ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5153

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM E. SHEA,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia
Honorable Royce C. Lamberth, Senior District Judge

APPELLANT'S REPLY BRIEF

MERIEM L. HUBBARD
RALPH W. KASARDA
JOSHUA P. THOMPSON
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Plaintiff-Appellant
William E. Shea

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

The following parties appeared before the district court, and now appear before this Court:

United States Secretary of State John Kerry

William Shea

Ruling Under Review

The ruling under review is United States District Judge Royce C. Lamberth's May 10, 2013, Order granting summary judgment to Defendant-Appellee Secretary of State John Kerry and dismissing the case with prejudice. The memorandum opinion accompanying the order can be accessed at *Shea v. Kerry*, 961 F. Supp. 2d 17 (D.D.C. 2013).

Related Cases

The case on review has previously been before this Court twice. *See Shea v. Clinton*, No. 08-5491, 2009 WL 1153448, at *1 (D.C. Cir. Apr. 2, 2009); *Shea v. Rice*, 409 F.3d 448 (D.C. Cir. 2005). Appellant is not aware of any related cases as defined in Circuit Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant William E. Shea is an individual and resident of the State of Texas. There is no corporate Plaintiff-Appellant in this case.

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Page

Cases

*Authorities upon which we chiefly rely are marked with asterisks.

Page

Page

Page

Federal Statutes

Federal Regulations

Miscellaneous

William Shea (Shea) replies to the Department of State's (Department) brief on Shea's claim that the Department discriminated against him on the basis of race in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2.

I

SHEA HAS STATED A *PRIMA FACIE* CASE OF DISCRIMINATION UNDER TITLE VII

In order to establish a *prima facie* case of discrimination under Title VII, Shea must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination. *See George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005); *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002). As a white male who alleges discrimination on the basis of race, Shea must additionally demonstrate "additional 'background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993) (quoting *Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)).[1] This requirement is satisfied by showing that but for an

[1] Title VII makes no distinction between races. *See* 42 U.S.C. § 2000e-2(a)(1). Thus, it is hard to understand why white plaintiffs must satisfy a different standard for stating a *prima facie* case then do minority plaintiffs. *Ricci v. DeStefano* seems to preclude the notion that the plaintiff's race is relevant to the elements of a successful disparate treatment claim. *See* 557 U.S. 557, 579 (2009) ("[E]xpress, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."). If Title VII does require that (continued...)

individual's race, he would have been qualified for employment. *See Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C. Cir. 1986).

Shea easily states a *prima facie* case. Shea's Complaint alleges that he was discriminated against on the basis of his race in violation of Title VII when he applied to and was hired by the Department. Dkt. 1, at 3-5. The Mid-Level Affirmative Action Plan (Affirmative Action Plan) was in effect when Shea applied to the Department and when he was hired. *Id.* But for his race, Shea would have been eligible to participate in the Affirmative Action Plan. Indeed, in the proceedings below, the Department twice[2] admitted that the only reason Shea could not apply for placement with the Affirmative Action Plan was because of his race. *See Shea*, 961 F. Supp. 2d at 33. Accordingly, the lower court correctly ruled that Shea established a *prima facie* case of discrimination under Title VII. *See id.* at 32-33.

---

[1] (...continued)
plaintiffs of different races meet different standards, the law would raise serious equal protection concerns. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (noting how the Equal Protection Clause requires all people, regardless of their race, to be treated equally under the law). Nevertheless, Shea clearly satisfies the elements for proving a *prima facie* case under either standard.

[2] After the Department failed to respond to requests for admissions, the district court ruled that it admitted that, but for Shea's race, he was qualified for the Affirmative Action Plan. Dkt. No. 69, at 9. After the Department objected, the lower court gave the Department a second chance to prove that non-minorities were eligible for the Affirmative Action Plan. Dkt. No. 78, at 1-2. The Department was unable to do so. *See Shea v. Kerry*, 961 F. Supp. 2d 17, 33 (D.D.C. 2013) ("Since State's submission was not responsive to this Court's Order, the Court deems Shea to have been qualified for MLAAP, except for his race.").

Despite presenting a hornbook case of Title VII discrimination—which the Department admitted—the Department argues that Shea failed this minimal burden. *See* Department Br. at 23-26; *see also Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 852 (D.C. Cir. 2006) ("[T]he burden for demonstrating . . . a prima facie case of reverse discrimination is minimal."). The Department argues that since Shea could have applied for mid-level placement through a "separate-but-equal" race-neutral program, he cannot challenge the Department's race-conscious program. *See* Department Br. at 23-26. The Department misunderstands the law. But for Shea's race, he could have applied for mid-level placement that did not require a "certificate of need." Dkt. 120-1, at 3 (SMF #12). Shea's eligibility for mid-level placement through a race-neutral plan that required a certificate of need, is wholly irrelevant to Shea's ability to challenge the race-conscious plan for which he was ineligible.

The only cases the Department cites for its unique interpretation of Title VII are *Johnson* and *Weber*. *See* Department Br. at 23. Yet, the cited passages have nothing to do with establishing a plaintiff's *prima facie* case of discrimination under Title VII. To be sure, both *Johnson* and *Weber* note that a factor in determining whether race-conscious plans trammel the rights of non-minorities is whether there exists "an absolute bar" to their advancement. *See United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208 (1979); *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 626 (1987). But that factor is only relevant to whether a plaintiff

has met his *ultimate burden* of proving that the race-conscious action was illegal, not to whether a plaintiff has stated a *prima facie* case. Tellingly, in both *Johnson* and *Weber*, the plaintiffs did state a *prima facie* case, but failed to show that there was an absolute bar to their advancement. *See Johnson*, 616 U.S. at 626-27; *Weber*, 443 U.S. at 208-09.

There is no merit to the Department's contention that because the Affirmative Action Plan did not present an absolute bar to his advancement, Shea cannot state a *prima facie* case of discrimination. Later in its Brief the Department realizes its error, and relies on the exact same passages from *Johnson* and *Weber* to argue the lawfulness of its Affirmative Action Plan. *See* Department Br. at 37-38 (citing *Johnson*, 616 U.S. at 636-40; *Weber*, 443 U.S. at 208). Whether the existence of the Department's race-neutral, mid-level placement plan legitimizes its race-conscious plan is an issue to which Shea will return later. *See infra* Arg. III.B. For now, it is important to note that even the Department recognizes that this factor goes to the lawfulness of the program, not to whether Shea has met the standards for stating a *prima facie* case.

II

THE DEPARTMENT FAILED TO PRESENT A STRONG BASIS IN EVIDENCE TO JUSTIFY ITS DISCRIMINATION AGAINST WILLIAM SHEA

Shea has met his initial burden to show that the Department discriminated against him on the basis of race in violation of Title VII. *See supra* Arg. I. Now, the Department bears the burden of showing that its discrimination was justified by a "strong-basis-in-evidence standard." *Ricci*, 557 U.S. at 584. The Department has made no attempt to do so. Instead, it argues that Shea is precluded from claiming that *Ricci* applies to Title VII disparate treatment claims, because he did not raise *Ricci* below. *See* Department Br. at 18-19, 22. Alternatively, the Department argues that *Ricci* does not apply to situations where employers intentionally discriminate on the basis of race pursuant to a race-conscious affirmative action plan. *Id.* at 18-23. Neither defense has merit.

A. Shea May Raise *Ricci* for the First Time on Appeal Because His Title VII Claim of Race-Based Discrimination Has Not Changed

The Department attempts to avoid the Supreme Court's holding in *Ricci* by arguing that Shea cannot raise that case for the first time on appeal. Department Br. at 18-19, 22. The Department misunderstands the law. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido,*

Cal., 503 U.S. 519, 534 (1992); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (same); *Teva Pharm., USA, Inc. v. Leavitt*, 548 F.3d 103, 105 (D.C. Cir. 2008) (same). Because Shea argues the same federal claim on appeal as he argued below—that the Department discriminated against him on the basis of race in violation of Title VII—he may make any argument in support of that claim before this Court.

Shea's complaint alleges a federal claim of racial discrimination under Title VII. Dkt. 1, at 3-5. That claim has not changed during the decade-long course of this litigation. *Compare Shea v. Rice*, 409 F.3d 448 (D.C. Cir. 2005), *with Shea*, 961 F. Supp. 2d at 21. Shea's federal claim before this Court is exactly the same. *See* Shea Op. Br. at 1. Because Shea is challenging an issue upon which the district court already ruled—whether the Department discriminated against him in violation of Title VII—he is permitted to direct the Court to any authority that supports that claim, regardless whether that authority was raised below. *See Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007).

The cases cited by the Department address a different point of law. In *Singleton v. Wulff*, the Supreme Court noted the general rule "that a federal appellate court does not consider an *issue* not passed upon below." 428 U.S. 106, 120 (1976) (emphasis added). The same is true of *Marymount Hosp. v. Shalala*, 19 F.3d 658, 663 (D.C. Cir. 1994), where the plaintiff attempted to argue, for the first time on appeal, that a

promulgated rule did not satisfy notice and comment procedures under the Administrative Procedure Act. Neither case is relevant here, because Shea is not raising a new issue on appeal.

The final case cited by the Department is even further off-point. The Department cites *Northwestern Indiana Tel. Co., Inc. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989), for the proposition that Shea cannot raise an *issue* on appeal that he failed to raise in previous appeals before the same court. Apparently, the Department believes Shea should have argued that *Ricci* applies to his case when he was before this Court on previous appeals. Department Br. at 22. In addition to being wrong for the reasons stated above, the Department's reliance on *Northwestern Indiana* is incorrect because: (1) this Court did not address the merits of Shea's discrimination claim in previous appeals; and, (2) *Ricci* had not been decided when Shea appeared previously before this Court.

Shea has consistently sought vindication for the Department's decision to racially discriminate against him in violation of Title VII. The Department has not offered any intelligible reason why this Court should preclude Shea from arguing that *Ricci* applies to claims of disparate treatment arising out of race-conscious affirmative action plans.

B. *Ricci* Applies to All Claims of Facially Discriminatory Conduct

Shea argues that *Ricci* applies to any intentional discrimination by an employer taken pursuant to a race-conscious affirmative action policy. Shea Op. Br. at 15-19. Specifically, Shea argues that whenever an employer intentionally discriminates on the basis of race, its action is presumed to violate Title VII's disparate treatment provisions. *Id.* Intentional discrimination can only be saved if the employer has a "strong basis in evidence" that its race-conscious action is necessary.

The *Ricci* Court explained that when ruling on overt, intentional discrimination claims—irrespective of the race of the plaintiff—reviewing courts are to begin with the premise that the action violates Title VII. 557 U.S. at 579. *Any* intentional race-conscious conduct comes within the scope of Title VII's disparate treatment provisions:

> Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.

Id. at 579-80. With these principles in mind, the *Ricci* Court concluded that "race-based action . . . is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." *Id.* 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 legal, *Ricci* mandates that Courts inquire whether the employer has a strong basis in evidence to support a valid defense. *Id.*

The Eighth Circuit agrees that after *Ricci*, a race-conscious affirmative action plan constitutes unlawful discrimination under Title VII absent a valid defense. *See Humphries v. Pulaski Cnty. Special Sch. Dist.*, 580 F.3d 688, 694 (8th Cir. 2009) ("We now join our sister circuits in concluding that evidence that an employer followed an affirmative action plan in taking a challenged adverse employment action may constitute direct evidence of unlawful discrimination."). Nearly all scholarship on *Ricci*'s applicability finds that the strong basis in evidence standard applies to race-conscious affirmative action plans. *See, e.g.*, Roberto L. Corrada, Ricci*'s Dicta: Signaling a New Standard for Affirmative Action Under Title VII?*, 46 Wake Forest L. Rev. 241 (2011) (*Ricci* applies to affirmative action plans); Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. Rev. 73, 118 (2010) (same). The Department's defenses to the contrary are without merit. *See* Department Br. at 18-23.

1. Justice Ginsberg's Dissent in *Ricci* Does Not Help the Department

Justice Ginsberg's dissent in *Ricci*, noted that the case "does not involve affirmative action." *Ricci*, 557 U.S. at 626 (Ginsberg, J., dissenting). The Department

seizes on this sentence to argue that *Ricci* should not govern this case. A dissenting opinion has no precedential value, but even Justice Ginsberg—in the sentence following that cited by the Department—recognizes that *Ricci* cannot be squared with the deferential standard described in *Johnson* and *Weber*. She notes that "if the voluntary affirmative action at issue in *Johnson* does not discriminate within the meaning of Title VII, neither does an employer's reasonable effort to comply with Title VII's disparate-impact provision." *Id.* (Ginsberg, J., dissenting). Justice Ginsberg's argument presumes that the Title VII injury in *Ricci* is indistinguishable from that in *Johnson*, since both were made pursuant to race-conscious conduct that is presumed lawful. It therefore follows that, because *Ricci* holds that an employer's efforts to comply with Title VII's disparate impact provisions *are not* a sufficient defense for engaging in the injury-inducing race-conscious action, neither can the existence of an injury-inducing affirmative action plan shield an employer's discriminatory conduct.

2. The Department's Interpretation of *Ricci* Is Illogical and Inconsistent with Settled Law

Unable to rely on binding authority, the Department offers its own interpretation of *Ricci*, arguing that the strong basis in evidence standard only applies "after an employer invalidates the selection that resulted from a 'fair opportunity

process.'" Department Br. at 20. There is nothing in *Ricci* that narrows the holding so severely, and the Department's proffered standard suffers additional flaws.

The Department emphasizes language in *Ricci* explaining that employers are not forbidden from designing tests that "*provide a fair opportunity for all* individuals, regardless of their race." Department Br. at 20 (quoting *Ricci*, 557 U.S. at 585). This language was meant to countenance the action of the New Haven Fire Department which—prior to administering the test—had spent $100,000 to ensure the tests would not be racially biased. *Ricci*, 557 U.S. at 564-65. In other words, *race-neutral* anti-discrimination measures are not prohibited by Title VII.[3] That does not mean, however, that *race-conscious* preferential treatment also escapes Title VII review simply because it predates an employer-determined "fair opportunity process." After all, the *Ricci* Court only countenanced a fair opportunity process undertaken for individuals "*regardless of their race*." *Ricci*, 557 U.S. at 585 (emphasis added). The Department's interpretation of *Ricci* puts the cart before the horse: It would require reviewing courts to decide whether a given employment process is fair in order to decide which standard to apply to determine if the process is fair. *Ricci* does not require such convoluted reasoning.

---

[3] A contrary interpretation would mean that even anti-discrimination measures, like Title VII, would be subject to *Ricci*. *See Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1634-38 (2014) (plurality op.) (holding race-neutral laws designed to end race-based classifications constitutional).

Next, the Department manufactures a distinction between race-conscious actions taken *ex post* and those taken *ex ante*, arguing that *Ricci* only applies to the former. *See* Department Br. at 20-21. The distinction is not useful; there are indispensable forward-looking and backward-looking elements to all race-based employment actions. For example, the Department argues that *Ricci* is a backward looking (*ex post*) case because the employer threw out the test results after administering the test. *Id.* at 19. But *Ricci* could just as easily be described as a forward-looking (*ex ante*) case. The City of New Haven threw out the test results in order to *avoid* a future disparate impact. *See generally Ricci*, 557 U.S. at 566-74 (describing the city's actions).[4] The *Ricci* Court explained that the "strong basis in evidence" standard applies irrespective of whether an employer is "avoiding or remedying" illegal conduct. *Id.* at 585. Assuming there is some meaningful distinction between actions taken *ex ante* and *ex post* in the context of race-based affirmative action, "avoiding" would be forward-looking (*ex ante*) and "remedying" would be backward looking (*ex post*). *Ricci* applies to both.

[4] The Department argues that, when an employer adopts a race-conscious affirmative action plan, it makes a forward-looking (*ex ante*) decision. *See* Department Br. at 20-21. But in order to legally adopt a race-conscious plan, an employer must look backward (*ex post*), and have a "strong basis in evidence" that its race-conscious action is designed to remedy past, intentional discrimination. *Id. See Ricci*, 557 U.S. at 582 (citing *Croson*, 488 U.S. at 500).

The Department's interpretation of *Ricci* would produce absurd results. The *Ricci* Court recognized that the City of New Haven had a "good faith belief" that it would be subjected to a disparate impact lawsuit if it certified the test results.[5] *Ricci*, 557 U.S. at 581. Yet the Court still imposed the higher standard of proof upon the city. *Id.* at 584. To adopt the Department's reasoning would mean that employers could act race-consciously without having a strong basis in evidence of past discrimination—or even a "good faith belief"—so long as they did so before undertaking a self-determined "fair employment practice." *See* Department Br. at 20. The Department's standard creates an incentive for employers to prematurely act race-consciously, and only on the basis of *weak* evidence. *Ricci* was not meant to produce such a perverse system; it was meant to "limit the discretion" of employers to act race-consciously in situations where they have a "strong basis in evidence" that failure to act would be otherwise illegal. 557 U.S. at 583.

3. The Department's Reliance on *United States v. Brennan* Is Misplaced

Shea argues that the Court in *United States v. Brennan*, 650 F.3d 65 (2d Cir. 2011), recognized the significance of *Ricci*, and rejected numerous attempts to limit the holding. *See* Shea Op. Br. at 17 (citing *Brennan*, 650 F.3d at 103-04). The Department argues that Shea misunderstands *Brennan*, but it fails to dispute any of

[5] The city did have to defend against a disparate impact lawsuit after certifying the test results. *See Briscoe v. City of New Haven*, 654 F.3d 200 (2d Cir. 2011).

Shea's arguments. Department Br. at 20-21. Indeed, the *Brennan* Court rejected four separate theories that would have limited the impact of *Ricci*. *See Brennan*, 650 F. 3d at 103-04.

The *Brennan* Court's resolution of the employees' legal theories "was necessary to the outcome" of the case and thus was part of the court's holding. *See McLaughlin v. Bradlee*, 803 F.2d 1197, 1204 (D.C. Cir. 1986) (explaining the difference between a court's holding and dictum). The Department argues that the court "specifically excluded" affirmative action plans from *Ricci*'s reach. Department Br. at 21. But, as the Department recognizes, affirmative action plans were not at issue in *Brennan*, *id.*, so any statements the court made with respect to the applicability of *Ricci* to affirmative action plans is dictum. *See Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993). Whatever weight the Second Circuit's opinion in *Brennan* should have in this case, surely the holding is more persuasive than the dictum.

There are good reasons this Court should decline to follow the dictum from an out-of-circuit case. The *Brennan* Court speculated that race-conscious affirmative action plans may not be covered by *Ricci*, because they benefit "all members of the racially defined class in a forward-looking manner." *Brennan*, 650 F.3d at 103. Thus, the *Brennan* Court speculates that there are two bases to distinguish "affirmative actions plans" from the race-conscious action prohibited by *Ricci*: (1) a forward-

looking/backward-looking distinction;[6] and (2) a benefit to all class members versus remedial make-whole remedies. *Id.* at 103. The Second Circuit speculates that *Ricci* only covers remedial make-whole remedies, and that measures taken to benefit "all members of the racially defined class" constitutes "affirmative action" and is not prohibited by *Ricci*.

The Second Circuit's interpretation is contradicted by *Ricci* itself—a case that did not involve remedial make-whole remedies, but involved measures taken to benefit all class members. After New Haven discarded the test results, no specific individual benefitted, and the city did not undertake remedial measures to make certain individuals whole. The result of New Haven's action permitted any person to take the test anew. Accordingly, a generalized class of persons benefitted: those who failed the test (and decided to take it again), and anyone who did not take the test (and desired to take it). To the extent that the " remedial make-whole" versus "generalized affirmative action" distinction has any purchase, *Ricci* involved generalized affirmative action.

The *Brennan* Court's dicta is also contradicted by the Supreme Court's decision in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality opinion), where the Court classified remedial make-whole programs as affirmative action. The *Wygant*

---

[6] Shea explained why the forward-looking/backward-looking distinction fails in Arg. II.B.2 above.

Court stuck down a collective bargaining agreement providing remedial, make-whole relief to identifiable minority teachers by shielding them from layoffs. The Court explained that this constituted "race-conscious remedial action," and that it was "affirmative-action." *Id.* at 277. Thus, even if *Ricci* itself were limited to make-whole remedies—which it is not—it does not follow that affirmative action and make-whole remedies are mutually exclusive categories.

C. The Department Failed to Defend Its Affirmative Action Program Under the Strong Basis in Evidence Standard

The Affirmative Action Program is not justified by a strong basis in evidence that remedial action was required. *See* Shea Op. Br. at 19-20. According to the *Ricci* Court, "an amorphous claim that there has been past discrimination" is insufficient to satisfy Title VII. *See Ricci*, 557 U.S. at 583 (quoting *Croson*, 488 U.S. at 499); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The burden of justification is demanding and it rests entirely on the state."). The *Ricci* Court explained that the Supreme Court's opinion in *Croson* sets out the type of evidence necessary to satisfy Title VII's strong basis in evidence standard. *See Ricci*, 557 U.S. at 583.

Croson explains that race-conscious relief could be justified if an employer has evidence of systematic exclusion of minority employees. 488 U.S. at 509. Similarly, if an employer has evidence of a "significant statistical disparity" between the number of qualified, willing, and able employees and those actually hired, an "inference of

discriminatory exclusion could arise." *Id.* But even in that case, an employer must first take "appropriate measures against those who discriminate on the basis of race." *Id.* *Croson* stressed that "proper findings" are necessary to "define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Id.* at 510. Only the "extreme case" would justify a specifically tailored racial preference. *Id.* at 509.

The Department cannot meet this exacting standard as a matter of law. It has failed to identify the number of qualified, willing, and able employees that applied and were denied entrance into the Foreign Service. The statistical disparity it purports to rely on was nonexistent three years before Shea applied to the Foreign Service, and when he applied, the disparity was still absent for individuals who received the preference. *See* Dkt. 120-4, at 60 (no imbalance for black males); Dkt. 120-5, at 22 (Shea - 008694) (same). The Department made no attempt to define the scope of the injury, instead giving preferential treatment to all minority applicants. Dkt. 120-1, at 3. This is not the "extreme case" envisioned by *Croson* that would permit the Department to introduce a narrowly tailored racial preference.

Shea is entitled to judgment that the Affirmative Action Program discriminated against him on the basis of race in violation of Title VII.

III

SHEA HAS PROVEN THAT THE AFFIRMATIVE ACTION PLAN VIOLATES TITLE VII UNDER *WEBER* AND *JOHNSON*

A. Shea Has Demonstrated That the Affirmative Action Plan Was Not Designed to Remedy a Manifest Imbalance in a Traditionally Segregated Job Category

Under *Johnson* and *Weber*, a race-conscious affirmative action must be tailored to remedy a "manifest imbalance" in a "traditionally segregated" job category. *See Weber*, 443 U.S. at 197; *Johnson*, 480 U.S. at 631-32. An affirmative action program that fails either requirement violates Title VII. *Hammon v. Barry*, 826 F.2d 73, 78 (D.C. Cir. 1987). The Department's Affirmative Action Plan fails both.

1. The Affirmative Action Plan Was Not Adopted to Correct a "Manifest Imbalance" in the Workforce

Shea argues that the Affirmative Action Plan was not justified by a "manifest imbalance" of minorities in the workforce. Shea Op. Br. at 22-26. Specifically, Shea argues that the Affirmative Action Plan was adopted in 1987, when the Department had no evidence of discrimination against "black, Hispanic, and Indian/Alaskan males" in the Foreign Service. *Id.* at 22; *see also Shea*, 961 F. Supp. 2d at 36; Dkt. 100, at 1; Dkt. 120-5, at 22. The Department concedes this point, admitting that it had no evidence of a manifest imbalance when the Affirmative Action Plan was adopted. *See* Department Br. at 40 (noting that the 1987 data relied upon to create the

Affirmative Action Plan was insufficient). The Department has also made no attempt to rebut Shea's argument that evidence gathered after the Plan went into effect cannot legitimize the program *nunc pro tunc*. *See* Shea Op. Br. at 24-25 (citing *inter alia Hammon*, 826 F.2d at 80-81 ("A predicate of discrimination is required *before* an employer may lawfully employ a race-conscious remedial device.") (emphasis added).

a. The Multi-Year Affirmative Action Plan for Fiscal Years 1990-1992 Did Not Create a New Affirmative Action Plan

The Mid-Level Affirmative Action Plan, Dkt. 120-1, and the Multi-Year Affirmative Action Plan for Fiscal Years 1990-1992, Dkt. 120-4 sound similar, but serve wholly different functions. The former—which Shea describes as the "Affirmative Action Plan"—gives preferential treatment to individuals from six distinct minority groups applying for positions in the Foreign Service. The latter—which Shea describes as the "Multi-Year Report"—covers all personnel issues, from recruiting to assignments, training, and sexual harassment. The Department seizes on the similar titles and argues that "the 1990-1992 Affirmative Action Program does not share the same characteristics as the 1987 Affirmative Action Program, but instead was implemented to correct [the failures of the 1987 Affirmative Action Plan]." Department Br. at 39. That is untrue.

The Multi-Year Report contains only *one paragraph* on the Affirmative Action Plan, which specifically states that it is a separate and distinct Department-run program. Dkt. 120-4, at 82 (Shea - 00140). Further, the Department has admitted that the Affirmative Action Plan lasted "five years," which would only be true if it did not change in 1990. *See* Dkt 120-1, at 4 (SMF #19). Nevertheless, the Department now argues that the Multi-Year Report corrected the admitted deficiencies in the Affirmative Action Plan, because it "set goals only for those under-represented groups." Department Br. at 41. But because the "goals" established in the Multi-Year Report had no effect on the preferential treatment required under the Affirmative Action Plan, it did not correct any of the Plan's deficiencies.

If one were to accept the Department's argument—that the Multi-Year Report constituted a wholly new affirmative action plan—then one should expect that only individuals from those groups identified as underrepresented would be preferred under the new plan. That is not what occurred. Under the Multi-Year Report, black males were not underrepresented. Dkt. 120-4, at 60. Yet black males were hired directly into the mid-level ranks during 1990-1992. Dkt 120-16, at 1- 2. On the other hand, if Shea is correct—that the Multi-Year Report did not replace the Affirmative Action

Plan—the hiring of black males into the mid-levels was required despite the evidence that black males were fully represented.[7]

Shea did not "admit" that the Multi-Year Report supplanted the Affirmative Action Plan when he applied to the Foreign Service. *See* Department Br. at 40. The Department's assertion otherwise misstates the facts. Shea's admission that the Multi-Year Report was in effect when he applied, is not an admission that it superceded the operative provisions of the Affirmative Action Plan. Shea's admission recognized that the Multi-Year Report made minor changes to the Affirmative Action Plan that are irrelevant to this lawsuit.[8] Shea has consistently argued that the Multi-Year Report did not replace the Affirmative Action Plan with something new and distinct.

In his Opening Brief, Shea posed the question of "what effect, if any" the goals in the Multi-Year Report had on the Affirmative Action Plan. Shea Op. Br. at 6. The Department provided no evidence that these "goals" had any effect. Thus, the Affirmative Action Plan was based on 1987 data that the Department admits fails to show a manifest imbalance in the workforce. Because "there [was] manifestly no

---

[7] If the Court decides that the Multi-Year Report created a whole new Affirmative Action Plan, the fact that black males were receiving preferential treatment despite being fully represented in the mid-levels—even under this allegedly "new" plan—shows that there was no "manifest imbalance."

[8] For example, the Multi-Year Report notes that the Department will stop widespread advertising of the Affirmative Action Plan in favor of recommendations from a small network of individuals. Dkt. 120-4, at 82 (Shea - 00140).

imbalance at all" in the mid-levels of the Foreign Service when Shea applied to the Department, its decision to discriminate against him pursuant to a race-conscious affirmative action plan violates Title VII. *See Hammon*, 826 F.2d at 78.

b. The Affirmative Action Plan Cannot Be Justified by a Manifest Imbalance in the Senior Foreign Service

For the first time in this litigation, the Department argues that the *Mid-Level* Affirmative Action Plan is justified by a manifest imbalance in the *Senior* Foreign Service. *See* Department Br. at 35-38. The Department argued before the trial court that any imbalance within the Senior Foreign Service is "irrelevant" to the Affirmative Action Plan. *See* Dkt. 128, at 8 n.1. However, in its opinion granting summary judgment to the Department, the trial court ruled that the Affirmative Action Program could be justified by an imbalance in the Senior Foreign Service, *see Shea*, 961 F. Supp. 2d at 39, and the Department now adopts that argument.

In order for the Affirmative Action Plan to be seen as a remedy for a "manifest imbalance" in the Senior Foreign Service, the Department must be able to identify how it is "crafted" and "tailored" to remedy that imbalance. *See Hammon*, 826 F.2d at 81. A remedy is properly tailored to the violation if it precisely targets the imbalance where it occurs. *See Croson*, 488 U.S. at 498 (narrow tailoring requires identifying the discrimination with precision); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 425 (D.C. Cir. 1992) (same). Granting a racial preference

to entry level Foreign Service officers is in no way tailored to an imbalance in the Senior Foreign Service.

Foreign Service officers are only eligible for the Senior Foreign Service after "15 years of professional work experience." 22 C.F.R. § 11.30(b)(iii)(A). 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. *See* 22 C.F.R. § 11.30, *et seq.*; *see also* 22 U.S.C.A. § 3942 (noting Senior Foreign Service Officers must be appointed by the President and confirmed by the Senate). 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 looked 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.

2. The Department Offers No Evidence That Foreign Service Officers Comprise a "Traditionally Segregated Job Category"

The first element of the *Johnson*/*Weber* standard is not satisfied by merely demonstrating a "manifest imbalance." The "manifest imbalance" must be found in a "traditionally segregated job category." *See* Shea Op. Br. at 26-28 (citing *Johnson*, 480 U.S. at 632 (both elements required)); *see also Weber*, 443 U.S. at 198-99; *Hammon*, 826 F.2d at 80-81 (same). A "traditionally segregated job category" requires a showing of some intentional action taken because of race that precluded individuals from a particular job. *See Weber*, 443 U.S. at 198-99 (prior discrimination against black individuals); *Hammon*, 826 F.2d at 77 (same); *Higgins v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987) (same); *In re Birmingham Reverse Discrimination Emp't Litig.*, 20 F.3d 1525, 1540 (11th Cir. 1994) (same); *Johnson*, 480 U.S. at 634 (women excluded from certain jobs). There is no evidence in the record that minority groups preferred under the Affirmative Action Plan were excluded from the Foreign Service. Indeed, the Department does not even argue that Foreign Service officers comprise a "traditionally segregated job category."

B. The Affirmative Action Plan Unnecessarily Trammels the Interests of Non-Minorities

Even under the deferential *Johnson*/*Weber* standard, a race-conscious affirmative program violates Title VII where it "unnecessarily trammels" the interests

of non-minorities. *See Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 637-38; *Hammon*, 826 F.2d at 81. The *Johnson*/*Weber* standard "does nothing to disturb the longstanding requirement that the remedy crafted to cure a violation be tailored to fit the violation." *Hammon*, 826 F.2d at 81. The Affirmative Action Plan fails this requirement for three reasons: (1) it is overinclusive; (2) the Department failed to exhaust race-neutral alternatives; and, (3) it was designed to attain a racial balance.

1. The Affirmative Action Plan Violates Title VII Because It Is Overinclusive

To the extent that the Affirmative Action Plan must be justified by data assembled before it was enacted, the parties agree that it is woefully overinclusive. *See* Shea Op. Br. at 29-30; Department Br. at 40; *see also* Dkt. 120-5, at 22 (showing no underrepresentation of Black, Hispanic, and Indian/Alaskan males). But even if the Affirmative Action Plan could be justified by data assembled post-enactment, the trial court correctly held that the Affirmative Action Plan is still overinclusive. *See Shea*, 961 F. Supp. 2d at 37. The Department concedes that its "revised" Affirmative Action Plan gave preferences to individuals for which it had no data showing under-representation. *See* Department Br. at 42 ("[A] black male was hired into the mid-levels . . . without any finding of underrepresentation of black males."). Given that fact, the Affirmative Action Plan is a textbook case of an overinclusive race-conscious

remedial program. *See Croson*, 488 U.S. at 505-06 (A remedial program that includes racial groups without a showing of underrepresentation is "grossly overinclusive.").

The Department makes no attempt to justify the overinclusiveness of its Affirmative Action Plan, instead arguing that Shea "should not be heard to complain," because he could have applied for mid-level placement through the Department's "separate-but-equal" program. Department Br. at 42. In other words, the Department is making the same argument that was rejected by the trial court—that Shea has failed to establish a *prima facie* case because he could have applied for mid-level placement through a race-neutral program. *See Shea*, 961 F. Supp. 2d at 32-33. Shea responds to this argument in detail above. *See supra* Arg. I.

The Department's Affirmative Action plan is overinclusive and therefore "unnecessarily trammels the rights of non-minorities" in violation of Title VII. *Johnson*, 480 U.S. at 637-38. Because "race . . . has been taken into account" in the Department's decisions to enforce the Affirmative Action Plan, Shea may be heard to complain about its overinclusiveness. *Id.* at 626.

2. The Department Failed to Exhaust Race-Neutral Alternatives

The exhaustion of race-neutral alternatives is the hallmark of a program that does not unnecessarily trammel the interests of non-minorities. *See Hammon*, 826 F.2d at 81. The Affirmative Action Plan violates Title VII, because the Department adopted "racial classifications [without showing] that available, workable race-neutral

alternatives [did] not suffice." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013). The Department's race-neutral, mid-level placement plan is the *only* race-neutral remedy cited to satisfy this requirement, although the Department "has at its disposal a whole array of race-neutral devices" that it must genuinely consider before adopting race-conscious measures. *Croson*, 488 U.S. at 509. A single race-neutral outlier is not sufficient. *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (The government must give "serious, good faith consideration [to] workable race-neutral alternatives.").

Nor can statements by the EEOC or Congress relieve the Department of its obligation to exhaust race-neutral remedies. It is a "well-settled requirement that alternatives to race-based measures be considered and, if possible, employed." *Hammon*, 826 F.2d at 81 n.12. Even if the EEOC and Congress explicitly urged the Department to act in a race-conscious manner, the Department cannot do so before "considering" and "employing" race-neutral alternatives. Race-conscious measures must be the "last resort." *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993).

3. The Affirmative Action Plan Was Designed to Achieve a Racial Balance

The Department admits that the Affirmative Action Plan was "designed to attain a racial balance." Department Br. at 42. The Department explains that "the

Affirmative Action Program was monitored regularly by State and by Congress to ensure that it was used to achieve a racial balance." *Id.* at 43. These admissions doom the Plan. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729 (2007) ("This working backward to achieve a particular type of racial balance . . . is a fatal flaw under our existing precedent."); *Grutter*, 539 U.S. at 330 ("outright racial balancing . . . is patently unconstitutional"); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake.").

IV

THE COURT SHOULD REMAND TO THE DISTRICT COURT TO CONSIDER SHEA'S DAMAGES CLAIM

The Department argues that Shea is not entitled to damages because he could have mitigated his claim by applying for its race-neutral, mid-level placement program. Department Br. at 44-45. The requirement to mitigate damages in a Title VII disparate treatment suit is minimal; a plaintiff need only show that he undertook "reasonable" efforts to "find other suitable employment." *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982); *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1133 (D.C. Cir. 1999). Shea continued to work for the State Department despite its racial discrimination, and thus easily satisfies this standard.

This mitigation defense is precisely the type of issue the district court should decide in the first instance. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 809 (1998) (remand for mitigation defense appropriate if damages are more than nominal); *Drexel Burnham Lambert Inc. v. Commodity Futures Trading Comm'n*, 850 F.2d 742, 743-44 (D.C. Cir. 1988) (remand to consider mitigation defense). Where summary judgment for a defendant is reversed—and granted to the plaintiff—it is proper to remand to calculate a plaintiff's damages award. *See Cannon v. District of Columbia*, 717 F. 3d 200, 206 (D.C. Cir. 2013) (summary judgment reversed and awarded to the plaintiff, and Court remanded for calculation of damages); *Stephens v. U.S. Airways Group, Inc.*, 644 F.3d 437, 439-42 (D.C. Cir. 2011) (same); *see also Perkins v. American Elec. Power Fuel Supply, Inc.*, 246 F.3d 593 (6th Cir. 2001); *New Jersey Coal. of Rooming & Boarding House Owners v. Mayor & Council of the City of Asbury Park*, 152 F.3d 217 (3d Cir. 1998) (remand to consider damages appropriate in discrimination case where lower court made improper legal determination). Because the court below awarded summary judgment to the Department, *see Shea*, 961 F. Supp. 2d at 55, remand to the district court is necessary to properly adjudicate Shea's claim for damages.

CONCLUSION

For the foregoing reasons, Shea respectfully requests this Court to reverse the decision of the district court granting summary judgment to the Department, and to

remand the case with instructions to grant summary judgment in favor of Shea on his claim that the Department violated his right to non-discrimination under Title VII. Shea also requests that the case be remanded to the district court to consider Shea's claim for damages.

DATED: August 8, 2014.

Respectfully submitted,

MERIEM L. HUBBARD
RALPH W. KASARDA
JOSHUA P. THOMPSON
Pacific Legal Foundation

By /s Joshua P. Thompson
JOSHUA P. THOMPSON

Counsel for Plaintiff-Appellant
William E. Shea

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   ☑ this brief contains 6,928 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), *or*

   ☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☑ this brief has been prepared in a proportionally spaced typeface using WordPerfect X5 in 14-point Times New Roman, *or*

   ☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

DATED: August 8, 2014.

/s Joshua P. Thompson
JOSHUA P. THOMPSON

Counsel for Plaintiff-Appellant
William E. Shea

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s Joshua P. Thompson
JOSHUA P. THOMPSON