563. The Court understood that its decision—and the strong basis in evidence standard—would significantly "constrain[] employers' discretion in making race-based decisions." Rather than presume the race-conscious action to be legal, *Ricci* mandates that courts inquire whether the employer has a strong basis in evidence to support a valid defense. *Id.* After *Ricci*, the question in all Title VII cases where the employer's conduct is facially discriminatory is "whether the [employer] had a lawful justification for its race-based action." *Id.* at 579-80.

The D.C. Circuit below rejected this approach, holding instead that *Ricci* only applies where an employer "modif[ies] the outcomes of personnel processes for the asserted purpose of avoiding disparate-impact liability under Title VII." App. A-22. The lower court's decision renders *Ricci* toothless. Simply by asserting an "opportunity-based" justification for their race-based conduct, employers are relieved from proving a lawful justification for a race-based decision; it becomes the employee's burden to prove the race-based decision was illegal. App. A-22. For example, under the lower court's theory, the exact same race-based conduct this Court held violated Title VII in *Ricci*—the City of New Haven's decision to throw out the test results—would have been upheld had the City explained its actions as a general desire to increase opportunities for racial minorities instead of a specific desire to avoid disparate impact liability. It makes little sense that an employer must assemble a "strong basis in evidence" when it has a good faith belief that it might be violating Title VII's disparate

impact provisions, but its actions are presumed lawful—and it need not produce any evidence—if it discriminates to "increase opportunity." Under the D.C. Circuit's holding, the justification for the discrimination determines how the court reviews the race-based action, and conflicts with *Ricci*'s presumption that race-based action is illegal and demands an extraordinary justification to be upheld. *Compare* App. A-22, *with Ricci*, 557 U.S. at 579-80.

The lower court's decision would permit race-based employment decisions even where the employer has *no evidence* of a potential disparate impact violation. Under the lower court's view, race-based conduct undertaken to avoid disparate impact is different in kind from race-based conduct intended to create opportunities for minorities. App. A-22. But the *Ricci* Court unambiguously held that an employer must prove, by a strong basis in evidence, that it will lose a Title VII disparate impact lawsuit before it can legally engage in disparate treatment. 557 U.S. at 585. Thus, *a fortiori*, an employer should not be able to engage in disparate treatment when there is absolutely no fear of a disparate impact lawsuit.

The decision below undermines *Ricci*, because it invites employers to avoid *Ricci* altogether by announcing a more "benign" purpose for identical race-based decisions. The Court should grant the petition and reverse the lower court's decision severely limiting *Ricci*, as it permits the federal government to engage in overt race-based discrimination under Title VII.

II

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW RADICALLY INCREASES THE NUMBER OF RACE-BASED AFFIRMATIVE ACTION PLANS PUBLIC AND PRIVATE EMPLOYERS CAN ADOPT

Even if *Johnson* and *Weber* apply to claims brought under Section 717, the Court should grant certiorari to review the D.C. Circuit's decision. If the lower court's application of *Johnson* and *Weber* remains good law, all employers—public or private—will have vastly greater authority to engage in overt racial discrimination. No other circuit court permits race-based affirmative action by employers when the action is targeted at a job category without a manifest racial imbalance.

This Court's decisions in *Johnson* and *Weber* permit affirmative action programs that would otherwise violate Title VII as long as they address a "manifest imbalance" in a "traditionally segregated job category." *Johnson*, 480 U.S. at 632. The requirement that the imbalance be in a "traditionally segregated job category" serves to limit the scope of the preferences, so that "race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefitting from the plan will not be unduly infringed." *Id.* In order to serve those interests, employers cannot be given license to use racial preferences, unless the program is targeted at remedying the imbalance where it actually exists.

But the decision below permits more than this type of narrow remedial program. The D.C. Circuit considered evidence of a "manifest imbalance" between the races at the Senior Foreign Service to justify an affirmative action program aimed at the mid-levels of the Foreign Service. App A-28-A-32. Other circuits have only applied *Johnson-Weber* to imbalances existing in the particular job that is challenged—not any job with the same employer. For example, in *Higgins v. City of Vallejo*, the Ninth Circuit found that the manifest imbalance standard was satisfied only after an analysis of the imbalances that existed at all levels of the city's fire department. 823 F.2d 351, 356 (9th Cir. 1987). And in *Stuart v. Roache*, the First Circuit upheld a consent decree that specifically applied to both entry-level hires and promotions. 951 F.2d 446, 452 (1st Cir. 1991); *see also Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 862 (9th Cir. 2006) (en banc) (Bybee, J., dissenting) (criticizing the majority's misapplication of *Johnson-Weber*: "Until today, two findings were required to satisfy this first factor: (1) the present existence of a manifest imbalance in *a particular job category in the employer's workforce*; and (2) that this imbalance stems from historical segregation in *that job category*.") (emphasis added).

Johnson-Weber is a narrow exception to the "neutrality principle" of Title VII. *See* Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 Ariz. L. Rev. 1003, 1008 (1997). The rationale for permitting limited race-based decision making is remedial; as this Court

has said in the Equal Protection context, "[u]nless they are strictly reserved for remedial settings, [classifications based on race] may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 488 U.S. at 493. The decision below stretches that remedial purpose and allows employers to use race to correct non-existent problems.

This case highlights the difficulties with the D.C. Circuit's radical extension of *Johnson* and *Weber*. The Department's decision to remedy a racial imbalance at the Senior Foreign Service by giving preferences to minority applicants to mid-level grades is a prototypical example of buying unclear benefits at undeniable costs. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745 (2007). The connection between racial preferences at the mid-level and racial balance at the Senior Foreign Service is attenuated at best, since mid-level officers hoping for promotions to the senior levels require good fortune just as much as good qualifications. Of course, the Department has not produced—and cannot produce—any evidence that the minority groups that benefit from the Affirmative Action Plan would still be underrepresented in the Senior Foreign Service many years down the road when these preferences could be expected to take effect. Nor could any such plan be "limited in time." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

The Department's purported justification for racial preferences at the mid-level—rectifying the racial imbalance at the Senior Foreign Service—is even more dubious in light of statutes allowing the President to fill five percent of the Senior Foreign Service through direct appointment. *See* 22 U.S.C.

§ 3901, *et seq.* The President is also authorized to appoint members of the Senior Executive Service directly to the Senior Foreign Service, 22 U.S.C. § 3945, even after the five-percent cap is met. *See id.* (exempting Senior Executive Service members serving under limited appointments in the Senior Foreign Service from the five-percent cap). Thus, many potential Senior Foreign Service officers may not even come from the pool of candidates the Department relies on to remedy the racial imbalance in the Senior Foreign Service. As the President—in consultation with the Department may appoint qualified minorities to the Senior Foreign Services directly, and rectify any racial imbalance immediately, the Department does not need to resort to the sordid use of racial preferences at the mid-levels to rectify the racial imbalance at the Senior Foreign Service many years later.

CONCLUSION

"*Weber* and *Johnson* were willing to permit affirmative action programs without giving all employers license to discriminate in favor of any group that currently finds itself disadvantaged anywhere in the labor market." *Doe*, 470 F.3d at 862 (Bybee, J., dissenting). The decision below poses a threat to that proposition by granting an employer the license to discriminate throughout an organization in response to a manifest racial imbalance in one particular, specialized job category. In addition, the decision below extends *Johnson* and *Weber* to allow the federal government to adopt race-conscious affirmative action plans despite Section 717's unambiguous text forbidding such plans. This Court should grant the

petition to resolve the radical expansion of *Johnson-Weber* created by the panel below.

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Respectfully submitted,

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