No. 15-742

In The Supreme Court of the United States

WILLIAM E. SHEA,

Petitioner,

v.

JOHN KERRY,
in his official capacity as Secretary of State,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, THE CENTER FOR EQUAL OPPORTUNITY, THE CATO INSTITUTE AND NATIONAL ASSOCIATION OF SCHOLARS IN SUPPORT OF PETITIONER

KIMBERLY S. HERMANN
SOUTHEASTERN LEGAL FOUNDATION
2255 Sewell Mill Road
Suite 320
Marietta, Georgia 30062
(770) 977-2131
khermann@southeasternlegal.org

JOHN J. PARK, JR.
Counsel of Record
STRICKLAND BROCKINGTON LEWIS LLP
1170 Peachtree Street
Suite 2200
Atlanta, Georgia 30309
(678) 347-2208
jjp@sbllaw.net

Counsel for Amici Curiae

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[Additional Counsel Listed On Signature Page]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court. In particular, SLF advocates for a color-blind interpretation of the Constitution and preservation of the rights granted all citizens. This aspect of its advocacy is reflected in SLF's filing of *amicus curiae* briefs in such cases as *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000); *Northeast Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The Center for Equal Opportunity (CEO) is a think tank formed pursuant to Section 501(c)(3) of

[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amici*'s intention to file this brief at least 10 days prior to the due date. No counsel for a party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.

the Internal Revenue Code and devoted to issues of race and ethnicity. Its fundamental vision is straightforward: America has always been a multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies not divide our people according to skin color and national origin. Rather, these policies should emphasize and nurture the principles that unify us. *E pluribus unum* . . . out of many, one. CEO has also participated as *amicus curiae* in cases presenting the constitutionality of race-based governmental action as a way of advancing its goals. *See, e.g.*, *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary*, 134 S. Ct. 1623 (2014); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The Cato Institute (Cato) was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs. The cases in which it has filed include many of those cited by SLF and CEO.

The National Association of Scholars (NAS), founded in 1987, is a nonprofit organization of professors, administrators, graduate students, and public members committed to the principles of traditional liberal arts education, academic freedom, and freedom of expression on our nation's college campuses. Since its inception, NAS has also strongly opposed the use of group-based preferences in academic faculty hiring and student admissions, in the belief that individual merit should be the deciding criterion in all such decisions. NAS has undertaken numerous research projects documenting the use of racial preferences in American colleges and universities, and has also participated in numerous *amicus curiae* briefs such as *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

SUMMARY OF ARGUMENT

This Court should grant certiorari and review the decision of the Court of Appeals for the District of Columbia because this case presents important, unsettled questions of federal law. This case also presents this Court with an opportunity to consider the continued vitality of *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987). As Petitioner notes, the lower court's ruling extends *Weber* and *Johnson* to the federal government. Rather than allowing the federal

government to engage in race-conscious affirmative action to address perceived statistical imbalances in its work force, the time has come to put the brakes on such programs. Fifty years have passed since Congress prohibited employment discrimination by many private employers in the Civil Rights Act of 1964, *Weber* is 35 years old, and *Johnson* almost 30. By now, the traditionally segregated jobs that they were designed to fix should have disappeared. With that disappearance, the need for voluntary affirmative action programs to redress statistical imbalances has likewise disappeared. Title VII's disparate impact provision is remedy enough, provided it is constitutionally applied. Accordingly, this Court should close the door it opened in *Weber* and *Johnson* years ago.

ARGUMENT

I. Introduction.

In this brief, *amici* will show that opening the door to the increased use of voluntary affirmative action plans will only exacerbate an ongoing trend in the workplace. Before doing so, they will point to the way in which the Court went astray in *Weber* and *Johnson*. Then, they will show how those decisions problematically accord different treatment to different racial groups. Given the constitutional problems inherent in the approach of *Weber* and *Johnson*, the changes in this Court's jurisprudence since them, and the passage of time, this Court should cabin or

overrule *Weber* and *Johnson*. This case presents the opportunity to do just that.

Over fifty years ago, through Title VII of the Civil Rights Act of 1964, Congress prohibited the use of racial preferences like those at issue in this case. Specifically, Congress barred racial discrimination in hiring and employment conditions on the basis of "race, color, religion, sex, or national origin" by many private employers. 42 U.S.C. § 2000e-2(a). Discussing that very prohibition, this Court recently noted that the heart and "promise" of Title VII is that "[n]o individual should face workplace discrimination based on race." *Ricci v. DeStefano*, 557 U.S. 557, 592 (2009); *see also id*. at 580 (characterizing the "important purpose of Title VII – that the workplace be an environment free of discrimination, where race is not a barrier to opportunity").

In 1972, Congress extended the prohibition against the use of racial preferences in hiring and employment conditions to the federal government. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 111 (Mar. 24, 1972) at § 717. That provision is equally categorical even though, as Petitioner notes, it differs somewhat from the parallel provision for private employers. Petition for Writ of Certiorari (Pet.) at 3. More particularly, and equally unambiguously, 42 U.S.C. § 2000e-16(a) provides that "[a]ll personnel actions" taken by federal governmental agencies "shall be made free from *any* discrimination based on race, color, religion, sex, or national origin." Thus, Congress extended the prohibition against using racial preferences beyond

just hiring and employment conditions, and provided additional protection to persons employed by, or seeking employment with, federal agencies.

Notwithstanding the clarity of the statutory text, the Court permitted race-conscious actions in a number of cases including *Weber* and *Johnson*, before necessarily reining them in. The *Weber* Court found "Respondent's reliance upon a literal construction" of the statute "misplaced." *Weber*, 443 U.S. at 201. To justify its recognition of a Title VII claim and rejection of a "literal construction" of the statute, the Court instead relied on select remarks from the statute's legislative history. *Id*. at 201; *see also id*. at 209 (Blackmun, J., concurring) (drawing on "additional considerations, practical and equitable, only partially perceived, if perceived at all" by the enacting Congress). In *Johnson*, the Court doubled down on its approach in *Weber* and rejected Justice Scalia's complaint that *Weber* "rewrote the statute it purported to construe." *Compare* 480 U.S. at 629 n.7, and *id*. at 670 (Scalia, J., dissenting). The holdings of *Weber* and *Johnson* provide that Title VII does not bar private employers and local governmental entities, respectively, from voluntarily adopting affirmative action programs designed to remedy "manifest racial imbalances in traditionally segregated job categories." *Johnson*, 480 U.S. at 628 (*quoting Weber*, 443 U.S. at 197).

The Court's decisions in *Weber* and *Johnson* contrast with its earlier decisions. In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976),

for example, Justice Marshall wrote for a unanimous Court:

> Title VII of the Civil Rights Act of 1964 prohibits the discharge of "any individual" because of "such individual's race." Its terms are not limited to discrimination against members of any particular race. Thus . . . we described the Act in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), as prohibiting "[d]iscriminatory preference for *any* [racial] group, *minority or majority.*"

Id. at 278-79 (footnotes and citation omitted);[2] *accord Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978). If the Court had adhered to the interpretation of Title VII it enunciated in *McDonald* and its other pre-*Weber* decisions, the application of Title VII to race-based decisionmaking would have proven to be both as straightforward as the congressional authors intended and as its plain language demands.

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[2] Justice White and then-Justice Rehnquist dissented from another part of the Court's opinion. *See McDonald*, 427 U.S. at 296.

II. Construing Title VII to afford different racial groups different levels of protection from employment discrimination raises constitutional problems and, thus, should be avoided.

Since *Weber* and *Johnson*, this Court has made it increasingly clear that race-based actions are very difficult to justify. Those decisions cast serious doubt on the continuing validity of *Weber* and *Johnson*. Moreover, this Court's decision in *Ricci* counsels against assuming that affirmative action programs directed at statistical imbalances can be voluntarily undertaken today.

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court held that the city's minority set-aside plan for construction contracts violated the Fourteenth Amendment. In doing so, the Court declined to apply *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and its approval of a federal program as an exercise of Congress' Spending Clause powers, to the city's program. The plurality explained:

> The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action,

> and to have federal courts enforce those limitations.

Id. at 490-91. Accordingly, the plurality said that, while the city could "eradicate the effects of private discrimination within its own legislative jurisdiction," it had to do so within the confines of Section 1 of the Fourteenth Amendment. *Id*. at 491-92.[3]

Subsequently, the Court held that a federal contracting set-aside could be challenged under the Due Process Clause of the Fifth Amendment. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Specifically, the Court held "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Id*. at 227. This effectively extended *Croson*'s view of the Fourteenth Amendment to the Fifth Amendment, binding the government at the state and federal levels. In so doing, the Court criticized the concept of benign racial classifications.[4] *Id*. at 225-26; *see also id*. at 240 (Thomas, J., concurring in part and concurring in the judgment) ("That these

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[3] In his opinion concurring in the judgment, Justice Scalia asserted, "[T]here is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification." *Croson*, at 524 (Scalia, J., concurring in the judgment).

[4] Significantly, the Court declined to follow its decision in *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), criticizing it for "undermin[ing] important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years." *Pena*, 515 U.S. at 231.

programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.").

While the framework used to review Title VII cases differs from that in constitutional cases, the statute provides equal protection to *all* within their scope. In 1976, this Court unanimously held that Title VII prohibited differential treatment of similarly situated employees, where those claiming mistreatment were white. *See generally McDonald*, 427 U.S. 273. As the Court explained, the terms of Title VII "are not limited to discrimination against members of any particular race." *Id*. at 278-79. In the same way, the plurality in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), noted, "The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Id*. at 273.

This Court has already acknowledged that there is no reason to now abandon these holdings and rob particular groups of the protection provided by Title VII. In *Ricci*, this Court confronted the question of "whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination." *Ricci*, 557 U.S. at 580. Noting that both statutory prohibitions had to be given effect, the Court rejected the suggestion that "an employer's good-faith belief that its actions are necessary to comply with Title VII's disparate-impact

provision should be enough to justify race-conscious conduct." *Id*. at 581. While the Court did not want to "bring compliance efforts to a near standstill," it still saw no need to "encourage race-based action at the slightest hint of disparate impact." *Id*. It explained that too low a standard could "amount to a de facto quota system." *Id*. Those considerations led the Court to import the strong-basis-in-evidence standard, which it characterized as "allowing violations of one in the name of compliance with the other only in certain, narrow circumstances." *Id*. at 583.

Even though the strong-basis-in-evidence standard came from a decision applying the Constitution, the Court drew on it. In doing so, it explained that employers should have to "act with extraordinary care" when "reconciling" the competing statutory duties. *Id*. at 582 (*quoting Wygant*, 476 U.S. at 277). That "extraordinary care" is lacking in both *Weber* and *Johnson*.

Ricci also shows that even "extraordinary care" is not necessarily constitutional. As the Court noted, the *Ricci* petitioners brought both statutory Title VII claims and constitutional equal protection claims. It considered the statutory claims first because it was capable of providing the relief the *Ricci* petitioners sought. *Ricci*, 557 U.S. at 576-77. Even so, the Court made it clear that its ruling was limited:

> We do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case.

> [Likewise,] we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.

Id. at 584. The answer to those reserved questions should be a resounding "No."

III. This case presents an opportunity to overrule or declare superseded *Weber* and *Johnson*.

Weber and *Johnson* have outlived their usefulness. They should be overruled or declared to be superseded for three reasons. First, this Court's decisions have undercut their legal validity. Second, the passage of time makes the need for the affirmative action programs they endorse unnecessary as a matter of fact and law. Third, they have led to a proliferation of private sector diversity programs that are of questionable constitutionality.

A. This Court now reviews race conscious actions under a standard different from that employed in *Weber* and *Johnson*.

The standards established in *Croson* and *Ricci* are significantly more rigorous than that employed in *Weber* or in *Johnson*.

Without any analysis of the applicable standard,[5] *Weber* finds that the adoption of the affirmative action plan "falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Weber*, 443 U.S. at 209. The Court expressly declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans." *Id*. at 208. Instead, it pointed to some features of the plan that led it to conclude that it was permissible.

In response, then-Justice Rehnquist, joined by Chief Justice Burger, warned: "By going not merely *beyond*, but directly *against* Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind." *Weber*, 443 U.S. at 255 (Rehnquist, J., dissenting).

In *Johnson*, the Court addressed the applicable standard. It declared, "A manifest [statistical] imbalance need not be such that it would support a prima facie case against the employer." *Johnson*, 480 U.S. at 632. Writing for the Court, Justice Brennan reasoned, "Application of the 'prima facie' standard in

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[5] In his concurring opinion, Justice Harry Blackmun endorsed the "arguable violation" theory, noting that "[i]n this litigation, Kaiser denies prior discrimination but concedes that its hiring practices may be subject to question." *Weber*, 443 U.S. at 210 (Blackmun, J., concurring).

Title VII cases would be inconsistent with *Weber*'s focus on statistical imbalance, and could inappropriately create a significant disincentive for employers to adopt an affirmative action plan." *Id*. at 632-33. In other words, applying the statute as written and setting a threshold would not allow private employers to engage in the programs then believed appropriate.

Johnson and *Weber* are hard to reconcile, not just with *McDonald* as discussed above, but also with *Wygant*.[6] In *Wygant*, the Court held that a race-conscious layoff provision violated the Equal Protection Clause of the Fourteenth Amendment. *Wygant*, 476 U.S. at 284. It reasoned that the school board's desire to preserve racial role models was not an adequate constitutional justification for the provision. *Id*. at 274-75. That theory had "no logical stopping point." *Id*. at 275. In addition, it did not "necessarily bear a relationship to the harm caused by prior discriminatory hiring practices." *Id*. at 276. In short, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id*.

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[6] In his dissent in *Johnson*, Justice Scalia observed, "The most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs. Even if the societal attitudes in question consisted exclusively of conscious discrimination by other employers, this holding would contradict a decision of this Court rendered only last Term." *Johnson*, 480 U.S. at 664 (Scalia, J., dissenting) (citing *Wygant*).

Two years after the Court decided *Johnson*, however, this Court held the minority set-aside program for city construction contracts in Richmond, Virginia, unconstitutional. In pertinent part, the Court found the city's justification for the program lacking, explaining that "[n]one" of the district court's factual findings, "singly or together, provide the city of Richmond with a 'strong basis in evidence for its conclusion that remedial action was necessary.'" *Croson*, 488 U.S. at 500 (*quoting Wygant*, 476 U.S. at 277). Continuing, the Court observed, "There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry." *Id*. The Court's holding in *Croson* cannot be squared with the insouciantly lenient standard of *Johnson*.

Similarly, neither can this Court's decision in *Ricci*. There, the Court held that the City of New Haven, Connecticut violated Title VII when the city refused to certify results of certain promotion examinations for its firefighters because it thought those examinations made it vulnerable to a disparate impact claim. In doing so, this Court drew the strong-basis-in-evidence standard from the constitutional arena and applied it to Title VII. The Court pointed out that, "[a]pplying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances." *Ricci*, 557 U.S. at 583; *see also id*. at 585 ("[U]nder

Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.").

This Court's application of the strong-basis-in-evidence standard in *Ricci* shows the weakness of the Foreign Service's justification for its actions. In *Ricci*, this Court noted that, standing alone, "a threshold showing of a significant statistical disparity" is "far from a strong basis in evidence." *Ricci*, 557 U.S. at 587. To meet that standard, the city in *Ricci* needed to show that either "the tests were flawed because they were not job related" or that "other equally valid and less discriminatory tests were available." *Id*. at 592. Absent either of those showings, the city was not entitled to discard the tests. *Id*. at 585 ("[O]nce th[e promotion] process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race.").

The Foreign Service's justification for its affirmative action program rests on an equally shaky foundation. As the Circuit Court explained, under that program, "[a]ll that we can glean from the record is that *all* minority applicants received the main benefit available under the 1990-92 Plan – waiver of the certificate-of-need requirement for entry into the

FS-01, -02, and -03 levels." Pet. App. at A-28 (emphasis in original). The Circuit Court used the statistical imbalances at the Senior Foreign Service level as a springboard to infer that "discriminatory practices may well have been afoot." Pet. App. at A-30. But the program at issue involves preferences for employment at the intermediate level, not at the senior level where the imbalances were shown to be present. As Petitioner notes, the path to the Senior Foreign Service levels is unrelated to service at entry-level grades. Pet. at 5-6.

B. Time has passed *Weber* and *Johnson* by.

In 1979, only 15 years after the enactment of the Civil Rights Act of 1964, *Weber* opened the door to "affirmative action plan[s] voluntarily adopted by private parties to eliminate traditional patterns of racial segregation." *Weber*, 443 U.S. at 201. Eight years later, *Johnson* extended *Weber*'s reach to include local governmental units. Almost 30 years later, it hardly seems time to allow the federal government to engage in affirmative action programs to remedy statistical imbalances in its workforce.

Weber and *Johnson* rest on the perceived need for remedial action to redress the effects of traditional segregation that results in a significant disparate impact. But, traditional segregation has been illegal for some 50 years, and its effects should be increasingly difficult to find. *Cf. Intl. Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977)

("[I]t is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."). There should be no further need for affirmative action plans designed to redress the effects of traditional segregation.

Instead, Title VII should be seen as an adequate and appropriate remedy for claims of employment discrimination. It offers the actual victims of discrimination an outlet for relief. In contrast, programs like those in *Weber* and *Johnson*, and the one employed by the Foreign Service in this case, reward people who need not be an actual victim of discrimination and do so at the expense of people who are not responsible for any discrimination. Should programs like those continue to be created, the problem to which they will be responding is, at best, societal discrimination, which we know is not a constitutional basis for a racial classification. *Wygant*, 476 U.S. at 274. At worst, it is, simply, "discrimination for its own sake" which is equally forbidden by the Constitution. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

C. Notwithstanding the passage of time and the limitations inherent in *Weber* and *Johnson*, non-remedial, race and gender conscious diversity programs have proliferated in the workplace and academia.

Neither *Weber* nor *Johnson* support the unlimited creation of programs created to address racial or gender imbalances in the workplace. The Court's approval of the affirmative action plan in *Weber* rested, in the first place, on the fact that African-Americans "had long been excluded from craft unions." *Weber*, 443 U.S. at 198. That exclusion led to a plan designed "to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id*. at 209. Similarly, the program in *Johnson* was designed to remedy underrepresentation in job categories which offered only limited opportunity in the past. *Johnson*, 480 U.S. at 634. Finally, the programs in both cases had temporal limitations – the *Weber* program was temporary and the *Johnson* program was time bound in that it was designed to "attain" balance, not to "maintain" it. *Weber*, 443 U.S. at 208-09; *Johnson*, 480 U.S. at 639-40.

Workplace diversity programs have grown dramatically, taking advantage of *Weber* and *Johnson* with no indication of adherence to their inherent limits. In his February 28, 2007 testimony before the U.S. Equal Employment Opportunity Commission, Roger Clegg, president and general counsel of *amicus* CEO, pointed to the existence of such programs at companies like Wal-Mart, General Motors, Pepsi, Kodak, Cisco Systems, Abbott Laboratories, Fortune

Brands, BellSouth, Bank of America, and Fannie Mae. Statement of Roger Clegg (Feb. 28, 2007), available at http://www.eeoc.gov/eeoc/meetings/archive/2-28-07/clegg2.html (last visited Jan. 5, 2016). Mr. Clegg noted that, according to a 1997 survey by Yankelovich Partners, "[e]ight out of ten business executives said that affirmative-action programs had resulted in them giving jobs and promotions to applicants who were less qualified than others." *Id*. Significantly, "the larger the company, the more likely the executive was to voice support for affirmative action and the less likely to support its abolition." *Id*. (internal parenthesis omitted). That was the case even though neither logic nor empirical results supports the pursuit of non-remedial diversity.

Similarly, as *amicus* NAS has extensively documented, discriminatory hiring practices in academia are commonplace. At the University of Louisville, a job posting read: "[T]he Department of Physics and Astronomy announces a tenure-track assistant professor position that will be filled by an African-American, Hispanic American or a Native American Indian." Colleen Flaherty, *Whites, Asians Need Not Apply*, InsiderHigherEd.com, Dec. 16, 2015, available at
https://www.insidehighered.com/news/2015/12/16/job-ad-u-louisville-raises-questions-about-considering-race-faculty-hires (last visited Jan. 6, 2016). Southern Illinois University entered into a consent decree with the U.S. Department of Justice "to allow non-minorities and men access to graduate fellowships originally created for minorities and women." Jonathan

D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. Times, Mar. 16, 2006, available at http://www.nytimes.com/2006/03/14/education/14minority.html?incamp=article_popular&_r=0 (last visited Jan. 6, 2016).

And the University of Oregon maintains an "Underrepresented Minority Recruitment Program" that "encourages departments to hire underrepresented minority faculty in tenure-related faculty appointments by providing supplemental funds to the department through its school or college following the successful tenure-related appointment of a new colleague from an underrepresented group." Underrepresented Minority Recruitment Program, University of Oregon Office of Academic Affairs, available at https://academicaffairs.uoregon.edu/UMRP (last visited Jan. 6, 2016); *see also Univ. & Cmty. College Sys. v. Farmer*, 113 Nev. 90 (Nev. 1997) (holding that a university's deliberately racially skewed wages did not violate the Equal Pay Act); *Rudin v. Lincoln Land Cmty. College*, 420 F.3d 712 (7th Cir. 2005) (holding that a jury could rationally believe that a community college that hired an African-American faculty member over a Caucasian did so for discriminatory reasons since hiring process halted when selection pool was thought to be insufficiently "diverse"). Like the State Department's Foreign Service program, these facially discriminatory programs are widespread given the permissiveness and lack of clarity of the current legal standards.

These programs illustrate the harm that *Weber* and *Johnson* can do. They should be overruled or

otherwise found to be unworthy of future support. Stare decisis does not preclude overruling *Weber* and *Johnson*. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989). As shown above, they are inconsistent with the statutory text and with decisions of this Court, both prior and subsequent. Given that *Weber*, by its own terms, had no intention of justifying permanent remedial programs at odds with the text of Title VII, there is no reason to permit it to support non-remedial, diversity programs without any apparent time boundary.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioner in the Petition for Certiorari, *amici* respectfully request that this Court grant the writ of certiorari, and on review, reverse the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

KIMBERLY S. HERMANN
SOUTHEASTERN LEGAL FOUNDATION
2255 Sewell Mill Road
Suite 320
Marietta, Georgia 30062
(770) 977-2131
khermann@southeasternlegal.org

JOHN J. PARK, JR.
Counsel of Record
STRICKLAND BROCKINGTON LEWIS LLP
1170 Peachtree Street
Suite 2200
Atlanta, Georgia 30309
(678) 347-2208
jjp@sbllaw.net

ILYA SHAPIRO
RANDAL J. MEYER
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

ROGER CLEGG
THE CENTER FOR
EQUAL OPPORTUNITY
7700 Leesburg Pike
Suite 231
Falls Church, Virginia 22043
(703) 442-0066
rclegg@ceousa.org

Counsel for Amici Curiae

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