

26-5486 ORIGINAL
No. 25A948

In The
Supreme Court of the United States

JORDAN MICHELSON,

Petitioner,

v.

TRUSTEES OF BOSTON COLLEGE
D/B/A BOSTON COLLEGE LAW SCHOOL,

Respondent.

On Petition for a Writ of Certiorari
to the
Massachusetts Appeals Court

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QUESTIONS PRESENTED

Question 1: **Is the Seventh Amendment to the United States Constitution incorporated as to the states by the Fourteenth Amendment?** If the Court answers in the affirmative, it must then decide whether the Massachusetts Appeals Court infringed upon Petitioner's Seventh Amendment right to a "trial by jury" when, in a qualifying civil suit arising under the common law, the M.A.C. engaged in factfinding and made a dispositive determination of material fact.

Question 2: **Does *Celotex* allow courts to read *negative* material facts into the undisputed record for purposes of summary judgment?** Below, the Massachusetts Appeals Court raised a novel, case-dispositive issue of law *sua sponte* on a summary judgment disposition while discovery was still ongoing. The M.A.C. then resolved that issue by making a negative inference of fact, adverse to the nonmoving party, from the silence of the record. The question is whether the M.A.C. misapplied the summary judgment standard articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which controls in Massachusetts.

Question 3: **Does the Fourteenth Amendment to the United States Constitution give a civil plaintiff the right to notice of, and an opportunity to respond to, potentially dispositive defenses to his claim?** If the court answers in the affirmative, the issue is whether the Massachusetts Appeals Court trammelled those rights when it raised a complete defense *sua sponte* and made a dispositive inference of fact relevant to that defense without affording the Plaintiff-Appellant any opportunity to respond or present rebuttal evidence.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page. Respondent, Trustees of Boston College, d/b/a Boston College, d/b/a Boston College Law School, is a Massachusetts-based, tax-exempt 501(c)(3) organization that operates a university in Middlesex County, Massachusetts. Petitioner is an individual who was enrolled as a law student at Boston College Law School from Fall 2019 until Spring 2022 and as a graduate student in Boston College's philosophy department from Fall 2020 until Spring 2024.

RELATED CASES

Massachusetts Superior Court, Middlesex County

Michelson v. Trustees of Boston College d.b.a. Boston College Law School

Civil Action No. 218CV02940

Slip Op. (Feb. 6, 2024)

Massachusetts Appeals Court

Michelson v. Trustees of Boston College

Appeal No. 2024-P-0714

105 Mass. App. Ct. 1132 (Jun. 6, 2025)

Massachusetts Supreme Judicial Court

Michelson v. Trustees of Boston College

Further Appellate Review Petition No. FAR-30416

497 Mass. 1102 (Jan. 15, 2026)

NOT “DIRECTLY RELATED”

Massachusetts Superior Court, Middlesex County

Michelson v. Trustees of Boston College

Civil Action No. 2481CV01856

Slip Op. (March 17, 2026)

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PETITION FOR WRIT OF CERTIORARI

The Plaintiff-Appellant below, Jordan L. Michelson (“Petitioner”), petitions for a writ of certiorari to review the judgment of the Massachusetts Appeals Court.

OPINIONS BELOW

The Massachusetts Appeals Court decision, appended as Appendix A, is published as *Michelson v. Trustees of Boston College*, 105 Mass. App. Ct. 1132 (Jun. 6, 2025). The decision below was an unpublished Middlesex Superior Court memorandum and order granting summary judgment, and is appended as Appendix B. The Massachusetts Supreme Judicial Court’s discretionary denial of Further Appellate Review (FAR-30416), appended as Appendix C, is published at *Michelson v. Trustees of Boston College*, 497 Mass. 1102 (Jan. 15, 2026).

JURISDICTION

The Massachusetts Appeals Court issued its decision in June 2025 and denied two timely motions for reconsideration. The final denial was in November 2025. The Massachusetts Supreme Judicial Court’s denial of Further Appellate Review (FAR-30416) occurred on January 15, 2026. On February 18, 2026, Justice Jackson issued a 60-day extension for Petitioner to file this petition. The motion extends the time to file until June 14, 2026—which is a Sunday, making the petition timely if postmarked by Monday, June 15, 2026. Petitioner timely files this petition and invokes this Court’s jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

7th Amend.: *The Seventh Amendment to the United States Constitution provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”*

14th Amend.: *Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”*

FEDERAL AND STATE LAW

FRCP 56: *Rule 56(a) of the Federal Rules of Civil Procedure (FRCP) provides, in relevant part: “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”*

MRCP 56: *Rule 56(c) of the Massachusetts Rules of Civil Procedure (MRCP) provides, in relevant part: “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”*

Note: The Supreme Judicial Court of Massachusetts has explicitly adopted federal jurisprudence as controlling in summary judgment proceedings under MRCP Rule 56(c). See *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 712 (1991) (it makes “eminent good sense” for Massachusetts courts to use the federal summary judgment standard articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)); accord, *Roman v. Trs. of Tufts Coll.*, 461 Mass. 707, 711 (2012).

STATEMENT OF THE CASE

1. SUMMARY / DISPOSITION BELOW

Disposition: The case below involved a common-law breach of contract dispute between a student (“Petitioner”) and his university/law school (“Respondent”). After Respondent had responded to one set of interrogatories, but prior to document and deposition discovery, the parties filed cross-motions for partial summary judgment on two issues:

- (1) The first issue was whether Respondent, by publishing a “Notice of Nondiscrimination” on its website and handbooks, had made a legally-cognizable promise not to “discriminate” as a matter of law.
- (2) The second issue pertained to Respondent’s interrogatory admission that university and law school programming was “sensitive to students’ sex, color, gender, sexuality, race, ethnicity, national origin, and creed.” Petitioner argued that this was disparate treatment and, by definition, “discrimination.” Respondent contended that its demographically-sensitive programming was not “discrimination” because the term “discrimination” entails “the unfair or prejudicial treatment of an individual or group motivated by a wrongful animus toward a protected characteristic of the individual or group and prohibited by applicable law.”

Trial Court: The Middlesex Superior Court did not consider any contract issues. It granted summary judgment for Respondent solely on the second issue, reasoning that (a) Petitioner could not bring a “discrimination” claim unless he was a “member” of a “protected” demographic class, and (b) Respondent, by affirmatively “choosing not to be colorblind in a way that ignores all ethnic differences,” did not engage in “discrimination.”

Appeal: In a summary disposition without oral argument, the Massachusetts Appeals Court (“M.A.C.”) affirmed the lower court’s decision on an “antecedent” alternative

ground: “mutual assent.” According to the M.A.C., the dispositive issue was not whether Respondent had made a nondiscrimination promise by publishing the Notice of Nondiscrimination. Nor was it whether Respondent had, in fact, engaged in “discrimination.” Instead, it held that the key issue was whether Petitioner had “viewed” the Notice of Nondiscrimination and “assented to” its terms. Since the record was silent as to whether Petitioner had viewed the Notice, the M.A.C. inferred that Petitioner had not. That negative inference was dispositive.

Petitioner filed two motions asking the M.A.C. to reconsider its decision. Attached, Petitioner submitted evidence (a signed affidavit and a copy of Respondent’s Form 990 Schedule E) showing that the M.A.C. had “misapprehended” a key fact: Petitioner had, of course, seen the Notice of Nondiscrimination, which must—by law—¹be posted conspicuously so as to apprise applicants that Respondent accepts federal funding and therefore does not discriminate on the basis of demographic classifications. Respondent had never claimed otherwise.

Key Issues: Petitioner made three relevant legal arguments in his motions for reconsideration, and reiterated those arguments in a petition for Further Appellate Review (FAR):

- (1) First, the M.A.C. misapplied the rules of civil procedure when it made a dispositive negative inference in favor of the moving party on a summary judgment disposition.
- (2) Second, under the Fourteenth Amendment and state analog, Petitioner should have been afforded prior “notice” of all potentially dispositive legal issues and “an opportunity” to rebut factual assertions relevant to any newly-raised legal issue.
- (3) Third, the M.A.C. trammled Petitioner’s right to a jury trial under the Seventh Amendment when it made a case-dispositive fact determination about whether Petitioner had “viewed” the Notice of Nondiscrimination.

Outcome: The motions for reconsideration and FAR petition were summarily denied.

¹ *N.B.*—Artificial Intelligence (AI) was not used in the drafting of this Petition. The em dashes are artisanal.

2. THEORY OF THE CASE

A wise Chicago Cubs fan once said: “Judges are like umpires... Nobody ever went to a ball game to see the umpire.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 55 (2005). Chief Justice Roberts went on, rather famously, to say that judges in America’s adversarial adjudicatory system have a specific role: they are obligated “to call balls and strikes, and not to pitch or bat.” *Id.* at 56. This principle of judicial constraint—the “party representation principle” or “balls and strikes” rule—was unanimously affirmed by this Court just last year. *See Clark v. Sweeney*, 607 U.S. 7, 9 (2025) (*per curiam*) (“To put it plainly, courts ‘call balls and strikes’; they don’t get a turn at bat.”)

But in its dispensation of the matter below, the Massachusetts Appeals Court (or, as it often refers to itself, “the M.A.C.”) did not stick to “balls and strikes.” The M.A.C. not only took a proverbial “turn at bat”—it also loaded the bases, juiced the ball, lobbed up a pitch, kneecapped the left fielder, moved in the outfield fence, and announced a game-ending grand slam. The result was to our traditional adversarial adjudicatory system what the Savannah Bananas are to Major League Baseball: something else entirely. Petitioner cries foul.

While the Supreme Court of the United States has at times permitted state courts to indulge in a small amount of provincial Calvinball, it has never been shy about asserting its authority to remedy state-court “mischiefs,” *Martin v. Hunter’s Lessee*, 14 U.S. 304, 335 & 348 (1816), and misconstructions. *E.g., Ware v. Hylton*, 3 U.S. 199 (1796); *Norris v. State of Alabama*, 294 U.S. 587 (1935); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Gideon v. Wainwright*, 372 U.S. 335 (1963). State courts have autonomy but are not autonomous: they are part of a national juridical system, *see* U.S. Const. Art. VI § 1 (state-court judgments entitled to “full faith and credit” in other jurisdictions), and exercise a judicial power that approximates—and often transposes—the “judicial Power of the United States.” U.S. Const. Art. III § 1; *cf. Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (citing THE FEDERALIST NO. 82).

Accordingly, the Supreme Court has, from time to time, prescribed certain Constitutional and procedural minima. These prescriptions remind state judiciaries that they are more than mere bush leagues unto their federal counterparts. *See Kansas v. Carr*, 577 U.S. 108, 118 (2016) (holding that “review by this Court, far from *undermining* state autonomy, is the only possible way

to vindicate it”) (citation omitted). Simply put: when—as they often do—state courts play in the Big Leagues, they must play by Big League Rules.

Below, the M.A.C. clearly did not play by Big League Rules. The three-judge panel tossed aside the parties’ briefs, skipped oral arguments, ignored the trial court’s decision entirely, raised a novel issue of law *sua sponte*, conducted its own factfinding, made a dispositive inference (*ex silentio*) that was adverse to the non-moving party, got the facts upside-down, and refused to permit any rebuttal or corrective. *Michelson v. Trs. Of Bos. Coll.*, 105 Mass. App. Ct. 1132, *7-11 (Jun. 6, 2025). In so doing, the M.A.C. whiffed threefold.

First strike: the M.A.C. usurped the jury’s role and acted as a factfinder, which contravenes the Seventh Amendment—assuming, of course, that a right to civil jury trial is indeed “among those rights the Fourteenth Amendment secures against the States.” *Thomas v. Humboldt Cnty., California*, 146 S. Ct. 27 (2025) (Gorsuch, J., respecting the denial of certiorari). Second strike: the M.A.C. botched the summary judgment standard articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which is the controlling standard for summary judgment motions made pursuant to Rule 56 of the Massachusetts Rules of Civil Procedure. *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 712 (1991). Finally, the M.A.C. failed to afford Petitioner with the minimum “notice” and “opportunity to respond” required under the Fourteenth Amendment. *Cf. Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). Strike three.

3. BACKGROUND

i. LAWSUIT

Petitioner applied to Respondent’s law school, Boston College Law School (“BC Law”), in 2019. He was admitted, enrolled in Fall semester classes, and matriculated as a member of BC Law’s Class of 2022. At all times relevant to Petitioner’s application and matriculation, BC Law held itself out to the public as a non-discriminatory educational institution—that is, an institution that does not segregate programming or engage in discrimination “of any kind” on the basis of ancestry, color, race, ethnicity, sex, or other *de jure* taboo demographic classification. One way

that BC Law held itself out as a non-discriminatory institution was by publishing the university's official non-discrimination policy (the "Notice of Nondiscrimination") in various prominent locations as required by federal law. As the university averred in Schedule E of its 2019, 2020, 2021, and 2022 IRS Form 990 submissions, the school's Notice of Nondiscrimination was published widely and conspicuously such that applicants, matriculants, and the public at large would be sure to see it. *E.g.*, Appendix D, Ex. 2.

Unfortunately, BC Law did not actually abide by its non-discrimination policy. As Petitioner alleged and attested—and Respondent has never disputed any of these facts through admissible evidence, indignant hand-waving notwithstanding—BC Law administrators sorted the Class of 2022 into explicit demographic categories before students had even set foot on campus. The most important of these demographic categories was "LAHANAS-identifying," a classification that referred to a person's eligibility (based on ancestry, color, and sometimes sexual orientation) for membership in BC Law's school-run demographic-identity organization, "LAHANAS." Being classified as "LAHANAS-identifying" was, in terms of access to resources and opportunities, the best thing that could happen to a BC Law student: it opened doors to special onboarding and pipeline programs, unique networking and mentorship opportunities, exclusive extracurricular and career-services programming, and much, *much* more. "LAHANAS" programming was, as one BC Law administrator bragged, "the FastPass to the front of the line." See Appendix E (summary of evidence in the record).

BC Law also—quite literally—segregated its on-campus recruiting. BC Law permitted law firms and other employers to recruit "LAHANAS-identifying" students early using a system of demographically-exclusive 1L summer fellowships and 2L summer internships that were not subject to the usual on-campus recruiting time limitations. That meant that "LAHANAS-identifying" law students got first crack at the most competitive law firm internships (*i.e.*, the kind that turn into full-time positions), often securing one or more summer internships before their less demographically desirable peers could even *apply* for such internships. As a result, when all was said and done, students of BC Law's Class of 2022 experienced either a bumper year or a bloodbath in the job market – depending on demographic orientation. See, *e.g.*, National Association for Law Placement, *Boston College Law School Class of 2022 Summary Report* (reporting massive demographic disparities in the median postgraduation salaries of BC Law's Class of 2022).

But while Petitioner’s lawsuit certainly mentioned the material aspects of BC Law’s discriminatory praxis, the Complaint’s primary focus was not on material dispossession—it was on the moral dimension of the school’s demographic caste system. Among other things, Petitioner observed that BC Law’s deliberate use of stereotypes, segregations, and disparate treatment “teaches its students – the next generation of lawyers, lawmakers, judges, and clerks – that ‘justice’ is not derived from fidelity to law, that ‘civil rights’ are not for everyone, and that ‘equality’ is just a rhetorical device.” Complaint at 2. This institutionalized rejection of universal rights—which was exacerbated by faculty and administrators’ open contempt for colorblind equality under the law—was the primary injustice that Petitioner, in bringing the lawsuit, opposed. *See id.* at 1 (“The principle is simple: subjecting a person to discrimination because of *what* they are, rather than judging that person by *who* they are, is repugnant to human dignity and civic equality.”)

ii. SUPERIOR COURT

On October 26, 2021, Petitioner filed a *pro se* complaint in Middlesex Superior Court. The Complaint alleged common-law breach of contract, Massachusetts Civil Rights Act (MCRA), and statutory discrimination claims. In May 2022, after waiting *just* long enough to render Petitioner’s preliminary injunction and requested injunctive relief moot (because graduation was “imminent”), the Superior Court held that the MCRA does not prohibit discrimination simplex and dismissed the statutory discrimination claims without prejudice for failure to fully exhaust administrative remedies with the Massachusetts Commission Against Discrimination, the U.S. Department of Education and/or the EEOC. However, the Superior Court allowed the breach of contract claim to go forward. *See* Dkt. #7.0 (“The Complaint adequately alleges the existence of a contract, the inclusion of a nondiscrimination promise, and actions in breach of that promise.”)

On October 3, 2022, the parties agreed to extend discovery and tracking order deadlines by nine months. Shortly thereafter, BC Law submitted interrogatory responses that identified a non-comprehensive list of over a hundred “specific, current policies and programs” that were “sensitive to students’ sex, color, gender, sexuality, race, ethnicity, national origin, and creed.” Respondent’s Supp. Response to Interrogatory No. 2. That certainly *seemed* like “discrimination” to Petitioner, especially given Respondent’s insertion of a legally baseless *mens rea* qualifier—a “wrongful

animus”—into its supplemental response to Interrogatory Number 4.² So Petitioner, before receiving any document or depositional discovery, moved for partial summary judgment on the issue of “discrimination.”³ His theory was that there was no *factual* dispute that BC Law classified its student body on the basis of demographic classifications and indulged in “unfair or prejudicial treatment” on the basis of those classifications, only a *legal* dispute as to an issue of law (*i.e.*, whether such treatment is “discrimination” *per se* or whether “discrimination” also requires a “wrongful animus toward a protected characteristic of the individual or group”). Appendix F.

Petitioner also asked the Superior Court to find an express⁴ non-discrimination warranty because Trustees of Boston College published its official non-discrimination policy in handbooks and official websites, which typically creates an express contractual term under Massachusetts law. *E.g.*, *Schaer v. Brandeis*, 432 Mass. 474 (2000); *MIT v. Guzman*, 90 Mass. App. Ct. 1102 (2016); *Morris v. Brandeis*, 60 Mass. App. Ct. 1119 (2004); *Sonoiki v. Harvard*, 37 F.4th 691 (1st Cir. 2022); *Doe v. Boston College*, 942 F.3d 527 (1st Cir. 2019); *Doe v. Boston College*, 892 F.3d 67 (1st Cir. 2018); *Walker v. Harvard*, 840 F.3d 57 (1st Cir. 2016); *Cloud v. Boston Univ.*, 720 F.2d 721 (1st Cir. 1983); *Kestenbaum v. Harvard*, 743 F. Supp. 3d 297 (D. Mass. 2024); *Czerwienski v. Harvard*, 666 F. Supp. 3d 49 (D. Mass. 2023); *Doe v. Harvard*, 462 F. Supp. 3d 51 (D. Mass. 2020); *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195 (D. Mass. 2017).

² To wit:

Interrogatory No. 4

Please provide a definition of the word “discrimination” insofar as it forms the basis of Defendant’s averments that Boston College does not engage in, countenance, facilitate, advocate for, or encourage discrimination “of any kind.”

Supplemental Response No. 4

Boston College generally interprets the term “discrimination” to mean the unfair or prejudicial treatment of an individual or group motivated by a wrongful animus toward a protected characteristic of the individual or group and prohibited by applicable law.

³ This is widely regarded as a bad move. Note, however, that the proper remedy for a premature motion by a *pro se* litigant or inexperienced lawyer is to deny the motion. That is not what happened here. Here, the Superior Court cancelled discovery, permitted a cross-motion that would otherwise have been impermissible, refused to consider any additional facts, and applied judicial discretion to box out (and ultimately kibosh) Petitioner’s statutory discrimination claims. Dkt. #17 & 19-22; *see also* Civil Action No. 2481CV01856 (slip op., March 17, 2026) (dismissing parallel suit with statutory discrimination and retaliation claims on *res judicata* grounds, despite fact that statutory claims had not been ripe when cross-motions were filed and retaliation occurred after the filing of the first lawsuit).

⁴ While Petitioner’s motion prayed only for summary judgment as to express contract, it did not disclaim the other theories of contract or other methods of contract formation that had been explicitly pled. *E.g.*, Complaint at ¶ 14 (“The Covenant encompassed both express and implied manifestations by the Defendant and its agents.”)

BC Law then cross-moved for full summary judgment as to all issues. The school made two—and only two—affirmative arguments. First, BC Law argued that the university’s official non-discrimination policy, which at all relevant times was published (in compliance with federal law) on school websites and in handbooks under the title “Notice of Nondiscrimination,” merely “state[d] Boston College’s policy, not a contractual promise.” Dkt #16. Second, BC Law argued that Petitioner was not “a member of a protected class” and therefore could not prove “that Boston College treated him improperly because of his membership in such a protected class.” *Id.* The rest of BC Law’s arguments were prospective assertions that Petitioner would ultimately be unable to substantiate his allegations.

The Middlesex Superior Court issued a ruling on February 6, 2024. The court’s opinion sidestepped the contract issues entirely and addressed the case as if Petitioner had filed a discrimination claim under the Civil Rights Act of 1964 or the Massachusetts equivalent, Chapters 151B and 151C. The substance was noteworthy. First, and most significantly, the court held that the discrimination claim failed outright because Petitioner had not explicitly identified his demographic bona fides (*i.e.*, his race, color, ethnicity, sexual orientation, etc.). *See* Slip Op. at 3-5 (Petitioner failed to establish an “essential element” of a discrimination claim: “membership in a protected class”). On that ground, the Superior Court held that there was not a “valid” discrimination claim and granted BC Law’s motion for summary judgment.

But the Superior Court did not stop there. It also analyzed BC Law’s disparate treatment of students through the lens of “historical context”—and found, without qualification, that BC Law’s two-tiered treatment was not only legal but “laudable.” Slip Op. at 6-7. The Superior Court then turned to the issue of whether deliberately segregated programming was permissible under *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 384-411 (2023) and found that it actually *was* permissible—as long as the segregation was *de facto* rather than *de jure*. Slip Op. at 6-7. The Middlesex Superior Court ultimately concluded that BC Law should not be punished but rather praised for “choosing not to be colorblind in a way that ignores all ethnic differences.” Slip Op. at 7.

iii. THE M.A.C.

Petitioner appealed. Taking the Middlesex Superior Court’s decision at face value, his appeal brief focused primarily on whether he had set forth a “valid” allegation that BC Law had

engaged in “discrimination” as that term is understood under state and federal law. He addressed issues of express and implied contract only in passing. Likewise, BC Law’s brief focused mostly on the “discrimination” issue. Where the parties touched on contract formation, they focused solely on the issue of the university’s *promise* (i.e., the *offer*) to prospective students. *E.g.*, Appellee’s Brief at 32 (“While Boston College must, and does, comply with state and federal antidiscrimination laws, it does not do so as a matter of contract with its students. Indeed, Michelson does not cite a single authority to support his assertion that the legally-required Notice constitutes a contractual promise.”)⁵ Thus, the briefs that were before the M.A.C. presupposed that Petitioner had seen the Notice of Nondiscrimination and had formed a subjective expectation based on that Notice; BC Law did not disagree with either premise, but argued that contract liability nevertheless did not attach because the Notice “states a policy, not a contractual promise.” *Id.* In other words: *caveat emptor*.

On June 6, 2025, a three-judge panel of the Massachusetts Appeals Court (*d.b.a.* “the M.A.C.”) issued a non-precedential “summary disposition without oral argument” pursuant to M.A.C. Rule 23.0. An M.A.C. Rule 23.0 summary disposition is non-precedential, precludes any novel interpretations of law, and is normally only appropriate only when the lower court’s opinion was obviously correct or obviously wrong. *See Sabatinelli v. Travelers Insurance*, 369 Mass. 674, 679 (1976) (summary disposition is only allowed where the trial court and M.A.C. are “in full agreement”). Here, however, the M.A.C. completely ignored the lower court’s opinion and instead affirmed summary judgment on alternative grounds—namely, the “antecedent” issue of contract formation. *See Michelson v. Trs. of Bos. Coll.*, 105 Mass. App. Ct. 1132 at *8 (Jun. 6, 2025) (“Although the [Middlesex Superior Court] judge focused on the issue of breach, we need not address it, as the antecedent issue of formation is dispositive.”)

Contract formation has two parts: *offer* and *acceptance*. The M.A.C. didn’t buy BC Law’s arguments below that the Notice of Nondiscrimination was not part of the *offer* to prospective students (i.e., that the Notice was merely aspirational and not meant to be taken as a serious non-

⁵ Legal arguments aside, this was demonstrably untrue. *See* Appellant’s Brief at 26-27 (quoting *Guckenberger v. Boston Univ.*, 974 F.Supp. 106, 150 (D. Mass. 1997) for the proposition that “Under Massachusetts law, the promise, offer or commitment that forms the basis of a valid [student-university] contract can be derived from statements in handbooks, policy manuals, brochures, catalogs, advertisements, and other promotional materials”); *see also id.* at 27 (BC’s employee handbook, which is one of the many places that the Notice of Nondiscrimination was published, states that “University Policies impose binding obligations on faculty, students and/or staff, as applicable.”)

discrimination promise)—presumably because there is so much case law to the contrary. *See supra* at 9 (string cite). The M.A.C. instead focused on the latter part of contract formation: the issue of *acceptance* and, more specifically, the *meeting of the minds* (a.k.a. “mutual assent”). An interesting legal issue, to be sure; but not one that was before the appellate court. The parties had never even mentioned, let alone briefed, that issue below; and the factual records (disputed *and* undisputed) were completely silent on the matter. So this was not a minor detour from the legal and factual issues raised below—it was a full-fledged *frolic*.

The M.A.C. went on to hold that the existence of a non-discrimination clause turned on a single question of fact: whether Petitioner had “viewed” and “assented to” the Notice of Nondiscrimination.⁶ *Michelson*, 105 Mass. App. Ct. 1132 at *10-11. What did the stipulated record say about that fact issue? Nothing. What about BC Law’s briefs and affidavits? Nada and zilch. Had Respondent ever asserted that Petitioner had not seen the Notice of Nondiscrimination? Absolutely not. In fact, it knew the opposite to be true. But none of that mattered. The M.A.C., after conducted its own factfinding, determined *sua sponte* that a new undisputed “fact” could be added to the undisputed record: the *negative* “fact” that Petitioner had never “even viewed” the Notice of Nondiscrimination. *Id.* In light of that shiny new negative “fact,” the M.A.C. held that Petitioner could not possibly hope to prove at trial that he had “assented to” a non-discrimination promise. *Id.* Case dismissed.

iv. RECONSIDERATION/FAR

The M.A.C.—in addition to taking a “turn at bat,” *contra Clark*, 607 U.S. at 9—whiffed on the facts: Petitioner had, *undisputedly*, “viewed” the Notice of Nondiscrimination. *Many times*. Not only did he view the Notice while visiting the BC Law website, which occurred on numerous occasions prior to his matriculation, but also when he received and filled out various application forms, during pre- and post-enrollment onboarding, and during a mandatory pre-matriculation DEI webinar. This was not contested by Respondent because it is a federally-funded university and therefore must, as a matter of federal law, publish its non-discrimination policy (*i.e.*, the “Notice

⁶ *But see Kauders v. Uber Techs., Inc.*, 486 Mass. 557, 572 (2021) (“actual notice of the terms” not necessary); *Polonsky v. Union Fed. Sav. & Loan Ass’n*, 334 Mass. 697, 701 (1956) (party is bound by contract terms “whether he reads it or not”). The notion that a party must individually assent to every clause in a contract would be especially unusual here, where the contract was between a sophisticated repeat actor (*e.g.*, a university) and an unsophisticated consumer (or student). *See, e.g.*, 3 CORBIN ON CONTRACTS § 28.38 (“The more sophisticated the party, the greater the burden to read [the contract terms].”)

of Nondiscrimination”) on its advertising materials, student handbooks, and websites. *E.g.*, 34 C.F.R. § 100 *et seq.* (schools that accept federal funds must inform all prospective students of non-discrimination policy).

This was, of course, the reason for Petitioner’s heavy emphasis on the Notice of Nondiscrimination—the Notice was not some airy aspirational mantra in one odd advertising pamphlet, but a deliberately-written, required-by-law warranty of non-discrimination that Respondent published repeatedly in numerous highly-visible locations including handbooks and policy statements. *See Kestenbaum*, 743 F. Supp. 3d at 312 & n.15 (anti-discrimination provision was actionable as contract term because it was “tethered” to specific conduct, rather than merely aspirational). When it comes to university-student contracts, that was (at least, prior to the M.A.C.’s non-precedential decision) the whole ballgame. *E.g.*, *Sonoiki*, 37 F.4th 691 at 703 (undisputed that student handbook was binding on university); *Doe v. Amherst Coll.*, 238 F. Supp. at 218 (gender discrimination claim sounded in contract).

Petitioner filed two motions for reconsideration. The first appended an affidavit stating, in no uncertain terms, that Petitioner had repeatedly “viewed” the Notice of Nondiscrimination prior to matriculating and had clearly assented to its incorporation into the university-student contract. Appendix D, Ex. 1. The second motion appended a copy of the Schedule E that was attached to Respondent’s FY2019-2020 IRS Form 990. That Schedule E, which was signed under penalty of perjury, attested—*inter alia*—that Respondent “publicized its racially nondiscriminatory policy... in a way that makes the policy known to all parts of the general community it serves” and that the university “included a statement of its racially nondiscriminatory policy toward students in all its brochures, catalogues, and other written communications with the public dealing with student admissions.” Appendix D, Ex. 2.

Petitioner’s motions for reconsideration also argued—at length—that the M.A.C. should reconsider its decision on the ground that it had misapplied basic principles of summary judgment procedure and trammelled Petitioner’s rights under the Seventh and Fourteenth Amendments. He reiterated these arguments in a Petition to the Massachusetts Supreme Judicial Court for Further Appellate Review (FAR). Both the motions for reconsideration and the FAR petition were denied without a written opinion. Petitioner now turns to the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

1. This case would be a strong vehicle for incorporating the Seventh Amendment

This case presents this Court with an opportunity to affirm that the Seventh Amendment to the United States Constitution is incorporated as to the states. While a previous instantiation of the Supreme Court held otherwise in *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916), that decision “is something of a relic” that the Supreme Court’s modern cohort “should confront... soon.” *Thomas v. Humboldt Cnty., California*, 146 S. Ct. 27 (2025) (Gorsuch, J., respecting the denial of certiorari). This case is a strong vehicle for such a confrontation because it involves a common-law claim, a demand to have all facts tried by jury, and a state court that went far out of its way to make a case-dispositive determination of fact. None of *Humboldt County*’s vehicle problems apply.

2. Misapplication of *Celotex* is a recurring issue of great importance

Forty years ago, in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court contemplated the narrow circumstances in which a court might be permitted to make a negative inference against the nonmoving party on summary judgment disposition. What was supposed to be a narrow exception to Civil Procedure Rule 56 has, in many cases, swallowed the rule. Today, state and federal courts regularly invoke *Celotex* and its progeny to gatekeep trial-by-jury, turning summary judgment dispositions into mini-bench trials. This was never the purpose of Rule 56 and was never the intention of the *Celotex* court. Massachusetts explicitly uses *Celotex* as its summary judgment standard, *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 712 (1991); *Roman v. Trs. of Tufts Coll.*, 461 Mass. 707, 711 (2012), making this case a clean vehicle for correcting judicial misapprehensions about *Celotex* and reestablishing the proper application of Rule 56.

3. The Seventh Amendment and *Celotex* issues are interrelated

A convenient aspect of this case is that the Seventh Amendment and *Celotex* issues are not completely independent legal issues; in a sense, they are two sides of the same coin. Summary judgment rules—whether state or federal—outline the affirmative powers of courts to issue summary judgment, while the Seventh Amendment delineates the maximum permissible extent of

those powers. Under *Celotex* and its progeny, these should never be in conflict. See *Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001) (“The Seventh Amendment is not violated by proper entry of summary judgment, *because such a ruling means that no triable issue exists to be submitted to a jury*”) (citing *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319–20 (1902)) (emphasis added); accord, *In re Akers*, 485 B.R. 479, 482 (D.D.C. 2012), *aff’d*, 598 F. App’x 4 (D.C. Cir. 2015) (collecting cases). The upshot of this dynamic is that incorporating the Seventh Amendment should have little practical effect on the summary judgment jurisprudence of the states that follow the *Celotex* standard (almost all of them, except a few outliers that place a heavier burden on the movant) unless courts are misapplying that standard.

4. This case presents an opportunity to illustrate the “balls and strikes” rule

The “party representation principle”—a.k.a. the “balls and strikes” rule—is fundamental to American law. See *Clark v. Sweeney*, 607 U.S. 7, 9 (2025) (*per curiam*) (in America, judges “don’t get a turn at bat.”) But it is not an intuitive principle and is often maligned by certain jurists, who point out that some other countries have ditched the principle entirely. This case artfully illustrates *why* the principle of party representation is so important: when courts stray from the briefs, they lose touch with the facts and law *of the particular case*. Here, the M.A.C. anchored on the facts and law of another case, *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 150 (D. Mass. 1997), which involved a completely different disposition (post-bench trial rather than pre-discovery) and a very different basis for the formation of a contract (language in a university mailer rather than an official, required-by-law policy). Without adversarial presentation to sharpen its perception, the M.A.C. had no way to prevent itself from hallucinating facts that neither party claimed were true. Thus, while the Supreme Court has previously explained *that* courts should stick to calling “balls and strikes,” this case is an opportunity to show *why*.

5. This case is straightforward and has a clean, tidy fact record

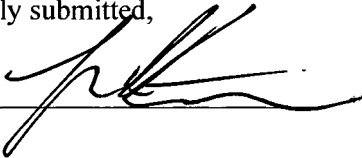
They say that hard cases make bad law. *Allen v. Morgan Cnty.*, 103 U.S. 515 (1880) (Harlan, J.). Happily, this is not such a case. The facts below are straightforward and simple – the consolidated statement of undisputed facts contains just twenty-one enumerated paragraphs. Also, as summary judgment was granted prior to any substantive discovery (*i.e.*, there clearly was not “adequate time for discovery,” *Celotex*, 477 U.S. at 322), all gaps are simply resolved to the

nonmovant. This results in a tidy factual record that nevertheless clearly presents the relevant legal issues. Thus, if certiorari is granted, the matter can be resolved quickly and efficiently.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'J' followed by a series of loops and a long horizontal stroke.

Date: June 14, 2026