
**FREEDOM SPEAKS!**

# You Need Not Apply: State Department Discriminatory Hiring and Title VII Confusion

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The U.S. State Department, which represents and promotes America and our values of justice, opportunity and rule of law around the world, has a dirty secret that flies in the face of justice, opportunity and – now in court – the rule of law.

What would you do if I told you that the State Department refused to even consider qualified candidates for a mid-level jobs in the Foreign Service because of their color? You would be outraged! Understandably so – but it is the truth.

You see, for decades, the courts have been rolling back race-based hiring quotas by federal, state and local governments. Why? Because race is a 'protected class', which means that governments and institutions affiliated with government must prove ongoing discrimination in order to sustain a race-based hiring quota. Courts have struck down program after program in the school admissions and public contracting arenas because they simply cannot prove ongoing discrimination.

But it's a different story when it comes to hiring, at least at the federal level.

According to the State Department's affirmative action plan in place from 1990-1992, it could not hire, or even consider hiring, whites for a mid-level grade position.

If federal statutory law expressly commands that *all* covered federal employees shall be "free from any discrimination based on . . . race," how can the government then adopt a race-based affirmative action plan and deny non-minority applicants employment because of their race?

That is the main question posed by *Shea v. Kerry*.

In 1992, Mr. Shea became a State Department Foreign Service officer at a junior-level post. He filed a complaint against the State Department for its discriminatory hiring policy during the years 1990-1992.

This case is complicated because the Supreme Court's Title VII jurisprudence is unclear and unworkable. The statute itself provides equal protection to *all* within its scope. But, in 1979, in an expensive reading contrary to the text, the Court found that Title VII did not prohibit affirmative action plans to remedy disparate impact. In other words, companies and the government were given the green light to exclude non-minorities whether or not they actually *proved* ongoing discrimination.

In recent years, we have seen the Supreme Court apply a much more literal and honest interpretation of Title VII and find that an employer can only make discriminatory employment decisions if it can establish that if it didn't, it would be subject to liability.

The time has come for the Supreme Court to clarify its Title VII jurisprudence and ensure that *no one* is excluded from applying or being considered for a job because of their race. Southeastern Legal Foundation, joined by the Center for Equal Opportunity, the Cato Institute and the National Association of Scholars, filed an *amici curiae* brief in support of Shea, asking the Supreme Court to take up the case.