No. 15-742

In the Supreme Court of the United States

WILLIAM E. SHEA, PETITIONER

v.

JOHN F. KERRY, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

From 1990 to 1992, the Department of State operated an affirmative action program providing a special path for racial minorities seeking to join the mid- and upper-level ranks of the Foreign Service as outside hires. The questions presented are:

1. Whether the court of appeals correctly held that the Department of State had carried its burden of producing evidence that its affirmative action program was lawful under Title VII of the Civil Rights Act of 1964, as construed in *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), and *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193 (1979).

2. Whether petitioner may raise, for the first time in this Court, an argument that Section 717 of Title VII bars the federal government from adopting any race-conscious affirmative action plan, despite this Court's holdings that the provision in Title VII governing private and municipal employers does not prohibit all such plans.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A45) is reported at 796 F.3d 42. A prior opinion of the court of appeals is reported at 409 F.3d 448. The opinion of the district court (Pet. App. D1-D78) is reported at 961 F. Supp. 2d 17. A prior relevant opinion of the district court is reported at 850 F. Supp. 2d 153.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2015. Pet. App. B1. On September 21, 2015, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 7, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. By 1985, Congress had become concerned about the lack of diversity in the officer corps of the United

States Foreign Service, a branch of the Department of State. Pet. App. A2-A3. Congress therefore directed the State Department to "develop * * * a plan designed to increase significantly the number of members of minority groups * * * in the Foreign Service," with "particular emphasis on * * * the mid-levels of the Foreign Service." Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 152(a) and (b), 99 Stat. 428.

Two years later, Congress found that the State Department "ha[d] not been successful in [its] efforts * * * to recruit and retain members of minority groups in order to increase significantly the number of members of minority groups in the Foreign Service" or "to provide adequate career advancement for * * * members of minority groups in order to increase significantly the[ir] numbers * * * in the senior levels of the Foreign Service." Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 183(a) and (a)(1), 101 Stat. 1364. Accordingly, Congress ordered the State Department to "substantially increase [its] efforts" to ensure that "the Foreign Service becomes truly representative of the American people throughout all levels of the Foreign Service." *Id.* § 183(b)(1), 101 Stat. 1364. Congress specifically directed that the State Department's plan "effectively address the need to promote increased numbers of qualified * * * members of minority groups into the senior levels of the Foreign Service." *Id.* § 183(b)(2), 101 Stat. 1365.

In accordance with these statutory commands, the State Department undertook several measures to increase diversity in the Foreign Service Officer corps, including the creation of a hiring path for mi-

norities into the Service's mid- and upper-level ranks. Pet. App. A6.

2. Petitioner applied for an entry-level position in the Foreign Service Officer corps in 1990. Pet. App. A3. At the time, there were six pay grades in the Foreign Service, ranging from FS-06 (entry level) to FS-01 (upper level); the Senior Foreign Service (SFS) was a step above FS-01. *Ibid.* Applicants from outside the State Department ordinarily entered the Officer corps at the junior levels (FS-06 to -04), and vacancies in the senior ranks were generally filled through internal promotions rather than external hires. *Ibid.*

There were, however, two distinct programs that permitted outside applicants to be hired directly into mid- and upper-level positions (FS-03 to -01). Pet. App. A6. One program, known as the Career Candidate Program (CCP) was race-neutral. *Ibid.* Under the CCP, the State Department could hire an outside applicant where it had issued a "certificate of need" attesting that no internal candidate could fill a vacancy. *Id.* at A7. The other program, which existed only from 1990 to 1992, was an affirmative action program that targeted minority applicants (the 1990-92 Plan). The 1990-92 Plan provided only one benefit—an automatic waiver of the CCP's certificate-of-need requirement for racial minorities. *Ibid.* Minority applicants were otherwise subject to the same "rigorous" hiring process as non-minority applicants, *ibid.*, and that process "screened out many interested minority candidates who did not meet" the standard hiring requirements. *Id.* at D53.

Petitioner did not attempt to apply through either program for mid-level placement. Instead, he applied

for an entry-level FS-05 position and was hired at that level in May 1992. Pet. App. A3, A10. The State Department terminated its affirmative action program in February 1993. *Id.* at D5.

3. Although he knew at the time he was hired that two members of his introductory class were starting at midlevel positions due to their participation in the 1990-92 Plan, petitioner did not file an administrative grievance with the State Department until 2001, nine years after he had joined the Foreign Service. Pet. App. D5-D6. Among other claims, petitioner asserted that his hiring at an entry-level position subjected him to lower pay than his peers hired under the 1990-92 Plan, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1 *et seq.*, and the Due Process Clause of the Fifth Amendment. Pet. App. A7-A8. The Foreign Service Grievance Board dismissed petitioner's complaint for lack of jurisdiction, and petitioner filed suit in federal court. *Id.* at A8.

The district court twice dismissed petitioner's Title VII claims as untimely—first in 2003 and, following a remand from the court of appeals, for a second time after this Court decided *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). See Pet. App. D7-D9 (summarizing the procedural history). Following the enactment of the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, the district court ultimately concluded that petitioner's Title VII claims were timely and that any constitutional claims had been abandoned (and were untimely in any event). Pet. App. D9, D19-D20 n.3.

In May 2013, the district court granted the State Department's motion for summary judgment on petitioner's Title VII claim. Pet. App. D1-D78. The court

held that the claim should be analyzed using the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), in accordance with this Court's decision in *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). Pet. App. D19, D22. At the first step of that framework, the court concluded that petitioner had made out a *prima facie* case of discrimination. *Id.* at D25-D29. The court then found that the State Department had discharged its burden of production by offering evidence that, if taken as true, established that it had acted pursuant to a lawful affirmative action plan. *Id.* at D29-D54. Finally, the court determined that petitioner failed to offer admissible evidence sufficient to raise a genuine issue concerning the lawfulness of the 1990-92 Plan. *Id.* at D53-D73.

4. The court of appeals affirmed. Pet. App. A1-A42.

a. After assuring itself that petitioner had standing to bring his claims, Pet. App. A9-A11, the court of appeals addressed the framework for resolving petitioner's discrimination claim. The court explained that, for nearly three decades, this Court's decision in *Johnson* has guided lower courts in analyzing Title VII claims that allege discrimination under an employer's voluntary affirmative action program. *Id.* at A16. The court rejected petitioner's argument that the decision in *Ricci* v. *DiStefano*, 557 U.S. 557 (2009), had implicitly overruled *Johnson* and *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193 (1979). Pet. App. A17-A21. The court observed that *Ricci* had "addressed a particular situation not in issue here"—*viz.*, an employer's attempt to avoid liability for disparate treatment because it had taken

race-conscious actions to avoid disparate-impact liability. *Ricci*, the court of appeals noted, had neither discussed nor mentioned the earlier decisions in *Johnson* and *Weber*, which have "direct application" to petitioner's claims. *Id.* at A19-A20.

The court of appeals then applied the *Johnson-Weber* framework. It agreed with the district court that petitioner had made out a *prima facie* case of discrimination. Pet. App. A23-A24. It also agreed that the State Department had offered sufficient evidence to show that it acted "pursuant to a valid affirmative action plan," and thus for a "nondiscriminatory" reason. *Id.* at A24. The State Department, the court explained, had established through statistical evidence and testimony before Congress the existence of a manifest imbalance in a traditionally segregated job category—namely, the upper ranks of the Foreign Service (FS-01 and SFS levels). *Id.* at A25-A32. The State Department had also showed that the 1990-92 Plan did not "unnecessarily trammel[] the rights of white applicants." *Id.* at A32. The court noted in particular that the only benefit awarded under the 1990-92 Plan was a certificate-of-need waiver at the threshold of the hiring process; that the Plan was time-limited; and that it did not limit the opportunities for advancement of non-minorities, who could apply to mid-level positions through the race-neutral CCP or gain promotion internally. *Id.* at A33-A35. Further, the court explained, the 1990-92 Plan was appropriately tailored because it targeted mid-level positions that, in the State Department's view, provided the best training ground for the senior-level positions where the manifest imbalance existed. *Id.* at A35-A38. And the State Department adopted the 1990-92 Plan only

after race-neutral efforts had failed to bear fruit. *Id.* at A40.

After determining that the State Department had carried its burden of production, the court of appeals addressed whether petitioner had proven that the State Department's justification was pretextual or its plan invalid. Pet. App. A42. The court observed that petitioner had attempted to challenge the existence of manifest imbalances but that the "district court [had] rejected every piece of statistical evidence proffered by [petitioner] as inadmissible." *Ibid.* Because petitioner neither appealed those evidentiary rulings nor offered "other claims of the 1990-92 Plan's invalidity for purposes of *Johnson*'s third step," the court concluded that he had failed to carry his burden at that step and that the State Department was entitled to summary judgment. *Ibid.*

b. Judge Williams concurred. Pet. App. A43-A46. He fully joined the court of appeals' opinion "painstakingly applying" *Johnson* and *Weber*, but wrote separately to express his "uncertainty" about the meaning of certain terms used in those decisions and to question some aspects of the State Department's statistical analysis that had not been challenged on appeal. *Ibid.*

ARGUMENT

The only question presented in the petition for a writ of certiorari that was actually decided by the court of appeals is whether, consistent with this Court's Title VII precedents, "evidence of a 'manifest imbalance' between the races" in one job category can support an employer's affirmative action program aimed at a related job category. Pet. 26; see Pet. i (Question Two). The court of appeals correctly answered that question in the affirmative, and its deci-

sion does not conflict with any decision of this Court or of another federal court of appeals. Further review is unwarranted, especially given that petitioner challenges an affirmative action plan that ceased to exist more than two decades ago. Review is likewise unwarranted to consider petitioner's contention—raised for the first time in this Court—that Section 717 of Title VII categorically bars the federal government as an employer from adopting any affirmative action plan. The petition for a writ of certiorari should therefore be denied.

1. The court of appeals correctly held that the State Department was entitled to summary judgment under the standards set forth in *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), and *United Steelworkers of America* v. *Weber, AFL-CIO-CLC*, 443 U.S. 193 (1979).

a. In *Weber*, this Court held that Title VII's prohibition on "discriminat[ion] * * * because of * * * race," 42 U.S.C. 2000e-2(a)(1), does not bar private sector employers from adopting "race-conscious affirmative action plans" "to eliminate manifest racial imbalances in traditionally segregated job categories." 443 U.S. at 197. The Court declined to "define in detail the line * * * between permissible and impermissible affirmative action plans," but held that the employer's plan in that case fell "on the permissible side of the line." *Id.* at 208. The Court explained that "the plan [did] not unnecessarily trammel the interests of the white employees," noting that the plan did not require that any white employees be fired, did not "create an absolute bar to" such employees' "advancement," and was "a temporary measure" that would end as soon as the percentage of black workers

in the relevant position approximated their percentage in the local labor force. *Id.* at 208-209.

In *Johnson*, the Court applied *Weber* to a municipal employer's plan to remedy gender imbalances in certain job categories. 480 U.S. at 619-621. The Court held, as a threshold matter, that the male employee's Title VII challenge to actions taken under the plan was to be analyzed under the burden-shifting "framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973)." 480 U.S. at 626. Under that framework, once the employee establishes a *prima facie* case that the employer took race or sex into account in making its decision, "the burden shifts to the employer to articulate a nondiscriminatory rationale," which it can do by producing evidence that it acted pursuant to "an affirmative action plan." *Ibid.* The burden then shifts back to the employee—who bears the ultimate burden of persuasion under Title VII, see *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 507, 511 (1993)—to show "that the employer's justification is pretextual and the plan is invalid." *Johnson*, 480 U.S. 626.

Applying that framework, the Court held that the employer's plan in *Johnson* did not violate Title VII. 480 U.S. at 631-642. The Court concluded that the plan targeted an "obvious [gender] imbalance" in the relevant job category and did not "unnecessarily trammel[] the rights of male employees or create[] an absolute bar to their advancement." *Id.* at 637-638. In reaching the latter conclusion, the Court emphasized that the plan set goals rather than quotas; treated gender only as a "plus" factor for otherwise qualified applicants; did not "automatically exclude[]" male applicants from consideration; did not "unsettle[any]

legitimate, firmly rooted expectation," because it operated only in the context of a promotion; and was temporary, in that it "was intended to *attain* a balanced work force, not to maintain one." *Id.* at 638-639.

b. The court of appeals correctly rejected petitioner's Title VII claim under *Johnson* and *Weber*. As the court determined, the 1990-92 Plan was "justified by the existence of a 'manifest imbalance' that reflected underrepresentation of [targeted groups] in 'traditionally segregated job categories.'" *Johnson*, 480 U.S. at 631 (quoting *Weber*, 443 U.S. at 197). Data collected by the State Department established an "across-the-board manifest imbalance" for "all minority groups * * * at the FS-01 level at the time of the plan's promulgation," and a General Accounting Office Report issued in 1989 established similarly manifest imbalances for "*all* minority groups at the SFS level." Pet. App. A28-A29. The court of appeals also identified evidence that, "if taken as true, would permit the conclusion that the manifest imbalance resulted from a 'predicate of discrimination' rather than from benign forces." *Id.* at A29 (quoting *Hammon* v. *Barry*, 826 F.2d 73, 74-75, 80-81 (D.C. Cir. 1987)). Not only did the degree of statistical imbalance alone "indicate that discriminatory practices may well have been afoot," but congressional hearings provided "evidence of pervasive historical discrimination in the Foreign Service tracing as far back as the 1960s." *Id.* at A30.

The court of appeals also correctly concluded that the 1990-92 Plan did not "unnecessarily trammel[] the rights of [non-beneficiaries] or create[] an absolute bar to their advancement." *Johnson*, 480 U.S. at 637-638; *Weber*, 443 U.S. at 208. The 1990-92 Plan involved an employment decision less likely to "upset

settled expectations"—the hiring process—and conferred a single benefit "at the very initial stage" of that process: waiver of the certificate-of-need normally required for outside hires. Pet. App. A33. It otherwise ensured that only "qualified" individuals would be hired by subjecting all applicants to "the same rigorous application path." *Id.* at A33-A34. The 1990-92 Plan did not serve as an "absolute bar" to nonminorities' advancement, because outside nonminority candidates could seek mid-level positions through the CCP and "internal white candidates" could (and did) "gain promotion" from "entry-level ranks." *Id.* at A34-A35. Like the affirmative action plans in *Johnson* and *Weber*, the 1990-92 Plan was also time-limited. *Id.* at A34. And the court of appeals determined that, in light of the State Department's long-held views on the experience needed to serve successfully in the SFS, "the 1990-92 Plan's emphasis on hiring at mid-level positions was adequately tailored to address manifest imbalances at the senior levels." *Id.* at A39.

c. Petitioner principally challenges the court of appeals' determination on this final point. He asserts (Pet. 27) that the 1990-92 Plan was invalid because it attempted "to remedy a racial imbalance at the Senior Foreign Service by giving preferences to minority applicants to mid-level grades." But as the court explained, the 1990-92 Plan was appropriately tailored "because the FS-02 and -03 levels serve as the training grounds for learning the skills necessary to perform at the SFS and FS-01 levels." Pet. App. A35. The State Department provided evidence—in the form of its hiring regulations—reflecting its consistent view that the best way to gain the skills necessary for ser-

vice in the upper ranks of the Foreign Service was through service in the mid-levels, and that outside hires provided a very narrow exception to the general preference for internal promotion. *Id.* at A37. Petitioner "introduced no evidence contradicting that understanding." *Id.* at A38.

As the court of appeals also explained, Pet. App. A36, the 1990-92 Plan resembled in that respect the plan that this Court upheld in *Weber*. In *Weber*, the employer faced a racial imbalance in the skilled craftworkers at its plant. 443 U.S. at 198-199. But "[r]ather than hiring already trained outsiders, [the employer] established a training program to train its production workers to fill craft openings." *Id.* at 199. Eligibility for the training program was based on seniority, but "at least 50% of the new trainees were to be black until the percentage of skilled craftworkers in the Gramercy plant approximated the percentage of blacks in the local labor force." *Ibid.* In *Weber*, "[t]he need to create an adequate pipeline of trained workers meant that the program was sufficiently tailored to target the 'manifest imbalance' among skilled workers." Pet. App. A36. The court of appeals correctly recognized that the 1990-92 Plan worked in a similar manner, *ibid.*; indeed, it was less intrusive than the training program in *Weber*, because it did not set aside positions for "a particular number of minorities," *id.* at D50.

Petitioner further asserts (Pet. 27) that the connection between the objectives of the 1990-92 Plan and the benefits it provided is "attenuated at best, since mid-level officers hoping for promotions to the senior levels require good fortune just as much as good qualifications." But the fact that mid-level hires were not

assured an eventual promotion does not undermine the need for "a sufficient reservoir of talented minority candidates from which to hire in order to achieve diversity in [the] SFS and FS-01 ranks." Pet. App. A38. Equally unavailing is petitioner's suggestion that the State Department's plan—which lasted approximately two years and ended more than 20 years ago—was not "limited in time." Pet. 27 (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 342 (2003)); see Pet. App. A34 ("[T]he 1990-92 Plan ceased to operate in 1993 and has not been replaced.").

Finally, petitioner argues (Pet. 27-28) that statutes permitting the President to make appointments directly to the Senior Foreign Service obviated the need for the 1990-92 Plan. Putting aside the fact that such action would have no effect on the FS-01 level, petitioner's proposal would have filled the Senior Foreign Service with appointees lacking the valuable experience that comes from years spent as mid- and senior-level officers in the Foreign Service.

d. The decision of the court of appeals in this case does not conflict with any decision of this Court or of another federal court of appeals. In particular, petitioner errs in contending (Pet. 22-24) that the decision below conflicts with this Court's decision in *Ricci* v. *DeStefano*, 557 U.S. 557 (2009), a decision discussed and distinguished by the court of appeals. In *Ricci*, a city government had administered a promotional test for firefighters that resulted in a statistical racial disparity, with white and Hispanic firefighters outperforming black candidates. *Id.* at 562-563, 566. When the latter candidates threatened to sue if the city relied on the test results, the city declined to certify those results. *Id.* at 562, 574. The Court thus began

its analysis "with this premise: The [c]ity's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense." *Id.* at 579. By contrast, "[t]he inquiry prescribed by *Johnson* and *Weber*," and the inquiry undertaken by the court of appeals in this case, "pertains to assessing whether there is a violation of Title VII's disparate treatment prohibition *in the first place*." Pet. App. A20 (emphasis added); see *Johnson*, 480 U.S. at 626 (explaining that "[t]he existence of an affirmative action plan provides" a "nondiscriminatory rationale for [the employer's] decision"); *Weber*, 443 U.S. at 197 (holding that "Title VII does not prohibit such race-conscious affirmative action plans").

Moreover, the Court in *Ricci* addressed the analytical framework applicable to employment actions taken "for the asserted purpose of avoiding or remedying an unintentional disparate impact." 557 U.S. at 585; see *id.* at 580 ("We consider * * * whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination."); *id.* at 584 ("[W]e adopt the strong-basis-in-evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII."). Affirmative action plans that are directed at remedying manifest imbalances in traditionally segregated professions, such as the 1990-92 Plan, do not fall within *Ricci*'s scope. See *id.* at 626 (Ginsburg, J., dissenting) ("This litigation does not involve affirmative action."). That is why, as the court of appeals noted, the Court in *Ricci* did not mention (much less discuss) its prior decisions in *Johnson* and *Weber*. Pet. App. A19-A20; see *United States* v.

Brennan, 650 F.3d 65, 102-104 (2d Cir. 2011) (applying *Ricci* to "make-whole relief" providing *ex post* benefits to specified individuals, and distinguishing affirmative action plans providing *ex ante* benefits to all members of a class); cf. *Humphries* v. *Pulaski Cnty. Special Sch. Dist.*, 580 F.3d 688, 694-697 (8th Cir. 2009) (applying *Johnson* to a public employer's affirmative action plan post-*Ricci*). Petitioner's suggestion (Pet. 9) that *Ricci* changed the standard established by *Johnson* and *Weber* thus lacks merit.

Petitioner also briefly argues (Pet. 25) that the decision below creates a circuit conflict because, he claims, no other court of appeals "permits race-based affirmative action by employers when the action is targeted at a job category without a manifest racial imbalance." But petitioner does not identify any case in which a court of appeals has considered, let alone rejected, an affirmative action plan comparable to the 1990-92 Plan. And, as explained above, p. 12, *supra*, this Court in *Weber* expressly sanctioned an affirmative action program that sought to remedy imbalance in one part of the workforce by targeting the workers that would later feed into the relevant position.

2. Petitioner asks the Court to hold that Title VII prohibits the federal government as an employer from implementing affirmative action programs at all. Specifically, petitioner argues (Pet. 11-24) that, although the Court in *Weber* and *Johnson* upheld affirmative action programs by private and municipal employers under Section 703 of Title VII, the prohibition on discrimination by the federal government in Section 717 is broader and should be construed to prohibit any such plans. That novel contention—raised for the first time in this Court—does not warrant review.

a. As an initial matter, petitioner's argument that Section 717 bars all affirmative action programs was neither presented to, nor decided by, the courts below. That is sufficient reason to deny review on that question. This Court has repeatedly emphasized that it is a court "of final review, 'not of first view,'" *FCC* v. *Fox Television Studios, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)), and that its "traditional rule * * * precludes a grant of certiorari" on a question that "was not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); see also, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (refusing to "allow a petitioner to assert new substantive arguments attacking * * * the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it").

Petitioner presents no reason to deviate from that settled practice here. To the contrary, adherence to the Court's traditional rule is especially appropriate in in this case, for three reasons. First, petitioner did not merely fail to cite Section 717 in the court of appeals or to argue that it bars all affirmative action programs in federal employment; rather, petitioner affirmatively identified Section 703 and the case law construing it as establishing the "legal framework for Title VII challenges to race-based affirmative action programs." Pet. C.A. Br. 8 (capitalization altered). Having directed the court of appeals to the Section 703 framework, petitioner should not now be able to

"claim[] that the course followed was reversible error." *Freytag* v. *Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in the judgment). Second, petitioner's argument based on Section 717 is one that, to the government's knowledge, no court of appeals has addressed. And third, petitioner is asking this Court to address his novel argument in a challenge to a program that ended more than 20 years ago. See Pet. App. A34. In those circumstances, the Court should follow its customary practice and refuse to decide petitioner's Section 717 argument in the first instance.

b. In any event, petitioner's argument lacks merit. He points out that Section 717 prohibits "*any* discrimination based on race, color, religion, sex, or national origin" in "[a]ll personnel actions," 42 U.S.C. 2000e-16(a) (emphasis added), whereas Section 703 lists specific types of personnel decisions and lacks the "expansive" term "any." Pet. 14-15 (citing, *inter alia*, *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 228 (2008)). Petitioner concludes from these textual differences (Pet. 15) "that Congress intended Section 717's prohibition on racial discrimination to be further reaching than the prohibition in Section 703."

That conclusion does not follow. Indeed, petitioner overlooks that the two provisions use the same operative term—"discriminate." Compare 42 U.S.C. 2000e-2(a)(1) (forbidding an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate"), with 42 U.S.C. 2000e-16(a) (providing that "[a]ll personnel actions * * * shall be made free from any discrimination"). And in *Johnson* and *Weber*, this Court held that actions taken pursuant to a valid affirmative action plan do not constitute "dis-

criminat[ion]" under Section 703. See *Johnson*, 480 U.S. at 626 (explaining that "[t]he existence of an affirmative action plan provides" a "nondiscriminatory rationale for [the employer's] decision"); *Weber*, 443 U.S. at 201 (holding that "an affirmative action plan voluntarily adopted by private parties" does not violate Section 703, despite the language "mak[ing] it unlawful to 'discriminate . . . because of . . . race' in hiring"). Those holdings should apply equally to the meaning of "discrimination" as used in Section 717.[*]

Moreover, petitioner's interpretation is contrary to the longstanding (and uniform) view of the courts of appeals that Section 703 and Section 717 have equal scope. See, *e.g.*, *Mlynczak* v. *Bodman*, 442 F.3d 1050, 1057 (7th Cir. 2006) ("Although claims brought by federal employees are subject to slightly different procedural prerequisites, * * * the substance of the federal employee's right in [Section] 717 is the same as the more familiar rights assured to all other employees, found in [Section 703]"); *Baqir* v. *Principi*, 434 F.3d 733, 742 (4th Cir.) ("Although phrased differently, [S]ection 703(a)(1) and [S]ection 717(a) have generally been treated as comparable, with the standards governing private-sector illegal claims applied to such claims brought by federal employees."), cert. denied, 549 U.S. 1051 (2006); *George* v. *Leavitt*, 407 F.3d 405, 410-411 (D.C. Cir. 2005) ("Despite the dif-

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[*] Although *Weber* involved a private company's affirmative action plan, the Court in *Johnson* applied *Weber*'s interpretation of Title VII to a public employer subject to constitutional constraints. *Johnson*, 480 U.S. at 620 n.2, 627-628 n.6. Petitioner therefore errs in suggesting (Pet. 21) that the analysis in those decisions "can be narrowed to situations where a private employer voluntarily decides to engage in an affirmative action plan."

ferences in language between the two provisions, we have held that 'Title VII places the same restrictions on federal and District of Columbia agencies as it does on private employers, and so we may construe the latter provision in terms of the former.'") (quoting *Singletary* v. *District of Columbia*, 351 F.3d 519, 523-524 (D.C. Cir. 2003)). That view accords with this Court's observation, made shortly after Congress extended Title VII to federal employment in 1972, that Congress had "carried over and applied to the Federal Government" "the substantive anti-discrimination law embraced in Title VII." *Morton* v. *Mancari*, 417 U.S. 535, 547 (1974); cf. *Dothard* v. *Rawlinson*, 433 U.S. 321, 331 n.14 (1977) (legislative history of the 1972 amendments reflects that, in "extending Title VII to the States as employers[,] * * * Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike").

Petitioner argues (Pet. 20) that the framework developed under Section 703 is constitutionally suspect because it employs "a changing standard of review based on the race of the plaintiff." That is incorrect. Non-minority plaintiffs do not face a "higher burden of proof" (Pet. 19) under Section 703 (or Section 717) than do minority plaintiffs. Rather, all plaintiffs must establish that the adverse employment action was taken "under circumstances which give rise to an inference of unlawful discrimination." *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). The "differen[ce]" noted by petitioner (Pet. 19-20) is that, in reverse-discrimination suits, the courts of appeals have adapted the test for establishing a *prima facie* case to account for the fact that the plaintiffs in

such suits cannot show, as in *McDonnell Douglas*, that they "belong[] to a racial minority." 411 U.S. at 802. But that alteration in the test is not a change in the burden of proof. See *Harding* v. *Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993) (explaining that the requirement that white plaintiffs point to "background circumstances" supporting a suspicion of discrimination "is not an additional hurdle for white plaintiffs," but is "a faithful transposition of" the *McDonnell Douglas* test that "ensures that white plaintiffs have the same rights as minority plaintiffs") (cited at Pet. 19). Nor is it anomalous: the Court in *McDonnell Douglas* itself recognized that the factors "specifi[ed]" there would "not necessarily [be] applicable in every respect to differing factual situations." 411 U.S. at 802 n.13; see *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 512 (2002) ("[T]he precise requirements of a prima facie case can vary depending on the context and were never intended to be rigid, mechanized, or ritualistic.") (internal quotation marks and citation omitted).

Petitioner is also incorrect (Pet. 19) that the employer's burden changes when the adverse employment action is taken against a non-minority plaintiff pursuant to an affirmative action plan. As in any case analyzed under the burden-shifting framework, once a non-minority plaintiff makes out a *prima facie* case of discrimination, "the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision." *Johnson*, 480 U.S. at 626; see *Hicks*, 509 U.S. at 507. Further, because "an *invalid* affirmative action plan is discriminatory," both courts below correctly required the State Department to produce evidence "that it acted for a 'nondiscriminatory reason,' *i.e.*, pursuant to a *valid* affirmative action plan" meeting

the requirements of *Johnson* and *Weber*. Pet. App. A24 (second emphasis added); see *id.* at D30 ("The question then is whether [the] State [Department] has offered evidence which, taken as true, permits the conclusion that [it] acted pursuant to a lawful affirmative action plan."). Here, the State Department carried its burden of producing evidence that the 1990-92 Plan satisfied the standards in *Johnson* and *Weber*, and was entitled to summary judgment because petitioner did not counter that proof with admissible evidence of his own or "raise[any] other claims of the 1990-92 Plan's invalidity." *Id.* at A42.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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