No. 23-509

Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

ROLLINS COLLEGE,

Respondent.

On petition for a writ of certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should announce a framework for determining discrimination under Title IX in the context of educational disciplinary proceedings—even though circuit courts are not conflicted on the issue—and even though the announcement would have no bearing on this case?*

2. Whether this Court should announce that, categorically, procedural deficiencies in educational disciplinary proceedings combined with additional evidence of sex bias permit a reasonable inference of discrimination under Title IX—even though circuit courts are not conflicted on the issue—and even though the announcement would have no bearing on this case?

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* Petitioner's first two questions ask the same thing. Pet. i. Accordingly, this brief treats Petitioner's first two questions as one.

CORPORATE DISCLOSURE STATEMENT

Respondent is Rollins College. There are no parent corporations or any publicly held companies owning 10% or more of Rollins's stock.

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INTRODUCTION

Petitioner was a student at Rollins College. Rollins disciplined him for violating its sexual-misconduct policy. He then sued Rollins for discrimination under Title IX. Count one pleaded an "erroneous outcome" theory of discrimination. Count two pleaded a "selective enforcement" theory of discrimination.

The district court granted summary judgment for Rollins on both counts, ruling that "there is no evidence by which a reasonable juror could conclude Rollins's conduct toward [Petitioner] was motivated by his gender." The Eleventh Circuit affirmed.

Petitioner now asks this Court to resolve a purported circuit split on the framework for determining discrimination under Title IX in the context of educational disciplinary proceedings. But the circuit courts are not split. And even if they were, the purported split would have no bearing on this case because Petitioner pleaded two specific theories of discrimination.

Petitioner also asks this Court to address whether, categorically, procedural deficiencies in disciplinary proceedings combined with additional evidence of sex bias permit a reasonable inference of discrimination under Title IX. Again, however, the circuit courts are not conflicted. And even if they were, such a conflict would have no bearing on this case because the district court and Eleventh Circuit did not categorically reject Petitioner's evidence; they considered the evidence and correctly concluded it was insufficient.

This Court should deny the petition for a writ of certiorari. Neither the petition nor this case presents questions necessary or appropriate for resolution by this Court.

STATEMENT OF THE CASE

I. Legal background

Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, prohibits sex discrimination in education. Subject to exceptions not relevant here, it states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* § 901(a) (codified as 20 U.S.C. § 1681(a)). This law is enforceable through an implied private right of action. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688–89 (1979); *but see Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 77 (1992) (Scalia, J., concurring) ("[W]e have abandoned the expansive rights-creating approach exemplified by *Cannon* . . . and perhaps ought to abandon the notion of implied causes of action entirely . . . .").

In *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994), the Second Circuit considered a Title IX claim in the context of disciplinary proceedings. The court explained that "[p]laintiffs attacking a university disciplinary proceeding on grounds of gender bias can be expected to fall *generally* within two categories." *Id.* at 715 (emphasis added). "In the first category, the claim is that the plaintiff was innocent and wrongly found to have committed an offense." *Id.* "In the second category, the plaintiff alleges selective enforcement. Such a claim asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender." *Id.*

In *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019), the Seventh Circuit also considered a Title IX claim in the context of disciplinary proceedings. Writing for the court, then-Judge Barrett noted that "the Second Circuit channels such claims into two general categories." *Id.* at 667 (citing *Yusuf*, 35 F.3d at 715). Then-Judge Barrett also noted that "[t]he Sixth Circuit has added two more categories to the mix." *Id.* Nevertheless, she explained that there was "no need to superimpose doctrinal tests on the statute" because "[a]ll of these categories simply describe ways in which a plaintiff might show that sex was a motivating factor in a university's decision to discipline a student." *Id.* Instead, it is "prefer[able] to ask the question more directly: do the alleged facts, if true, raise a plausible inference that the university discriminated against [the plaintiff] 'on the basis of sex'?" *Id.* at 667–68.

No circuit court has disagreed with *Purdue*. To the contrary, every circuit court that has addressed *Purdue* has either expressly or effectively agreed with it:

- *Doe v. Univ. of Scis.*, 961 F.3d 203, 209 (3d Cir. 2020) ("We agree with the Seventh Circuit . . . .").
- *Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 236 (4th Cir. 2021) ("We agree with the Seventh's Circuit's approach . . . .").
- *Doe v. William Marsh Rice Univ.*, 67 F.4th 702, 709 (5th Cir. 2023) (noting that a prior decision had "adopt[ed] the approach of *Purdue*").
- *Does 1-2 v. Regents of the Univ. of Minn.*, 999 F.3d 571, 577 (8th Cir. 2021) ("[F]ollowing the lead of the Seventh Circuit in [*Purdue*], we recently adopted a simpler, more straightforward

pleading standard for Title IX claims arising from university disciplinary proceedings . . . .").

- *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 947 (9th Cir. 2020) ("[W]e find persuasive the Seventh Circuit's approach to Title IX claims in this context.").
- *Doe v. Univ. of Denver*, 1 F.4th 822, 830 (10th Cir. 2021) ("We think the [*Purdue*] approach better accords with the text and analytical framework of Title IX.").
- *Doe v. Samford Univ.*, 29 F.4th 675, 687 (11th Cir. 2022) ("We agree with the Seventh Circuit's approach . . . ." (citation omitted)).

To be sure, the Eleventh Circuit made a "modification" to the *Purdue* approach. *Id.* But the modification does not create a conflict. The Eleventh Circuit merely reframed the question by focusing on whether there is a "reasonable" inference of discrimination instead of a "plausible" inference. *Id.* As Chief Judge William Pryor explained, "facial plausibility is determined by asking whether the facts alleged 'allow[] the court to draw the *reasonable* inference that the defendant is liable.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The Tenth Circuit similarly reframed the question when it applied the *Purdue* approach at summary judgment. *Univ. of Denver*, 1 F.4th at 830 ("Because *Purdue* articulated the motion to dismiss standard, we reframe the operative question for summary judgment and ask: Could a reasonable jury—presented with the facts alleged—find that sex was a motivating factor in the University's disciplinary decision?"). Again, this did not create a conflict. Like the Eleventh Circuit, the Tenth Circuit agreed with *Purdue*. *Id.*

II. Factual background[1]

Rollins College is an educational institution that receives federal financial assistance. In 2015, Rollins adopted a policy that governs sexual misconduct by its students. Pet. App. 60a.

Four years before Rollins adopted its policy, the U.S. Department of Education issued a letter (known as the "Dear Colleague" letter) to provide guidance in complying with Title IX. *Id.* The Dear Colleague letter was rescinded in September 2017—two months before the investigation in this case commenced. *Id.* at 38a.

Petitioner was a student at Rollins. *Id.* at 67a. In February 2017, he attended a function at his fraternity with another student, Jane Roe. *Id.* The two drank alcohol, went to a bar, and then went to Petitioner's dorm room. *Id.* Petitioner inserted his fingers into Roe's vagina, and she touched his penis. *Id.* Roe then left the dorm room. *Id.*

Four days later, Roe reported to Rollins's Title IX Coordinator, Oriana Jimenez, that the sexual encounter with Petitioner was not consensual. *Id.* Roe did not want to participate in a Title IX investigation, and Rollins did not investigate her report at that time. *Id.* at 68a.

Nine months later, in November 2017, Rollins received an anonymous call that a person with a name similar to Petitioner's had sexually assaulted three women. *Id.* Jimenez then reached out to Roe to see if she wanted to proceed with an investigation against

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[1] This section includes facts recited in the district court's summary-judgment order and the circuit court's opinion. As the district court noted, "the material underlying facts are not in dispute." Pet. App. 59a n.2.

Petitioner. *Id.* Jimenez told Roe that because of the call, Rollins would be looking into Roe's February report regardless if Roe decided to proceed. *Id.* Roe decided to participate. *Id.* Petitioner was notified of the allegation against him on November 20, 2017. *Id.*

Once Rollins decided to move forward in November, it hired an outside investigator to investigate Roe's allegation. *Id.* The investigator, Deena Wallace, was an attorney who had previously served as a sex-crimes prosecutor at the state attorney's office. *Id.* at 9a. Wallace interviewed twenty-two witnesses. *Id.* She also did four interviews of Roe and one interview of Petitioner in the presence of his advisor—an attorney hired by Petitioner's mother. *Id.* at 9a, 68a–69a. Roe said that during the encounter with Petitioner, she was drunk, tired, and told Petitioner "no" and "stop." *Id.* at 69a. Petitioner said Roe did not tell him to stop or show signs of being uncomfortable. *Id.*

After the investigation, Wallace issued a 71-page report with 15 exhibits, finding Petitioner responsible for violating Rollins's sexual-misconduct policy. *Id.* Wallace found Roe more credible than Petitioner. *Id.* She identified the following reasons for believing Roe: Roe's report to a friend hours after the assault was consistent with Roe's other reports, Roe used great detail in explaining how Petitioner placed her hand on his penis, Roe physically manifested stress, Roe's personality changed after the incident, and Roe was unable to see Petitioner on campus. *Id.* Wallace acknowledged conflicting evidence against Roe, including texts sent by Roe shortly after the incident, but Wallace accepted Roe's explanation that she was still processing the event and was not ready to say Petitioner assaulted her. *Id.*

Wallace also emphasized the testimony of other witnesses. *Id.* at 70a. One witness alleged that Petitioner may have assaulted her. *Id.* Wallace explained that Petitioner's "genuine, sincere statement" about this witness was drastically different than his statements about his encounter with Roe, further convincing Wallace of Roe's version. *Id.* Another witness alleged that Petitioner had sex with her without her consent. *Id.*

Once Wallace completed the report, Jimenez edited it, and Petitioner received a letter notifying him of the findings on March 5, 2018. *Id.* at 71a. Petitioner received the following sanctions: a no-contact order between him and Roe, dismissal from Rollins, and restrictions from participating in commencement ceremonies, alumni reunion events, or returning to campus. *Id.* Petitioner appealed, and Rollins's Vice President of Student Affairs affirmed the findings and sanctions but ensured they had no effect on Petitioner's undergraduate degree. *Id.* In other words, Petitioner was able to graduate and receive his undergraduate degree from Rollins. *Id.* at 1a–2a.

III. Procedural background

In July 2018, Petitioner sued Rollins in the Middle District of Florida. (Doc. 1.)[2] He later filed an amended complaint. (Doc. 14.) His amended complaint pleaded two counts of discrimination under Title IX: one based on an "erroneous outcome" theory and another based on a "selective enforcement" theory. *Id.* at 27–37.

The district court granted summary judgment for Rollins on both counts. Pet. App. 92a. In doing so, the court acknowledged the "*Yusuf* framework" and that

[2] "Doc." refers to filings in the district court's docket.

Petitioner had pleaded both "erroneous outcome" and "selective enforcement." *Id.* at 74a–75a. The court said "*Yusuf* provides a useful way to contextualize the conduct [Petitioner] alleges was discriminatory." *Id.* at 76a. But the court also recognized that "ultimately, talismanic labels aside, the question boils down to this: did Rollins discriminate against [Petitioner] on the basis of gender." *Id.* (citing *Purdue*, 928 F.3d at 667–68). The court concluded that "[a]fter scrutiny of the record, there is no evidence by which a reasonable juror could conclude Rollins's conduct toward [Petitioner] was motivated by his gender." *Id.*

The Eleventh Circuit affirmed. *Id.* at 3a. Like the district court, the Eleventh Circuit acknowledged the *Yusuf* framework and that Petitioner had pleaded both "erroneous outcome" and "selective enforcement." *Id.* at 2a, 20a. And, like the district court, the Eleventh Circuit recognized that "these two tests do not capture the full range of conduct that could lead to liability under Title IX, but instead simply describe two ways in which a plaintiff might show that sex was a motivating factor in a university's decision." *Id.* at 21a (cleaned up). Nevertheless, the court separately addressed Petitioner's claims as he had pleaded them. *Id.* at 22a–45a. In doing so, the court expressly agreed with the *Purdue* approach but "modif[ied]" the inquiry "to fit review of a grant of summary judgment" by asking: "could a jury presented with the record evidence, viewed in [Petitioner's] favor, reasonably find that Rollins discriminated against [him] on the basis of sex?" *See id.* at 21a.

To show selective enforcement, Petitioner argued that Rollins "treat[ed] Roe more favorably based on sex" by not investigating *her* for misconduct in the sexual encounter with Petitioner. *Id.* at 22a. The

Eleventh Circuit noted that Petitioner "did not make a complaint that Roe had sexually assaulted him" and there was no evidence that Petitioner was incapacitated—and thus unable to consent—during the encounter. *Id.* at 23a–27a. The Eleventh Circuit therefore agreed with the district court that "[Petitioner] was not similarly situated to Roe, and as a result nothing about the differential treatment of [Petitioner] and Roe suggests that sex had anything to do with it." *Id.* at 23a (cleaned up).

To show erroneous outcome, Petitioner relied on purported evidence of "stereotyped views of gender," "procedural flaws in the investigation," "external pressure from the Department of Education," and "patterns of decision-making at Rollins." *Id.* at 30a–31a. The Eleventh Circuit considered and addressed each category of evidence independently and collectively. *Id.* at 31a–45a. The court concluded that "even when taken as a whole, and viewed in [Petitioner's] favor, the evidence does not create a jury issue as to whether there was a causal connection between the purported erroneous outcome in [Petitioner's] case and gender bias on the part of Rollins." *Id.* at 40a.

In addition to his Title IX claims, Petitioner also sued for breach of contract under Florida law. (Doc. 14 at 37–46.) A jury found that the claimed breaches—including alleged procedural defects—were not material. (Doc. 198.) The Eleventh Circuit affirmed the district court's denial of Petitioner's motion for judgment as a matter of law on the issue of materiality. Pet. App. 47a–52a. Petitioner does not challenge that ruling in his petition.

ARGUMENT

I. There is no conflict on the first question. And even if there were a conflict, it would have no bearing on this case.

Petitioner claims there is a "conflict among the Circuits as to the proper test for sex discrimination under [Title IX]." Pet. 14. Specifically, he claims there is a conflict between circuits that use *Yusuf*'s "selective enforcement" and "erroneous outcome" theories and circuits that use the *Purdue* approach. Pet. 15–17. He further argues that the Eleventh Circuit "defectively revised" the *Purdue* approach. Pet. 2, 17–22.

This Court should deny the petition for three reasons. First, there is no conflict. Second, the Eleventh Circuit has not defectively revised the *Purdue* approach. Third, even if there were a conflict, it would have no bearing on this case.

A. There is no conflict as to the proper test for sex discrimination under Title IX.

As noted *supra* pp. 3–4, no circuit court has disagreed with then-Judge Barrett's reasoning in *Purdue*, and every circuit court that has addressed *Purdue* has either expressly or effectively agreed with it. Simply put, there is no conflict.

The decisions cited in the petition do not show otherwise. For example, Petitioner cites *Yusuf*. Pet. 15–16. Yet, as the Fifth Circuit expressly acknowledged, there is "no meaningful tension between *Yusuf* and *Purdue*." *Van Overdam v. Tex. A&M Univ.*, 43 F.4th 522, 527 (5th Cir. 2022). While "*Purdue* is surely correct that we are governed by the standard set forth in the text of Title IX," "*Yusuf* is likewise correct that there are different fact patterns that could very well

state a claim of sex discrimination under Title IX." *Id.* at 528. Other circuit courts have acknowledged the same.

In *Purdue* itself, then-Judge Barrett did not identify a conflict with *Yusuf*. 928 F.3d at 667. Indeed, she did not say that the "erroneous outcome" and "selective enforcement" theories were improper. *Id.* She noted only that those theories "simply describe ways in which a plaintiff might show that sex was a motivating factor in a university's decision to discipline a student." *Id.* But "[i]ntentional discrimination can take several forms." *SECSYS, LLC v. Vigil*, 666 F.3d 678, 685 (10th Cir. 2012) (Gorsuch, J.). So instead of trying to categorize every possible form of discrimination, then-Judge Barrett "prefer[red] to ask the question more directly: do the alleged facts, if true, raise a plausible inference that the university discriminated against [the plaintiff] 'on the basis of sex'?" *Purdue*, 928 F.3d at 667–68.

The Seventh Circuit recognized the same in a later decision. *Doe v. Columbia Coll. Chi.*, 933 F.3d 849, 854–55 (7th Cir. 2019). Again, it did not hold that the *Yusuf* theories were improper; it merely said the theories "need not be considered because at bottom they all ask the same question." *Id.*

The Eleventh Circuit understood *Yusuf* and *Purdue* the same way. *See Samford*, 29 F.4th at 686–87. Again, it did not hold that the *Yusuf* theories were improper; it merely recognized that they "do not capture the full range of conduct that could lead to liability under Title IX." *Id.* at 687.

Other circuits have likewise found no tension between *Yusuf* and *Purdue*. Notably, the Fourth and Tenth Circuits have agreed with the *Purdue* approach

while also recognizing that the *Yusuf* theories describe particular forms of discrimination. *Sheppard*, 993 F.3d at 236 ("We agree with the Seventh's Circuit's approach . . . . In adopting this approach, however, we find no inherent problems with the erroneous outcome and selective enforcement theories identified in *Yusuf*. In fact, either theory, with sufficient facts, may suffice to state a plausible claim."); *Univ. of Denver*, 1 F.4th at 830 (adopting the *Purdue* approach but "recogniz[ing] that evidence of an erroneous outcome or selective enforcement are means by which a plaintiff might show that sex was a motivating factor in a university's disciplinary decision").

Petitioner claims that the First Circuit's approach conflicts with *Purdue*. *See* Pet. 15–16. Yet, the two decisions he cites create no conflict. In the first decision—which was decided before *Purdue*—the First Circuit expressly declined to "adopt[] a framework." *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 90 (1st Cir. 2018). In the second decision, the First Circuit again had no need to adopt a framework because the "parties agree[d] on the theories of liability outlined in *Yusuf*." *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 74 n.11 (1st Cir. 2019). Indeed, the First Circuit acknowledged in a later decision that it had "not set forth a single test for analyzing this type of Title IX claim, and ha[d], instead, recognized several ways in which a plaintiff may establish sex discrimination." *Doe v. Stonehill Coll., Inc.*, 55 F.4th 302, 332 (1st Cir. 2022) (citing *Bos. Coll.*, 892 F.3d at 90). The court also acknowledged the *Purdue* approach without asserting any conflict. *Id.* at 332 n.44.

The other two decisions cited by Petitioner likewise do not present a conflict. Pet. 15–16. One is a Second Circuit decision decided before *Purdue* that does not

even mention the *Yusuf* theories. *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016). The other is an unpublished decision of the D.C. Circuit in which the court summarily affirmed the district court without addressing *Purdue*. *Robinson v. Wutoh*, 788 F. App'x 738 (D.C. Cir. 2019) (unpublished).

B. The Eleventh Circuit has not defectively revised the *Purdue* approach.

The Eleventh Circuit has expressly agreed with the *Purdue* approach. It did so first in *Samford*. 29 F.4th at 687. And it did so again in the decision below. Pet. App. 21a.

Petitioner claims that, below, the Eleventh Circuit gave "lip service" to *Purdue* because although the court expressly agreed with *Purdue* it nevertheless "invoked the *Yusuf* 'erroneous outcome' and 'selective enforcement' categories." Pet. 14; *see also* Pet. 16. However, Petitioner ignores that *he* invoked those categories by specifically pleading them in his complaint. (Doc. 14 at 27–37.) He also invoked the *Yusuf* categories—and did not mention *Purdue*—in response to Rollins's motion for summary judgment.[3] (Doc. 74.) And he again invoked the *Yusuf* categories in his principal brief in the Eleventh Circuit. *See Original Brief of Plaintiff-Appellant John Doe*, 2021 WL 4171022, at *17–19.

Given that Petitioner specifically pleaded and argued the *Yusuf* categories, it was proper for the Eleventh Circuit to address Petitioner's claims as he had raised them. Other circuits have done the same.

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[3] *Purdue* had been decided at the time Petitioner filed his response to Rollins's motion for summary judgment. In fact, Rollins's motion cited and discussed *Purdue*. (Doc. 60 at 7.)

Kashdan v. George Mason Univ., 70 F.4th 696, 700–01 (4th Cir. 2023) (noting the *Purdue* approach but addressing the appellant's claims under the *Yusuf* categories he had pleaded); *William Marsh Rice Univ.*, 67 F.4th at 709 (same); *Stonehill Coll., Inc.*, 55. F.4th at 332 n.44 (same). After all, "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *NASA v. Nelson*, 562 U.S. 134, 147 n.10 (2011) (citation omitted).

Petitioner next argues that the Eleventh Circuit "defectively revised" the *Purdue* approach in two ways Pet. 2, 17–22. But the first "revision" has no bearing on this case, and neither "revision" creates a conflict.

First, Petitioner complains that in *Samford* the Eleventh Circuit modified the *Purdue* approach by asking whether there is a "reasonable inference" of discrimination instead of a "plausible inference." Pet. 18–19. Petitioner claims that this modification is "at odds with the rule governing the sufficiency of federal complaints." Pet. 19. Unlike *Samford*, however, Petitioner's case was decided at summary judgment—not on a motion to dismiss. The sufficiency of Petitioner's complaint is therefore irrelevant, and the purported conflict has no bearing on this case.

Even if this case had been decided on a motion to dismiss, the modification in *Samford* does not create a conflict. To the contrary, *Samford* expressly noted that "the ultimate inquiry is the 'facial plausibility' of the complaint." 29 F.4th at 687. The court merely modified the inquiry because, as Chief Judge William Pryor explained, "facial plausibility is determined by asking whether the facts alleged 'allow[] the court to draw the *reasonable* inference that the defendant is

liable.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678 (2009)); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) ("Asking for plausible grounds to infer an agreement . . . simply calls for enough fact to raise a *reasonable* expectation that discovery will reveal evidence of illegal agreement." (emphasis added)); *Univ. of Scis.*, 961 F.3d at 209 (concluding that the plaintiff's complaint contained "plausible allegations supporting the reasonable inference" that he was discriminated against). Simply put, the court asked the same question more directly.

Second, Petitioner complains that, below, the Eleventh Circuit reframed the *Purdue* approach to fit summary judgment by asking: "could a jury presented with the record evidence, viewed in [Petitioner's] favor, reasonably find that Rollins discriminated against [Petitioner] on the basis of sex?" Pet. 19–20. Petitioner claims that this "was not consistent with summary judgment procedural rules." Pet. 20–21.

The Eleventh Circuit's reframing was wholly consistent with summary-judgment principles. Indeed, this Court has framed the question at summary judgment in the same manner. *E.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[S]ummary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party."). And the Tenth Circuit has likewise reframed the *Purdue* approach to fit summary judgment. *Univ. of Denver*, 1 F.4th at 830 ("Because *Purdue* articulated the motion to dismiss standard, we reframe the operative question for summary judgment and ask: Could a reasonable jury—presented with the facts alleged—find that sex was a motivating factor in the University's disciplinary decision?").

Petitioner argues that the Eleventh Circuit's formulation ignores that, at summary judgment, (1) the evidence must be construed in favor of the nonmovant, (2) ambiguities and inferences must be drawn in favor of the nonmovant, and (3) the court must not make credibility determinations or weigh the evidence. Pet. 20–21. Yet, the Eleventh Circuit's formulation plainly states that the evidence must be "viewed in [Petitioner's] favor." Pet. App. 21a. And the court repeatedly acknowledged as much throughout its opinion. Pet. App. 19a (noting that the evidence must be "viewed in the light most favorable to the nonmoving party "); Pet. App. 27a (referring to the record "viewed in the light most favorable to [Petitioner]"); Pet. App. 40a (same).

Petitioner further argues that the Eleventh Circuit's formulation ignores that "summary judgment is inappropriate when it is sought on the basis of questions of motive and intent." Pet. 21. Petitioner is mistaken; "the presence of issues involving state of mind, intent, or motivation does not automatically preclude summary judgment." *Stepanischen v. Merchs. Despatch Transp. Corp.*, 722 F.2d 922, 929 (1st Cir. 1983); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." (citation omitted)). To hold otherwise would mean that summary judgment or a directed verdict could never be granted for the defendant in a discrimination case. Of course, this Court has recognized that summary judgment and directed verdict *can* be granted in favor of the defendant in a discrimination case. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) ("Certainly there

will be instances where . . . no rational factfinder could conclude that the action was discriminatory."); *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 150 (2008) (holding that the plaintiff's summary-judgment evidence on discriminatory motivation was "lacking").

Finally, Petitioner's arguments about summary-judgment principles do not concern Title IX's text. Instead, he merely faults how the Eleventh Circuit applies those principles in general. Such arguments are not confined to Title IX and fall outside of the questions presented in the petition. In any event, even if the Eleventh Circuit had misapplied summary-judgment principles—which it did not—"[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see also Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring in the judgment, joined by Scalia, J.) ("There is no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion . . . .").

C. Even if there were a conflict on the first question, it would have no bearing on this case.

Not only is there no conflict on the first question, but even if there were a conflict it would have no bearing on this case. Petitioner claims that the conflict is between the *Purdue* approach and *Yusuf*'s "selective enforcement" and "erroneous outcome" theories. Pet. 15–16. Yet, as noted *supra* p. 13, the *Yusuf* categories are the only two theories Petitioner raised in this case.

In other words, Petitioner does not identify anything that the Eleventh Circuit should have considered other than his 'erroneous outcome' and 'selective

enforcement' claims. Accordingly, even if there were a conflict as Petitioner contends, resolution of that conflict would have no bearing on this case. This Court should not accept jurisdiction to address conflicts that have no bearing on the case at hand. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical state of facts." (cleaned up)); *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 177 n.17 (1977) ("Because the question has no bearing on our decision of the questions presented by petitioner, we decline to decide it.").

II. There is no conflict on the second question. And even if there were a conflict, it would have no bearing on this case.

This Court has long emphasized that it should not grant certiorari "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923). This Court's rules recognize as much. *See* Sup. Ct. R. 10.

Petitioner asks this Court to decide "whether procedural deficiencies in a college or university disciplinary proceedings combined with additional evidence of sex bias permit a sufficient inference of gender bias to avoid summary judgment" in a Title IX case. Pet. 15. But Petitioner does not argue that there is a conflict on this question. Nor can he, because there is none. The lack of a conflict is unsurprising, as courts do not broadly declare that abstract categories of evidence will always defeat summary judgment. *See*

Reeves, 530 U.S. at 148–49 ("Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. . . . [W]e need not—and could not—resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law.").

Even if there were such a conflict, it would have no bearing on this case. The court below did not hold that, as a categorical matter, evidence of "procedural deficiencies in a college or university disciplinary proceedings combined with additional evidence of sex bias" is insufficient to defeat summary judgment. To the contrary, the Eleventh Circuit expressly considered and addressed Petitioner's "evidence of procedural flaws in the investigation" as well as Petitioner's other purported evidence of gender bias. Pet. App. 30a–31a.

Petitioner also fails to explain why the question he raises is "of importance to the public, as distinguished from that of the parties." *Layne*, 261 U.S. at 393. Again, there is no dispute whether evidence of "procedural deficiencies in a college or university disciplinary proceedings combined with additional evidence of sex bias" can, in some cases, defeat summary judgment. What Petitioner is really asking is whether the evidence presented *in this case* was sufficient to avoid summary judgment. *See* Pet. 23–31.

That question is not important to the public or one which this Court should address. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) ("[This Court does not] sit for the benefit of the particular litigants."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual

findings . . . ."). In any event, as explained *infra* § III, the Eleventh Circuit did not err in concluding that the evidence in this case was insufficient to defeat summary judgment.

III. The Eleventh Circuit did not err in concluding that the evidence in this case was insufficient to defeat summary judgment.

The record does not contain any direct evidence of discrimination on the basis of sex. Accordingly, Petitioner points to various categories of circumstantial evidence to argue that a jury could infer such discrimination. Pet. 23–31. As explained below, the Eleventh Circuit considered all this evidence—both individually and collectively—and correctly concluded that it was insufficient to defeat summary judgment.

A. Differential treatment of Jane Roe

Petitioner first points to purported evidence that Rollins treated Roe more favorably than him. Pet. 23–25. Specifically, he claims that "Rollins treated Jane Roe more favorably by failing to initiate a disciplinary process to determine whether she violated the Rollins sexual misconduct policy." Pet. 23.

The Eleventh Circuit expressly considered this evidence and addressed it at length. Pet. App. 22a–28a. The court explained that Roe was not similarly situated to Petitioner because (1) no one had alleged that she engaged in any misconduct, and (2) there was no evidence she had engaged in misconduct as defined in Rollins's policy. *Id.* Because Roe was not similarly situated to Petitioner—i.e., she was not a comparator—"no reasonable jury could find that Rollins' failure to investigate Roe was based on sex." *Id.* at 27a.

Petitioner suggests that, under *Purdue*, a comparator is irrelevant. Pet. 23–25. But nothing in *Purdue* makes a comparator irrelevant. *See Sheppard*, 993 F.3d at 237 (applying the *Purdue* approach and rejecting the plaintiff's claim of differential treatment because he did not identify a comparator). *Purdue* did not address comparators because the plaintiff there did not allege that anyone was treated differently than him. *See* 928 F.3d at 656–59, 667–70.

This Court has long recognized the relevance of a comparator when inferring discrimination based on differential treatment. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) ("Especially relevant . . . would be evidence that white employees involved in [similar conduct] were nevertheless retained or rehired."); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981) ("[I]t is the plaintiff's task to demonstrate that similarly situated employees were not treated equally."). After all, "[d]isparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 601 (1997) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas and Ginsburg, JJ.).

At bottom, all that Petitioner showed was that he was treated differently than Roe. But mere differential treatment is not actionable. Petitioner must go further and show that he was treated differently "on the basis of sex." 20 U.S.C. § 1681(a); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("[A] disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in [the decisionmaking] process and had a determinative influence on the outcome."). Because Petitioner and

Roe were not similarly situated, nothing about Roe's differential treatment suggests that Petitioner was treated differently on the basis of sex.

B. Purported procedural irregularities

Petitioner next points to evidence that "Rollins was guilty of various irregularities." Pet. 25. He suggests that, under *Purdue*, this evidence would have been sufficient to defeat summary judgment. Pet. 25–26.

Petitioner is mistaken. *Purdue* did not hold that evidence of procedural irregularities is sufficient to infer discrimination. 928 F.3d at 667–70. Indeed, the Seventh Circuit acknowledged in a later decision that "a plaintiff cannot prove gender discrimination by merely identifying mistakes or imperfections in the process." *Doe v. Univ. of S. Ind.*, 43. F.4th 784, 793 (7th Cir. 2022).

To be sure, the court in *Purdue* relied in part on the plaintiff's allegations of procedural irregularities. 928 F.3d at 669–70. But "[t]he plaintiff alleged what amounted to a sham grievance process." *Univ. of S. Ind.*, 43. F.4th at 794. Namely, a majority of the Title IX committee credited the victim's accusation without hearing from her (orally or in writing) and took no other evidence into account. *Purdue*, 928 F.3d at 669. They did not even read the investigative report and refused to hear from the plaintiff's witnesses. *Id.*

Here, by contrast, there were no such irregularities. Rollins hired an outside investigator to investigate Roe's allegation. Pet. App. 68a. The investigator, Deena Wallace, was an attorney who had previously served as a sex-crimes prosecutor at the state attorney's office. *Id.* at 9a. Wallace interviewed twenty-two witnesses. *Id.* She also did four interviews of Roe and

one interview of Petitioner in the presence of his advisor—an attorney hired by Petitioner's mother. *Id.* at 9a, 68a–69a. After the investigation, Wallace issued a 71-page report with 15 exhibits. *Id.* at 69a. The report acknowledged conflicting evidence against Roe, including texts sent by Roe shortly after the incident. *Id.*

The irregularities cited in the petition do not show otherwise. Indeed, Petitioner cites irregularities alleged in an entirely different case. Pet. 25 (citing Pet. App. 28a–30a (in which the court "summarize[d] the allegations presented, and found to be insufficient to make out a claim of gender bias, in *Samford*")). They are not irregularities in *this* case.

C. Purported stereotyped views of gender

Petitioner's third category of evidence concerns purported stereotyped views of gender. Pet. 26–27. Again, the Eleventh Circuit expressly considered this evidence and addressed it at length. Pet. App. 31a–34a.

For example, the Eleventh Circuit acknowledged Petitioner's challenge to certain statistics in Rollins's training manuals, but the court correctly noted that Petitioner "does not cite to any evidence in the record indicating the respective statistics are questionable or false." Pet. App. 34a. The court further noted that some of the materials cited by Petitioner were "years removed from [his] investigation" and none were seen by the Title IX investigator in Petitioner's case. Pet. App. 40a–41a. Petitioner fails to address these deficiencies or otherwise explain how the Eleventh Circuit misconstrued the evidence. Pet. 26–27.

D. Purported investigation flaws

Petitioner's fourth category of evidence concerns purported investigation flaws. Pet. 27–28. Yet again, the Eleventh Circuit expressly considered this evidence and addressed it at length. Pet. App. 34a–37a. The court determined that "[m]ost of the[] alleged flaws are not flaws at all or demonstrate little connection to gender bias." Pet. App. 35a. Petitioner does not explain how the Eleventh Circuit misconstrued this evidence; he simply makes a conclusory argument that the evidence was sufficient to defeat summary judgment. Pet. 27–28.

In any event, the Eleventh Circuit did not err. For example, Petitioner emphasizes that Rollins's Title IX investigator interviewed him once but interviewed Roe multiple times. Pet. 27. The Eleventh Circuit expressly considered this evidence but noted that Petitioner had "submitted two written statements in addition to his interview. So [the investigator] still heard from [Petitioner] several times." Pet. App. 36a. The court further noted that the investigator interviewed Petitioner "at the end," and she testified that after she re-interviewed Roe, "there were no outstanding questions in her mind that gave her any reason to re-interview [Petitioner] for any reason." Pet. App. 36a (alterations adopted).

E. Purported patterns of decision-making

Petitioner's fifth category of evidence concerns purported patterns of decision-making at Rollins. Pet. 29–30. Once again, the Eleventh Circuit expressly considered this evidence and addressed it at length. Pet. App. 39a–40a. And again, Petitioner does not explain how the Eleventh Circuit misconstrued this evidence; he simply makes a conclusory argument that the

evidence was sufficient to defeat summary judgment. Pet. 29–30.

The Eleventh Circuit did not err in concluding that the evidence of purported patterns of decision-making was insufficient to defeat summary judgment. For example, Petitioner emphasizes that "Rollins never investigated a female for sexual misconduct while [Petioner] was a student there." Pet. 29. However, the Eleventh Circuit correctly noted that "[Petitioner's] statistical presentation is misleading." Pet. App. 39a. "Of the 12 reported cases of alleged sexual misconduct at Rollins between 2011 and 2018, none included complaints against a female student—11 were female students complaining about male students, and the other was a male student complaining about a male student." *Id.* Just as hiring statistics are not probative of discrimination unless they are disproportionate to the qualified labor pool—*see Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(k); *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 997 (1988)—investigation statistics are not probative of discrimination unless they are disproportionate to the reports of misconduct.

"[S]chools are not responsible for which students choose to report sexual misconduct." Pet. App. 39a–40a; *see also Doe v. Brown Univ.*, 43 F.4th 195, 207 (1st Cir. 2022) ("More women lodge complaints of sexual misconduct by men than vice versa."). And it is "unreasonable" to infer that sex discrimination is the cause of the statistical disparity "rather than recognize that other non-biased reasons may support the gender makeup of the sexual misconduct cases." *Bos. Coll.*, 892 F.3d at 92; *accord Doe v. Univ. of Denver*, 952 F.3d 1182, 1194 (10th Cir. 2020) ("A factfinder

could not reasonably infer from bare evidence of statistical disparity in the gender makeup of sexual-assault complainants and respondents that the school's decision to initiate proceedings against respondents is motivated by their gender."). "The gender of the students accused of sexual assault is the result of what is reported to the University, and not the other way around." *Bos. Coll.*, 892 F.3d at 92.

Petitioner also emphasizes that "many of the Rollins investigation reports delved into the sexual history of the male." Pet. 29. But Rollins's policy expressly states that an accused's sexual history "may be relevant where there is evidence of a pattern of misconduct." Pet. App. 62a. As the Eleventh Circuit noted, the inquiry into Petitioner's sexual history "was due to the fact that an anonymous caller reported that [Petitioner] had assaulted three female students." *Id.* at 40a.

F. Pressure from the Department of Education

Petitioner's statement of facts—but not his argument—addresses pressure from the Department of Education in the form of the Dear Colleague letter. Pet. 3–7. Perhaps Petitioner chose not to make an argument based on the letter because the Eleventh Circuit soundly rejected his argument below. *See* Pet. App. 38a–39a. As the court explained, the letter was rescinded *before* Rollins began its investigation of Petitioner, so any pressure had dissipated by that time. *Id.* at 38a.

Even if the investigation had begun before the Dear Colleague letter was rescinded, the letter would still be insufficient to permit a reasonable inference of sex discrimination. Then-Judge Barrett recognized as

much in *Purdue*, explaining that the "the letter, standing alone, is obviously not enough to get [the plaintiff] over the plausibility line." 928 F.3d at 669. Every other circuit to address the issue has held the same. *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018) ("Of course, all of this external pressure alone is not enough to state a claim that the university acted with bias in this particular case."); *accord Univ. of Scis.*, 961 F.3d at 210; *Regents of the Univ. of Minn.*, 999 F.3d at 578; *Doe v. Regents of Univ. of Cal.*, 23 F.4th 930, 937 (9th Cir. 2022); *Univ. of Denver*, 952 F.3d at 1192–93; *see also Bos. Coll.*, 892 F.3d at 92 (concluding that the plaintiff's argument about the Dear Colleague letter was "conclusory and meritless"); *Doe v. The Citadel*, No. 22-1843, 2023 WL 3944370, at *4 (4th Cir. June 12, 2023) (unpublished) (rejecting the plaintiff's reliance on the Dear Colleague letter because he "did not plead facts that would connect the letter to any sex discrimination *in his case*").

G. The evidence viewed collectively

Not only did the Eleventh Circuit consider each category of evidence individually, but the court also considered the evidence collectively. Pet. App. 40a–45a. Again, Petitioner does not explain how the Eleventh Circuit misconstrued the evidence; he simply makes a conclusory argument that the evidence was sufficient to defeat summary judgment. Pet. 30–31. The closest Petitioner comes to making a specific argument is his claim that the Eleventh Circuit distinguished "a clearly inapposite case." Pet. 31. Notably, the Eleventh Circuit addressed that case only because *Petitioner* submitted it as a supplemental authority. Pet. App. 43a.

In any event, the Eleventh Circuit did not err in concluding that that the evidence—"even when taken as a whole"—did not permit a reasonable inference of sex discrimination. Pet. App. 40a. Although some of Rollins's training materials contained problematic language, "some were years removed from [Petitioner's] investigation" and none were seen by the Title IX investigator. *Id.* at 40a–41a. The investigation flaws identified by Petitioner were "either not flaws at all or matters that have a gender-neutral explanation." *Id.* at 41a. "[T]he pressure from the Department of Education had dissipated by the time of [Petitioner]'s investigation, as the 2011 'Dear Colleague' letter was rescinded in September of 2017." *Id.* And the record contains "no discernable patterns of gender-biased decision-making." *Id.* In sum, there is no evidence from which a jury could reasonably infer that Petitioner was discriminated against "on the basis of sex." 20 U.S.C. § 1681(a).

CONCLUSION

Petitioner has failed to demonstrate a conflict among the circuit courts or an important question that should be settled by this Court. Instead, his petition attempts to have this Court reconsider the same summary-judgement evidence that both courts below correctly concluded was insufficient to support a reasonable inference of sex discrimination. "[Certiorari] jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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