No. 15-742

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

REPLY BRIEF IN SUPPORT OF 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?

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INTRODUCTION

In 1990, when William Shea (Shea) applied to the Department of State (Department) to be a Foreign Service officer, he was discriminated against on the basis of his race in violation of Section 717 of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-16. At that time, the Department was operating under its Mid-Level Affirmative Action Program (Affirmative Action Plan), which gave racially preferential treatment to entry-level individuals applying to the Foreign Service. As a result of the Affirmative Action Plan, Shea, a white male of Irish decent, received less pay and was promoted less swiftly, than colleagues who identified as one of the Department's preferred races. This discrimination continues today. *See* App A-6; Pub. L. No. 111-2, 123 Stat. 5 (2009).

Petitioner William Shea respectfully submits this Reply to the Opposition Brief of Respondent Secretary of State John Kerry. Review by this Court is needed because Section 717 has been interpreted to permit the federal government to engage in race-based discrimination with only minimal judicial oversight. Section 717 was designed to thwart such race-based discrimination for the millions of federal government employees. By interpreting Section 717 in such a manner, the court below also renders the statute unconstitutional. Worse, the decision below lessens the protections for both state and private employers by permitting race-based affirmative action programs even where there is no evidence of a racial imbalance in the relevant job category. Certiorari should be granted.

I

WHETHER SECTION 717 PERMITS THE FEDERAL GOVERNMENT TO ADOPT RACE-BASED AFFIRMATIVE ACTION PROGRAMS IS AN ISSUE OF NATIONWIDE SIGNIFICANCE MERITING THIS COURT'S REVIEW

A. Section 717 Prohibits All Discrimination on the Basis of Race

Section 717 is unequivocal: "*All* personnel actions affecting employees or applicants for employment . . . in executive agencies . . . shall be made free from *any* discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (emphasis added). As explained in detail in the Petition, Congress deliberately wrote Section 717 expansively to prohibit all discrimination—even if undertaken for supposedly "remedial" reasons. *See* Pet. at 12-15. Yet, the Court below held that claims brought under Section 717 should be analyzed under the legal standards that govern claims of race-based discrimination under Section 703, 42 U.S.C. § 2000e-2(a). *See* App. A-12-16; *see also United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616 (1987).

At least five reasons counsel against reading the prohibition against race-based discrimination in Section 717 as similar to the prohibition on discrimination in Section 703. First, the text of Section 717 is materially different from the earlier-adopted prohibition in Section 703. *Compare* 42 U.S.C. § 2000e-2(a), *with* 42 U.S.C. § 2000e-16(a); *see also Ali*

v. Fed. Bureau of Prisons, 552 U.S. 214, 218-21 (2008) (explaining the significance of "any" in statutory text). Second, the purpose of Section 717 differs significantly from the purpose of Section 703. *See generally* Am. Br. Center for Individual Rights at 3-7 (explaining the history and purpose of the two statutes prohibiting discrimination). Third, the *Weber* Court's textual justification for permitting race-based affirmative action plans under Section 703 has no counterpart in Section 717. *See Weber*, 443 U.S. at 204-07 (Section 703(j) permits race-based affirmative action plans). Fourth, in interpreting Section 703, the *Weber* Court was concerned with binding the hands of private employers—a concern not present in Section 717, which only covers discrimination by the federal government. *See Weber*, 443 U.S. at 207 (recognizing that Congress desired to "avoid undue federal regulation of private businesses"). Fifth, applying *Johnson* and *Weber* to claims under Section 717 would create serious constitutional problems. *See infra* I.B-C.

The Department asserts that because both statutes use the term "discriminate," they should be read the same. Opp. at 17-18. To be sure, both statutes prohibit discrimination, which, it should be noted, this Court generally interprets to *prohibit* race-based affirmative action. *See 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."). But only Section 703 applies to private employers, and only Section 703 contains a provision permitting race-based affirmative action. *See* 42 U.S.C. § 2000e-2(a); 42 U.S.C. § 2000e-2(j). The Department's argument also fails to explain the textual significance of Section 717's prohibition on "all"

personnel actions and on "any" discrimination. *See Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2240 (2011) (surplusage should be avoided "where a competing interpretation gives effect to every clause and word of a statute") (internal quotation marks omitted).

B. The Lower Court's Reading of Section 717 Is Unconstitutional

Section 717 is the exclusive remedy for employment discrimination by a federal government employer.[1] *See Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 825-26 (1976). Under the lower court's decision, however, this remedy is largely unavailable to white males, who must bear a nearly impossible burden of demonstrating that race-based conduct by the federal government violates Section 717. *See Johnson*, 480 U.S. at 626; *Weber*, 443 U.S. at 208-09.

Contrary to *Johnson* and *Weber*, the Department argues that "[n]on-minority plaintiffs do not face a 'higher burden of proof' under Section 703 (or Section 717) than do minority plaintiffs." Opp. at 19. That *Johnson* and *Weber* created a new standard for analyzing claims of discrimination for non-minority plaintiffs under Section 703 is self-evident. The *Johnson*/*Weber* standard is significantly more difficult for white males than a traditional 703 claim brought by a female or minority plaintiff, which is analyzed under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *See Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1369 (10th Cir. 1997). Courts and commentators

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[1] Employees alleging that state employers discriminate pursuant to an affirmative action plan may bring claims under 42 U.S.C. § 1983.

—including the district court in this case—have long recognized that *Johnson* and *Weber* apply different standards depending on the race of the plaintiff. *See Shea v. Kerry*, 961 F. Supp. 2d 17, 54 (D.D.C. 2013); *Taken*, 125 F.3d at 1369; *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n.7 (6th Cir. 1994); 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); Bernard D. Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. Chi. L. Rev. 423, 456 (1980); Philip P. Frickey, *Wisdom on* Weber, 74 Tul. L. Rev. 1169 (2000).

Whereas this shifting burden of proof under *Johnson* and *Weber* raises constitutional questions as applied to private employers under Section 703, it is plainly unconstitutional when incorporated into Section 717's prohibition on discrimination by the federal government. Under the Fifth Amendment, the federal government must treat all individuals equally with respect to race. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). If the prohibition on discrimination in Section 717 only applies with full force to individuals of certain races, then Congress must use "narrowly tailored measures that further compelling governmental interests." *Id.* This Court has never found a compelling interest in preventing discrimination only against certain races, and has held the opposite in many decisions. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). And, as Judge Williams recognized below, the standards for evaluating discrimination under *Johnson* and *Weber*

are too vague and imprecise to be narrowly tailored. *See* App. A-43-46; *see also* Am. Br. of Gail Heriot & Peter Kirsanow at 12-15 (subjecting the lower court's interpretation of Section 717 to strict scrutiny).

By granting the Petition and reading Section 717 according to its plain text, the Court can resolve these significant constitutional questions. *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (finding that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available").

C. Shea's Section 717 Claim Is Properly Presented

The Department asks this Court to deny the Petition, because Shea failed to specifically argue in the court below that Section 717 bars all race-based discrimination. Opp. at 16. 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). Because Shea argues the same federal claim on the petition as he argued below—that the Department discriminated against him on the basis of race in violation of Section 717—he may make any argument in support of that claim before this Court. *See, e.g.*, *Shea v. Rice*, 409 F.3d 448, 449 n.1 (D.C. Cir. 2005); *Shea v. Clinton*, 850 F. Supp. 2d 153, 156 (D.D.C. 2012).

The authority cited by the Department addresses a different point of law. In *Glover v. United States*, the

Court declined to rule on *defenses* not argued below, and that were not within the scope of the question presented to the Court. 531 U.S. 198, 205 (2001). In *F.C.C. v. Fox Television Stations, Inc.*, after the Court reversed a decision on statutory grounds, it declined to reach the constitutional questions which had not been decided by the lower courts. 556 U.S. 502, 529 (2009). *United States v. Williams* is the Department's most curious citation, there the Court did address an issue despite the fact that the party did not raise it below. 504 U.S. 36, 41 (1992).

In any event, these decisions are not relevant here, because Shea is not raising a new claim on appeal. His *argument* that Section 717 bars all discrimination on the basis of race is fully consistent with his claim throughout this litigation that he was discriminated against in violation of Title VII. Moreover, as the Department aptly notes in its Opposition, raising that argument in the court below would have been futile, as the D.C. Circuit had already ruled that *Weber* and *Johnson* govern claims of discrimination by the federal government. *See* Opp. at 18 (citing *George v. Leavitt*, 407 F.3d 405, 410-11 (D.C. Cir. 2005)).

II

THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *RICCI v. DeSTEFANO*

The D.C. Circuit's decision squarely conflicts with this Court's decision in *Ricci v. DeStefano*. *See* Pet. at 22-24. The Department's attempts to explain away this plain conflict are unpersuasive.

This Court in *Ricci* found that the city's race-based conduct violated Title VII "in the first instance." 557 U.S. 557, 579 (2009); *see also* Opp. at 14. *Ricci* concerned the legality of a Title VII defense, only after the Court found that the race-based decision violated "the disparate-treatment prohibition of Title VII." 557 U.S. at 579. It is this initial holding of the *Ricci* Court that conflicts with the decision below.

That holding applies here, where the Department disqualified Shea from the Affirmative Action Plan solely because of his race. App. A-10-11. Instead, the court below applied *Weber* and *Johnson* and required Shea to prove that the race-based action failed to remedy a "manifest imbalance" in a "traditionally segregated job category." That standard conflicts with *Ricci*, because it fails to recognize the party discriminating must offer a "strong basis in evidence" to justify its discriminatory employment decision. *Ricci*, 557 U.S. at 585. Here, the Department's race-based conduct was presumed lawful, and Shea bore the burden of proving a negative—that it was not justified by a "manifest imbalance" in a "traditionally segregated job category." *See Weber*, 443 U.S. at 208-09.

This Court emphasized that any time an employer engages in race-based discrimination in furtherance of a race-conscious affirmative action program, it must have a "strong basis in evidence" that its past discrimination requires it to adopt a race-conscious policy. *Ricci*, 557 U.S. at 585. In contrast, the lower court would permit race-based employment decisions even where the employer has *no evidence* of a potential disparate impact violation.

The Department tacitly relies on the argument it pressed in the lower court. Citing *United States v. Brennan*, 650 F.3d 65, 102-104 (2d Cir. 2011), the Department argues *Ricci* only applies to *ex post* race-based decisions. Opp. at 15. The distinction is not useful; there are indispensable forward-looking and backward-looking elements to all race-based employment actions. In *Ricci*, this Court explained that the "strong basis in evidence" standard applies irrespective of whether an employer is "avoiding or remedying" illegal conduct. 557 U.S. 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.

III

THE LOWER COURT'S EXPANSIVE READING OF *JOHNSON* AND *WEBER* WOULD RADICALLY INCREASE RACE-BASED DISCRIMINATION BY PUBLIC AND PRIVATE EMPLOYERS

Even if *Johnson* and *Weber* apply to claims brought under Section 717, the lower Court's decision vastly expands the universe of permissible race-based affirmative action. Both Shea and the Department are unable to find any decision by a court of appeals that "permits race-based affirmative action by employers when the action is targeted at a job category without a manifest racial imbalance." Pet. at 25; Opp. at 15. The decision below is the first.

In *Johnson* and *Weber*, this Court held that Title VII permits employers to use "affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Weber*, 443 U.S. at 209. But neither case resolved the scope of a particular "job category." "Category" implies that affirmative action programs must be limited in scope and specifically targeted to remedy precise problems. The Court recognizes this limitation in its contracting cases, holding that preferences are permissible only to remedy specific instances of past discrimination. *See, e.g.*, *Croson*, 488 U.S. at 476-77; *Wygant*, 476 U.S. at 277; *see also Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."). Permitting an employer to maintain an affirmative action program for one job category even though a racial imbalance was found only in a different category would significantly expand the scope of race-based discrimination.

The lower court and Department's comparison of the Affirmative Action Plan at issue in this case to the discrimination allowed in *Weber* is wrong. *See* App. A-36; Opp. at 12. In *Weber*, the company instituted an affirmative action program for craft trainees to remedy a racial imbalance in skilled craftworkers. 443 U.S. at 198-99, 208-09. *Johnson* involved the classification of "Skilled Craft Worker," which included no women. 480 U.S. at 621. The programs in both cases targeted an imbalance where it actually existed. This case is not analogous, because, here, there is no evidence in the record of any imbalance in the relevant job category. Instead, the imbalance existed at higher

levels, including the Senior Foreign Service, which is manned by political appointees. The rationale of *Johnson* and *Weber* does not extend to this situation.

Johnson-Weber is best understood as an exception to the general neutrality principle embodied by 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). Because it is an exception to a general principle, courts should not expand it beyond its precise boundaries. *See Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989). That should be the case here, where an expansion of the exception would allow employers to engage in more pernicious racial tinkering.

Lastly, the Department defends the Plan because it did not serve as an "absolute bar" to non-minorities' advancement. First, this is irrelevant if the evidence shows no "manifest imbalance" in a "traditionally segregated job category." *Johnson*, 480 U.S. at 631. If an affirmative action plan does not target such an imbalance, it is a violation of Title VII. More importantly, the "absolute bar" language is inconsistent with this Court's cases characterizing quotas and set-asides as *per se* unconstitutional in higher education and contracting. *See Gratz*, 539 U.S. at 280; *Bakke*, 438 U.S. at 307 (Powell, J., op.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."). These set-asides did not create an "absolute bar" to the advancement of white or Asian applicants. Rather, they placed members of certain

minority groups on different "tracks," effectively removing them from the competition.

Throughout this decades-long litigation, the Department has had ample opportunity to explain how racial preferences given to entry-level Foreign Service officers would help in their quest to attain more Senior Foreign Service officers. Their only explanation is that the Department has an internal "view" that "the best way to gain skills necessary for service in the upper ranks of the Foreign Service was through service in the mid-levels." Opp. at 12.[2] Such speculation cannot justify race-based discrimination.

[2] Lost in this discussion in the distinction between mid-level and entry-level is the fact that it is often relevant to pay, not duty or responsibility. Entry-level and mid-level Foreign Service officers may work the same job, in the same location, with the same responsibilities, but the latter receives significantly more pay.

CONCLUSION

To address important questions of federal law that conflict with decisions of this Court, the Petition should be granted.

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Respectfully submitted,

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