No. 23-509

IN THE

# 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*

## REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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February 14, 2024

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## ARGUMENT IN REPLY

Petitioner John Doe, in further support of his Petition for a Writ of Certiorari, submits this Reply to the Brief in Opposition of Respondent Rollins College ("Respondent"). The Brief in Opposition does not rebut John Doe's showing why the Petition should be granted.

### I. THERE IS CIRCUIT CONFLICT ON THE FIRST QUESTION AS TO THE PROPER TITLE IX TEST FOR SEX DISCRIMINATION THAT IS VERY MATERIAL TO THIS CASE

The first question presented is: "Should this Court resolve the conflict among the Circuits as to the proper test for sex discrimination under 20 U.S.C. § 1681 in Title IX of the Education Amendments Act of 1972 by adopting the test stated in *Doe v. Purdue*, 928 F.3d 652, 667 (7th Cir. 2019), as the governing rule?" (Petition, p. i.) Respondent denies there is conflict on the first question as to the proper test for Title IX sex discrimination and urges three reasons, which lack merit to deny the Petition.

#### A. The Conflict Between *Yusuf* and *Doe v. Purdue*.

Respondent denies the conflict between the Second Circuit's "erroneous outcome" and "selective enforcement" tests of *Yusuf v. Vassar College*, 35

F.3d 709 (2d Cir. 1994), and the direct test described by *Doe v. Purdue*, 928 F.3d 652, 667-668 (7th Cir. 2019), relying upon the statutory text. Respondent cites language in *Van Overdam v. Texas A&M Univ.*, 43 F.4th 522, 527 (5th Cir. 2022), that denies meaningful tension between *Yusuf* and *Doe v. Purdue* and argues that the Seventh Circuit did not identify a conflict with *Yusuf*. (Br. In Opp, pp. 10-13.) The Seventh Circuit did, however, pursue a different approach, recognizing such doctrinal tests as "erroneous outcome" and "selective enforcement," stating there was "no need to superimpose doctrinal tests on the statute" and stating a test based on the statutory language. 928 F.3d at 667-668.

One circuit court decision has noted the conflict between the two approaches. "Looking to how our sister circuits have addressed this issue, courts are split" and noting that the Seventh Circuit in *Doe v. Purdue* "rejected *Yusuf* as an all-inclusive doctrinal framework for student disciplinary proceedings." *Sheppard v. Visitors of Virginia State Univ.*, 993 F.3d 230, 235 (4th Cir. 2021). The Second Circuit, however, recently continued its adherence to *Yusuf* tests, even as a dissenting judge denied that the "erroneous outcome" and "selective enforcement" tests are the exclusive ways for a Title IX plaintiff to state a claim. *Roe v. St. John's Univ.*, No. 21-1125, ___ F.4th ___, 2024 WL 357997 *5, *19, 2024 U.S. App. LEXIS 2114 (2d Cir. Jan. 31, 2024) (Sack, J. majority, Menashi, J, dissenting).

There is no question but that at least six circuits other than the Seventh Circuit have embraced the *Doe v. Purdue* test, and they are listed at page 15 of the Petition. Respondent in its Brief in Opposition at pages 4-5 list cases that follow or agree with *Doe v. Purdue*.

Where Respondent errs is in disregarding the different doctrinal approach of *Yusuf* and disregarding the continued adherence to *Yusuf* by some courts.

What the Petition shows is that the doctrinal "erroneous outcome" and "selective enforcement" tests of *Yusuf* are used, as they were by the Eleventh Circuit, to reach results that would not be reached using the superior method of analysis of the *Doe v. Purdue* test. See discussion in Petition, at pages 22-31, of more favorable treatment of Jane Roe, irregularities, stereotyped views of gender, investigation flaws, patterns of decision-making, evidence viewed collectively. However theoretically possible it is that the doctrinal "erroneous outcome" and "selective enforcement" tests of *Yusuf* might be used consistent with *Doe v. Purdue*, the reality of this case is that the Eleventh Circuit's treatment of this case facilitated a defense brief approach not consistent with *Doe v. Purdue*. (Petition, pp. 22-31.)

The Eleventh Circuit's opinion in this case continued to rely on the *Yusuf* framework. The Eleventh Circuit considered John Doe's claim under a "selective enforcement" analysis, asking whether there was "sufficient evidence for a jury to find that

the institution's treatment of similarly situated male and female students was inconsistent." 77 F.4th at 1352. The Eleventh Circuit treated John Doe's claim under the "erroneous outcome" analysis, asking whether there was sufficient evidence "both that he was innocent and wrongly found to have committed an offense and that there is a causal connection between the flawed outcome and [sex] bias". 77 F.4th at 1354. The Eleventh Circuit's use of *Yusuf* in this case contributes to the circuit conflict raised by the first question presented.

One can add that the Second Circuit's decision in *Roe v. St. John's Univ.*, No. 21-1125, ___ F.4th ___, 2024 WL 357997 *5, *19, 2024 U.S. App. LEXIS 2114 (2d Cir. Jan. 31, 2024) (Sack, J. majority, Menashi, J, dissenting), is an example of how the *Yusuf* tests can be misapplied to cut off meritorious Title IX claims that *Doe v. Purdue* would not.

As noted above, the Second Circuit has recently continued adherence to *Yusuf*. *Roe v. St. John's Univ.*, No. 21-1125, ___ F.4th ___, 2024 WL 357997 *5, 2024 U.S. App. LEXIS 2114 (2d Cir. Jan. 31, 2024) (Sack, J. majority). The Petition at pages 15 to 17 then discusses the decisions in three other circuits that also adhere to *Yusuf*. Respondent attempts to deny the circuit conflict created by the First Circuit decisions, but those decisions do not depart from *Yusuf*. *Doe v. Trustees of Boston College*, 892 F.3d 67 (1st Cir. 2018), *Doe v. University of Massachusetts-Amherst*, 933 F.3d 56 (1st Cir. 2019). Nor does the one D.C. Circuit case cited, *Robinson v. Howard Univ., Inc.*, 335 F.Supp.3d 13

(D.D.C. 2018), *aff'd sub nom*, *Robinson v. Wutoh*, 788 F.App'x 738 (D.C. Cir. 2019). Additionally, Respondent goes too far in reading *Doe v. Columbia*, 831 F.3d 46 (2d Cir. 2016), as not involving *Yusuf* theories. *Doe v. Columbia* was briefed, orally argued and won by John Doe's Counsel of Record here, and *Yusuf* was discussed. In retrospect, though, *Doe v. Columbia* may be read and has been read (in dissent) to go outside *Yusuf*. *Roe v. St. John's Univ.*, ___ F.4th ___, 2024 WL 357997 *19, 2024 U.S. App. LEXIS 2114 (2d Cir. Jan. 31, 2024) (Menashi, J., dissenting).

In sum, the conflict identified in the Petition on the first question stands.

Justice Gorsuch's observation in 2012 in *SECSYS, LLC v. Vigil*, 666 F.3d 678, 685 (10th Cir. 2012), cited by Respondent (Br. In Opp. p. 11), that intentional discrimination can take several forms is true enough, but it calls for a good test and does not justify living with what is a conflict between the *Yusuf* doctrinal "erroneous outcome" and "selective enforcement" tests, the statutory language based test of *Doe v. Purdue*, and the Eleventh Circuit's modification of *Doe v. Purdue*.

### B. The Eleventh Circuit's Defective Revision of the *Doe v. Purdue* Test.

Respondent strenuously says the Eleventh Circuit has expressed agreement with the *Doe v. Purdue* test and the Eleventh Circuit applied the *Yusuf* "erroneous outcome" and "selective enforce-

ment" tests because the Complaint in this case relied upon them. (Br. In Opp, pp. 13-14.) What Respondent does not acknowledge to the Court is what the Petition pointed out: "On July 5, 2018, John Doe sued Rollins in the Middle District of Florida federal court, asserting two claims under Title IX, 20 U.S.C. § 1681, *consistent with Title IX law at the time*, one Title IX claim for selective enforcement and one Title IX claim for erroneous outcome, and also asserting a third claim under Florida law for breach of contract." (Petition, p. 1; emphasis supplied.) The *Doe v. Purdue* decision was handed down on June 28, 2019, 928 F.3d 652 (7th Cir. 2019), and thus after the Complaint in this case was filed. Respondent ignores this point when asserting that it was appropriate for the Eleventh Circuit to turn to the *Yusuf* "erroneous outcome" and "selective enforcement" tests.

Much of the Eleventh Circuit's analysis in *Doe v. Rollins College* whether summary judgment was properly granted against John Doe's Title IX claims invoked the Second Circuit "selective enforcement" and "erroneous outcome" tests associated with *Yusuf* with a passing reference or two to what was a defective reformulation of the test stated in *Doe v. Purdue*, 928 F.3d at 667.

The Petition at pages 17-22 shows how the Eleventh Circuit defectively revised *Doe v. Purdue* test. Respondent does not deny that the Eleventh Circuit revised *Doe v. Purdue* test, but sidesteps the Petition's points by asserting the revision has no bearing on the case and in any event does not cre-

ate a conflict. (Br. In Opp, pp. 14-17.) Respondent's arguments on this point miss the mark.

Respondent cannot deny that the Eleventh Circuit's revision of the *Doe v. Purdue* test was at odds with the rule governing the sufficiency of federal complaints, this Court having ruled in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), "that a complaint must plead specific facts sufficient to support a *plausible* inference that the defendant is liable for the misconduct alleged." *Doe v. Columbia*, 831 F.3d 46, 54 (2d Cir. 2016) (emphasis supplied). The Eleventh Circuit's requirement of a "*reasonable"* inference effectively sets aside the practical commonsense approach of the *Doe v. Purdue* test and permits a court to interpose its own policy preferences as to what is considered discriminatory at the outset of litigation summary judgment principles.

Respondent erroneously denies that the Eleventh Circuit's revision was not consistent with summary judgment principles. The summary judgment question as formulated by the Eleventh Circuit thus relied upon its revision of the *Doe v. Purdue* test to be based upon a purported reasonableness requirement—the Eleventh Circuit posed the operative question for summary judgment as "[c]ould a reasonable jury . . . find that sex was a motivating factor in the university's disciplinary decision?" (22a, 77 F.4th at 1352.) The Eleventh Circuit reformulation of the *Doe v. Purdue* test, however, was not consistent with summary judgment procedural rules by ignoring important rules cabining the consideration of summary judgment by a court. Re-

spondent insists that the Eleventh Circuit formulation recognizes that the evidence must be viewed in John Doe's favor, but that is but one of the four rules cabining the grant of summary judgment identified at pages 20-21 of the Petition.

The Eleventh Circuit reformulation, by ignoring the rules cabining the consideration of summary judgment by a court, does not effectuate the practical common-sense approach of the *Doe v. Purdue* test and permits a court to interpose, in the context of summary judgment, its own policy preferences as to what is considered discriminatory. The Eleventh Circuit formulation allowed it to ignore evidence showing school administrators possessed such outdated, stereotypical, and discriminatory views of gender and sexuality and to explain away evidence that male and female students were treated differently by administrators and investigators as merely 'pro-victim,' while ignoring the fact that asymmetrical treatment relying on gender stereotypes can lead to a reasonable inference of discrimination on the basis of sex. In contrast, the Second Circuit "selective enforcement" and "erroneous outcome" tests associated with *Yusuf* are a cover for the Eleventh Circuit's assertion of various rationalizations fit for a defense brief, but not a summary judgment decision.

### C. The Superior Method Of Analysis of the *Doe v. Purdue* Test.

Respondent argues that even if there were a conflict on the first question presented, it would have

no bearing on this case, asserting that the *Yusuf* erroneous outcome and selective enforcement theories were stated in the Complaint. (Br. in Opp, pp. 17-18.) But as noted above, the July 2018 Complaint pre-dated the June 2019 *Doe v. Purdue* opinion; and what's more, Respondent's argument sidesteps the critically important section of the Petition at pages 22-31 that discusses the superior method of analysis of the *Doe v. Purdue* test, reviewing such issues as more favorable treatment of Jane Roe, irregularities, stereotyped views of gender, investigation flaws, patterns of decision-making, evidence viewed collectively. That the *Doe v. Purdue* test is the superior method of analysis is not a mere matter of arguing over evidentiary issues, but rather deciding a matter of public importance.

## II. RESPONDENT APPEARS TO MISAPPREHEND THE SECOND AND THIRD QUESTIONS PRESENTED

The second question presented is: "Is it an important federal question whether the U.S. Supreme Court should adopt the superior method of analysis for determining sex discrimination under 20 U.S.C. § 1681 in Title IX of the Education Amendments Act of 1972, contained in the test stated in *Doe v. Purdue*, 928 F.3d 652, 667 (7th Cir. 2019), applied in accordance with governing motion to dismiss and summary judgment procedural rules, and dispense with use or purported use of the "selective enforcement" and "erroneous outcome" Second Circuit

tests associated with *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994)?" (Petition, p. i.) Respondent argues, non-responsively, that there is no conflict on the second question, but even if there were, it would have no bearing on the case. (Br. in Opp. 18.) Per Supreme Court Rule 10, the second question focuses on the importance of the federal question of adopting the *Doe v. Purdue* test as the superior method of analysis for Title IX sex discrimination, a question which Respondent really does not address.

Respondent instead jumps to the third question presented: "Is it an important federal question 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 when a student who alleges that a college or university-imposed discipline in violation of Title IX?" (Petition, p. i.) Respondent argues there is no conflict on this question and that courts do not declare abstract categories of evidence that will always defeat summary judgment. (Br. in Opp. 18-19.) But Respondent is evading the point of the third question presented, which per Supreme Court Rule 10 focuses on the importance of the federal question of what permits an inference of gender bias.

## III. RESPONDENT'S DEFENSE OF THE ELEVENTH CIRCUIT OPINION DOES NOT GRAPPLE WITH THE PETITION'S ANALYSIS THAT THE ELEVENTH CIRCUIT IS IN ERROR IF THE SUPERIOR METHOD OF ANALYSIS OF THE *DOE v. PURDUE* TITLE IX SEX DISCRIMINATION TEST IS APPLIED

Respondent argues that the Eleventh Circuit considered all the evidence and concluded it was insufficient to defeat summary judgment. (Br. in Opp. 20-28.) What Respondent does not do is to grapple with the analysis at pages 21-31 of the Petition that the Eleventh Circuit is in error if the superior method of analysis of the *Doe v. Purdue* test for Title IX sex discrimination is applied.

It is easy for Respondent to say the Eleventh Circuit considered all the evidence, but the question here is how did the Eleventh Circuit consider the evidence? What Respondent does not face up to is that the Eleventh Circuit in *Doe v. Rollins College*, after improperly reformulating the *Doe v. Purdue* test, turned back to using or purporting to use the "selective enforcement" and "erroneous outcome" tests of *Yusuf*; and the Eleventh Circuit in *Doe v. Rollins College* did so in order to justify defense brief-type arguments to reject John Doe's Title IX claims. In contrast, the *Doe v. Purdue* test applied in accordance with governing procedural rules would not have supported that treatment.

In this case, procedural deficiencies in the Rollins disciplinary proceedings combined with additional evidence of sex bias permit a sufficient inference of gender bias to avoid summary judgment. Respondent emphasizes that the school conducted a lengthy investigation, but the record in this case, viewed as a whole, establishes that the discipline was imposed on the student with no hearing and using the lowest possible burden of proof. Rollins College, as a result of pressure from the Department of Education to crack down on sexual assault on campus, adopted policies and practices reflecting a gender stereotype that viewed men as sexual predators and women as defenders of virtue. In implementing these policies, Rollins: encouraged women to pursue complaints beyond the limitations period contained in its policy; used prosecutorial interview tactics; ignored information suggesting that male students could also be victims; and engaged in far reaching inquiries into the sexual history of male students. Every procedural irregularity favored the female student and prejudiced the male student, including the failure to comply with timelines, the different ways the investigator interviewed male and female students, and the wide-ranging inquiry into John Doe's (and only John Doe's) prior sexual history.

This Court has recognized that the law prohibits "decisions. . . predicated on mere 'stereotyped' impressions about the characteristics of males or females. . ." *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978). The

Court has also been clear that this includes stereotypes about both how the sexes are and how they behave, such as beliefs that men or women possess certain traits. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion) ("we are beyond the day when" decisions can be made "by assuming or insisting that [persons] matched the stereotype associated with their group"). The Title IX Coordinator, who supervised and approved the investigation, had publicly endorsed a stereotypical view of men by sending an email to the entire campus community describing men as acting "in a hyper-masculine and sexually aggressive manner to gain approval from their male peers. . ." (Email, R.74-7, PageID#2813.) Compare *Doe v. Purdue*, 928 F.3d at 669 (gender stereotypes could be inferred when a university center posted an article insinuating that men were "the cause of campus sexual assault.").

## CONCLUSION

Based on the foregoing and the original Petition, this Court should grant the Petition for a Writ of Certiorari and such other and further relief as deemed just and proper.

Dated: New York, New York
February 14, 2024

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