

No. 26-5486

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner frames this case as raising federal questions regarding incorporation of the Seventh Amendment and interpretation of the Fourteenth Amendment.

Respondent follows the sequencing of Petitioner's questions presented but restates them to reflect the record correctly. The questions actually presented are:

1. Whether this Court should review a state intermediate court's unpublished affirmance of summary judgment on a state law contract-formation ground, where petitioner offered no record evidence that he viewed or assented to the alleged contract term, and where the petition depends on materials and factual assertions that were never part of the record.
2. Whether this case presents a suitable vehicle for revisiting *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916), where Petitioner first invoked the Seventh Amendment in a motion for reconsideration after the Appeals Court affirmed summary judgment, the judgment rests on Petitioner's failure to prove an enforceable contract term, and summary judgment for failure of proof does not deny any jury trial right he might otherwise have.
3. Whether *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), requires a plaintiff bearing the burden of proof on an element to come forward with affirmative evidence sufficient to establish that element, and permits judgment against a plaintiff who fails to do so.
4. Whether the Fourteenth Amendment's Due Process Clause entitles a civil plaintiff to additional notice before an appellate court affirms summary judgment on the ground that he failed to prove an enforceable contract term, where formation is a threshold element of the breach of contract claim, the defendant challenged formation, and the plaintiff, after a full opportunity to respond, chose to rest on a deliberately streamlined record.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Trustees of Boston College d/b/a Boston College Law School submits this Corporate Disclosure Statement. Respondent Trustees of Boston College states that it is a non-profit organization. Trustees of Boston College has no parent corporation and no publicly held corporation owns 10% or more of it. Trustees of Boston College is a citizen of the Commonwealth of Massachusetts.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	8
I. THE FEDERAL QUESTIONS PRESENTED WERE NEITHER DECIDED BELOW NOR SHOWN TO HAVE BEEN TIMELY OR PROPERLY PRESENTED	9
A. The federal questions presented were not properly raised or decided in the courts below	9
B. The Seventh Amendment question was first raised after the Appeals Court ruled, and no state court decided it	9
C. The summary judgment question is not a federal question	10
D. The Petition depends on materials first offered after judgment	10
II. THE PETITION SEEKS FACT-SPECIFIC REVERSAL OF AN UNPUBLISHED STATE LAW DECISION	11
A. The Petition’s factual premises are not in the record	11
B. The Appeals Court did not infer a fact against Petitioner. It concluded that he failed to provide evidence of the fact.....	13
C. Petitioner’s misunderstanding of the summary judgment standard is not correctable by certiorari	15
III. THIS CASE IS AN UNSUITABLE VEHICLE FOR RECONSIDERING <i>BOMBOLIS</i>	17
IV. THE APPEALS COURT DECIDED AN ELEMENT OF THE CLAIM THE PARTIES PRESENTED	18
A. The court decided the question Petitioner’s own claim presented.....	18
B. The Appeals Court had the authority to affirm on formation grounds, and the record supports its conclusion.....	19

V. PETITIONER RECEIVED NOTICE AND AN OPPORTUNITY TO RESPOND	22
CONCLUSION.....	23
SUPPLEMENTAL APPENDIX	1a

TABLE OF CITED AUTHORITIES

CASES

<i>477 Harrison Ave., LLC v. JACE Boston, LLC</i> , 483 Mass. 514, 134 N.E.3d 91 (2019)	19
<i>Adams v. Robertson</i> , 520 U.S. 83 (1997) (per curiam).....	9
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	13, 16
<i>Archer v. Grubhub, Inc.</i> , 490 Mass. 352, 190 N.E.3d 1024 (2022).....	14, 16
<i>Canney v. New England Tel. & Tel. Co.</i> , 353 Mass. 158, 228 N.E.2d 723 (Mass. 1967)	18, 20
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	i, 10, 12
<i>Coonce v. Coonce</i> , 356 Mass. 690, 255 N.E.2d 330 (1970).....	10
<i>Currens v. Bd. of Assessors of Boston</i> , 370 Mass. 249, 346 N.E.2d 849 (1976)	10
<i>Doe v. Amherst College</i> , 238 F. Supp. 3d 195 (D. Mass. 2017).....	21
<i>Gabbidon v. King</i> , 414 Mass. 685, 610 N.E.2d 321 (1993).....	19
<i>Guckenberger v. Boston Univ.</i> , 974 F. Supp. 106 (D. Mass. 1997).....	21
<i>Herndon v. Georgia</i> , 295 U.S. 441 (1935).....	9
<i>Howell v. Mississippi</i> , 543 U.S. 440 (2005) (per curiam)	9
<i>I & R Mech. Inc. v. Hazelton Mfg. Co.</i> , 62 Mass. App. Ct. 452, 817 N.E.2d 799 (2004).....	17
<i>Kourouvacilis v. General Motors Corp.</i> , 410 Mass. 706, 575 N.E.2d 734 (1991).....	10, 13–16
<i>Love v. Massachusetts Parole Bd.</i> , 413 Mass. 766, 604 N.E.2d 28 (1992).....	10
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	23
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973).....	16
<i>Michelson v. Trustees of Boston College</i> , 105 Mass. App. Ct. 1132, 261 N.E.3d 908, 2025 WL 1604368 (Mass. App. Ct. June 6, 2025) (Rule 23.0 order)	19
<i>Minneapolis & St. Louis R.R. Co. v. Bombolis</i> , 241 U.S. 211 (1916).....	i, 17
<i>Sabatinelli v. Travelers Ins. Co.</i> , 369 Mass. 674, 341 N.E.2d 880 (1976).....	2
<i>Schaer v. Brandeis University</i> , 432 Mass. 474, 735 N.E.2d 373 (2000).....	20
<i>Sonoiki v. Harvard Univ.</i> , 37 F.4th 691 (1st Cir. 2022).....	21
<i>Thomas v. Humboldt Cnty.</i> , 124 F.4th 1179 (9th Cir. 2024).....	17

<i>Thomas v. Humboldt Cnty.</i> , 146 S. Ct. 27 (2025)	17
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CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VII.....	i, 1, 8–9, 17
U.S. Const. amend. XIV § 1.....	i, 17, 23

STATUTES

28 U.S.C. § 1257(a)	9
---------------------------	---

RULES

SUP. CT. R. 10	2, 8, 11
SUP. CT. R. 14.1(g)(i)	9
MASS. R. A. P. 23.0	2, 7, 11, 18, 20
MASS. R. Civ. P. 56(e)	12
MASS. R. Civ. P. 56(f).....	6

INTRODUCTION

Petitioner sued Boston College for breach of contract, contending that a legally required “Notice of Nondiscrimination” posted on the university’s website was an enforceable promise made to him as a law student. Pet. 8–9.¹ The Massachusetts Appeals Court affirmed summary judgment for Boston College because Petitioner, who bore the burden of proof, offered no evidence that he ever viewed, let alone assented to, that Notice. Pet. App. A 9–11. The Appeals Court’s unpublished, nonprecedential decision, which applied settled Massachusetts contract and summary judgment principles to a record Petitioner chose to leave thin, does not warrant this Court’s review.

First, none of the federal questions now raised were addressed by or decided below, and Petitioner has not carried his burden of showing that each was timely and properly presented. Petitioner raised his Seventh Amendment argument for the first time in a motion for reconsideration, after the Appeals Court affirmed. Pet. 4, 13. His due process theory likewise surfaced only after decision, and the Appeals Court and the Supreme Judicial Court disposed of his post-decision filings without opinion. Pet. 13; Supp. App. 19, 21. His summary judgment question arises under Massachusetts procedure, not federal law. And the Petition rests on materials that

¹ “Pet.” refers to the petition for writ of certiorari; “Pet. App.” to the appendix to the petition. The page numbers referenced in “Pet. App.” refer to the internal pagination of each lettered section as Petitioner’s Appendix is not consecutively paginated. “Supp. App.” refers to Respondent’s Supplemental Appendix. The APP designations refer to the record appendix filed in the Massachusetts Appeals Court, excerpts from which are included as Appendix E of Respondent’s Supplemental Appendix.

were never part of the summary judgment record. *See* Pet. 4, 7, 12–13; Pet. App. D, E.

Second, the Petition seeks fact and record specific review of state law. It identifies no conflict among the lower courts. *See* Sup. Ct. R. 10. The judgment rests on whether a website notice became a term of a contract between a private university and its student. The courts below resolved that question under settled Massachusetts law. The Supreme Judicial Court denied both direct and further appellate review. Pet. 13; Supp. App. 21.

Third, contrary to Petitioner’s claim that the decision below changed “the whole ballgame” for “university-student contracts,” Pet. 13, the unpublished Rule 23.0 order is nonprecedential and binds no other court.² Pet. 11; *see* Sup. Ct. R. 10. The Appeals Court assumed, without deciding, that Petitioner and Boston College had a contractual relationship. Pet. App. A 9 n.6. The Appeals Court went on to hold that “[a]lthough the [Superior Court] judge focused on the issue of breach, we need not address it, as the antecedent issue of formation is dispositive.” Pet. App. A 8. That narrow holding does not call into question the enforceability of the handbooks and other documents that universities deliver to, and that are accepted by, their students.

² To the extent Petitioner suggests that the Appeals Court denied him due process by deciding his appeal under Rule 23.0, *see* Pet. 11, his argument fails. There is no general constitutional right to appellate oral argument. *Sabatinelli v. Travelers Ins. Co.*, 369 Mass. 674, 677, 341 N.E.2d 880, 882 (1976). Petitioner’s reliance on *Sabatinelli* is misplaced. That case addressed former Appeals Court Rule 1:28, which permitted a panel only to “affirm the action of the court below” where “no substantial question of law is presented.” *Id.* at 881 n.2. The current Appeals Court Rule 23.0 authorizes a panel to “affirm, modify, or reverse,” and provides that “[t]he panel need not provide an opportunity for oral argument before disposing of cases under this rule.” MASS. R. A. P. 23.0.

Fourth, the Appeals Court decided an element of the claim the parties presented. Contract formation is a threshold element of the breach of contract claim Petitioner chose to bring, and he bore the burden of proving that the Notice was a term of any contract. Boston College, as the cross-moving party, pointed to the absence of any evidence of notice or assent, which shifted the burden to Petitioner. Petitioner came forward with no evidence of notice or assent after deliberately streamlining the record.

Finally, the Petitioner received notice and an opportunity to respond. The formation ruling came as no surprise, because Boston College challenged formation in both its motion to dismiss and its cross-motion for summary judgment. The Appeals Court’s unpublished decision, resting on Massachusetts law and a factually deficient record of Petitioner’s own making, does not warrant review.

STATEMENT OF THE CASE

On October 26, 2021, Petitioner filed a suit against Boston College in Middlesex Superior Court, Civil Action No. 2181CV02940, alleging breach of contract, violation of the Massachusetts Civil Rights Act (“MCRA”), and state statutory discrimination claims.³ Supp. App. 23. The Complaint alleged that Boston College’s publication of a “Notice of Nondiscrimination” (the “Notice”) on its website created an enforceable contract. Supp. App. 33–34, ¶ 17. The Complaint

³ Petitioner also filed a discrimination claim against Boston College Law School with the Massachusetts Commission Against Discrimination (“MCAD”). Supp. App. 186. MCAD recommended a “finding of Lack of Jurisdiction” because Petitioner failed to identify the protected class he was a member of or allege that Boston College discriminated against him based on his membership in any protected class. Supp. App. 189-190.

does not mention a handbook of any kind. Petitioner also moved for a preliminary injunction, which the court denied because his “vague contentions do not establish a likelihood of success on the merits” and he had not shown a likelihood of imminent irreparable harm. Supp. App. 24, Order on Dkt. 7.5. Boston College moved to dismiss, arguing as to Count I, the breach of contract claim, that Petitioner had not alleged that any contract between the parties contained a nondiscrimination provision or that Boston College had breached such a provision. Supp. App. 51–52.

After a hearing on Boston College’s Motion to Dismiss, the Court dismissed the MCRA and statutory discrimination claims, finding that “there are no facts alleging ‘threats, intimidation or coercion’ as required for a MCRA Claim” and that “[f]ailure to file a MCAD Complaint is a jurisdictional defect and no allegations establish any of the rare exceptions to exhaustion.” Supp. App. 24, Order on Dkt. 7.0. The court did not hold that the MCRA “does not prohibit discrimination simplex.” Pet. 8. Although the court denied the motion as to the breach of contract claim (Count I), it cautioned that “[e]ven Count I came very close to dismissal.” Supp. App. 24, Order on Dkt. 7.6.

During discovery, Petitioner served an interrogatory asking Boston College to identify its programs and policies “sensitive to” students’ sex, color, gender, sexuality, ethnicity, national origin, and creed. Supp. App. 60. That language was Petitioner’s, not Boston College’s, and Boston College objected. Petitioner moved to compel, and the court ordered a response. Supp. App. 65. Boston College’s compelled supplemental response broadly identified any program or policy that in

any way considered the listed criteria, including, for example, its policy on single-sex dormitory restrooms. Supp. App. 95–100.

On October 19, 2022, Petitioner moved for summary judgment. Supp. App. 66–67. His theory, as he put it, was “simple”: “By (*inter alia*) posting a ‘Notice of Nondiscrimination’ on its website, BC Law made an explicit promise to all prospective students.” Supp. App. 73. In the Parties’ Consolidated Statement of Facts, Boston College admitted only that, “[a]t all relevant times, Boston College published ‘Notice of Nondiscrimination’ on its website.” Supp. App. 82–83, ¶ 8. The only handbook referenced in paragraph 8 of the statement of material facts is an *employee* handbook. Supp. App. 82–83. Petitioner later confirmed as much, explaining that he had “identified two instances in which Boston College published the Notice of Nondiscrimination, using identical language each time, on its main website and in the university’s employee handbook.” Supp. App. 145 n.15.

Boston College opposed and cross-moved for summary judgment. Supp. App. 110. It argued that the legally required Notice posted on its website did not establish a contractual term, and that Petitioner had offered no other evidence that the parties entered into a contract containing a nondiscrimination provision. Supp. App. 110–11. As Boston College pointed out, Petitioner “[did] not even assert as an undisputed fact that he and Boston College entered into a contract that included a nondiscrimination provision.” Supp. App. 114. Boston College argued that Petitioner “has not established, *and cannot establish*, that he and Boston College entered into a contract that included a nondiscrimination provision.” Supp. App.

114. Petitioner now characterizes his decision to move for summary judgment as a “bad move,” and suggests that the court cut off discovery. Pet. 9 n.3. On October 3, 2022, by joint motion, the parties had requested, and the court had granted, a request to extend discovery to May 22, 2023. Supp. App. 25, Order on Dkt. No. 14. Petitioner chose to move for summary judgment seven months before the discovery deadline, and he never sought a continuance under MASS. R. Civ. P. 56(f) to obtain additional discovery before the Superior Court ruled.

At the summary judgment hearing, Petitioner represented to the Superior Court that the evidentiary record had been intentionally streamlined, that Petitioner planned to develop a full record at trial, and that he believed he needed only to make a prima facie showing of discrimination to survive the motion. Pet. App. F, Tr. 8:23–9:21. At that same hearing, Petitioner broadly represented that the anti-discrimination policy appeared in “policy handbooks.” Pet. App. F, Tr. 7:19–22. Petitioner’s written submissions identify only Boston College’s website and an employee handbook. See Supp. App. 82–83, ¶ 8; 142; 145 n.15.

The Superior Court granted Boston College’s cross-motion for summary judgment, finding that Petitioner “[did] not demonstrate that Boston College discriminated against him.” Supp. App. 154.159. Moreover, the court did not “sidestep” the contract question. *Contra* Pet. 10. It set out each element of a contract claim, beginning with “an agreement between the parties, supported by valid consideration,” and held that Petitioner had not carried his burden. Supp. App. 154.159.

On February 12, 2024, Petitioner filed a Notice of Appeal. Supp. App. 160. On March 5, 2024, the Massachusetts Appeals Court (“Appeals Court”) entered a Notice of Assembly at Docket No. 2024-P-0714. Supp. App. 160. On July 1, 2024, Petitioner filed an application for direct appellate review, and the Massachusetts Supreme Judicial Court (“SJC”) denied his application. Supp. App. 21, 161–85. On June 6, 2025, a three-judge panel of the Appeals Court affirmed the Superior Court Decision by an unpublished Rule 23.0 order. Pet. App. A 1–12. The panel assumed, without deciding, that the parties had a contractual relationship for the provision of a legal education, and explained that “[t]he narrow issue is whether such contract included a nondiscrimination term.” Pet. App. A 9 n.6. The panel did not reach, much less reject, Boston College’s argument that the Notice was not part of any offer to prospective students. *Contra* Pet. 11. It held that Petitioner “failed to assert any additional facts in support of the conclusion that he even viewed, let alone assented to, the defendant’s notice of nondiscrimination.” Pet. App. A 10–11.

On June 20, 2025, Petitioner moved for reconsideration, attaching an affidavit in which he attempted to supplement the record. Pet. 13; Pet. App. D, Ex. A. The Appeals Court denied that motion without opinion. Pet. 13. On October 29, 2025, Petitioner moved again for reconsideration and attempted to supplement the record with Boston College’s FY 2019–2020 IRS Form 990. Pet. 13. The Appeals Court again denied the motion without opinion. Pet. 13. On November 5, 2025, the Appeals Court denied Petitioner’s request for a written decision explaining those denials. Supp. App. 19, Dkt. 22. Petitioner then moved for further

appellate review. Pet. 13. On January 15, 2026, the SJC denied that motion without opinion. Pet. App. C. Petitioner now seeks this Court's review.

The Petition describes a second action Petitioner filed in the Superior Court, No. 2481CV01856, as "not directly related" to this one. Pet. ii, 9 n.3. In March 2026, the Superior Court, having compared the two Actions' allegations and claims, dismissed the second action on res judicata grounds. Supp. App. 2–10. On May 1, 2026, the Superior Court denied Petitioner's Motion for Stay of Judgment and Motion for Reconsideration. Supp. App. 15, Dkt. No. 26–26.2.

REASONS FOR DENYING THE PETITION

The Petition does not warrant review. The questions presented were neither decided below nor shown to have been timely or properly presented. Instead, Petitioner seeks reversal of an unpublished, nonprecedential affirmance applying settled Massachusetts contract and summary judgment principles to a factually deficient record. *See* Sup. Ct. R. 10. This case is also unsuitable for the Court to resolve the question of whether the Seventh Amendment's right to a jury trial applies to the states because the judgment rests on Petitioner's failure to prove an enforceable contract term. Furthermore, formation was an element of the contract claim Petitioner presented, and Petitioner had notice and a full opportunity to respond.

I. THE FEDERAL QUESTIONS PRESENTED WERE NEITHER DECIDED BELOW NOR SHOWN TO HAVE BEEN TIMELY OR PROPERLY PRESENTED.

A. The federal questions presented were not properly raised or decided in the courts below.

This Court reviews a state-court judgment only as to federal rights “specially set up or claimed” in the state courts, 28 U.S.C. § 1257(a), and the petitioner must show when and how each federal question was raised. Sup. Ct. R. 14.1(g)(i). When the state courts have not addressed a federal claim, this Court presumes that it was not properly presented, and the petitioner bears the burden of showing otherwise. *Adams v. Robertson*, 520 U.S. 83, 86–87 (1997) (per curiam); see *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam). No state court addressed any question the Petition presents, and Petitioner has not carried that burden as to any of them.

B. The Seventh Amendment question was first raised after the Appeals Court ruled, and no state court decided it.

Petitioner did not invoke the Seventh Amendment in the Superior Court, in his Appeals Court briefing, or in his application for direct appellate review. He raised his Seventh Amendment argument for the first time in a motion for reconsideration filed after the Appeals Court affirmed. Pet. 4, 13. “The long-established general rule is that the attempt, to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it.” *Herndon v. Georgia*, 295 U.S. 441, 443

(1935). The Appeals Court denied both reconsideration motions without opinion, Pet. 13, and the SJC denied further appellate review without opinion, Pet. App. C.

C. The summary judgment question is not a federal question.

The summary judgment question is not a federal question at all. *Celotex* construed Federal Rule of Civil Procedure 56, which does not govern proceedings in state court. The Appeals Court applied Massachusetts summary judgment law, Pet. App. A 7–11, which follows *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 575 N.E.2d 734 (1991). That Massachusetts adopted *Celotex*’s reasoning as a matter of state procedure does not make a dispute over its application a question of federal law.

D. The Petition depends on materials first offered after judgment.

Petitioner relies almost entirely on materials outside the summary judgment record, including his own affidavit, dated June 19, 2025, and a Boston College IRS form from 2019. *See* Pet. 4, 7, 13; Pet. App. D, Exs. A, B. He first submitted those documents with his June 20 and October 29, 2025 motions for reconsideration to the Massachusetts Appeals Court *after* it affirmed summary judgment for Boston College. Pet. 13. But “[a]n appealing party may not . . . attempt to place before an appellate court facts which are not stated or incorporated in the record on appeal.” *Currens v. Bd. of Assessors of Boston*, 370 Mass. 249, 254, 346 N.E.2d 849, 852 (1976); accord *Love v. Massachusetts Parole Bd.*, 413 Mass. 766, 768, 604 N.E.2d 28, 30 (1992). The rule applies whether the extra-record material appears in exhibits, other documents, or briefs. *Coonce v. Coonce*, 356 Mass. 690, 693, 255 N.E.2d 330,

332 (1970). Petitioner could not then, and cannot now, attempt to supplement the record with facts that were not in the record before the Superior Court.

II. THE PETITION SEEKS FACT-SPECIFIC REVERSAL OF AN UNPUBLISHED STATE LAW DECISION.

The Petition identifies no conflict among federal courts of appeals, state courts of last resort, or any other courts on any question presented. *See* Sup. Ct. R. 10. He challenges a nonprecedential Rule 23.0 order that binds no other court and that applied settled Massachusetts contract and summary judgment principles to the record Petitioner made. “A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. The Petition’s merits arguments confirm that all Petitioner seeks is reversal of factual findings based upon assertions outside the record.

A. The Petition’s factual premises are not in the record.

The Petition’s statement of the case compounds the problem. Petitioner asserts that he “undisputedly” viewed the Notice “[m]any times,” Pet. 12; *see* Pet. 4, that the Notice “must—by law—be posted conspicuously,” Pet. 4, and that Boston College published it “in various prominent locations as required by federal law,” Pet. 7. There is no support in the record for any of these statements, nor does he cite to any. Boston College admitted only that, “[a]t all relevant times, Boston College published ‘Notice of Nondiscrimination’ on its website.” Supp. App. 82–83, ¶ 8. Boston College never conceded, or declined to “contest,” that Petitioner viewed the Notice, Pet. 12; there was nothing to contest, because no record fact asserted it.

Petitioner himself notes that the record contains “[n]othing . . . [n]ada and zilch” showing that he viewed, much less, assented to, the Notice. Pet. 12.

The same is true of Petitioner’s account of how Boston College operates. He asserts that “[a]t all times relevant to Petitioner’s application and matriculation BC Law held itself out to the public as a non-discriminatory educational institution,” Pet. 6; that it averred in its IRS Form 990 filings that the Notice was “published widely and conspicuously,” Pet. 7 (citing Pet. App. D, Ex. B); that it segregated on-campus recruiting through demographically exclusive fellowships and internships, Pet. 7; and that a National Association for Law Placement (“NALP”) report shows demographic disparities in graduates’ salaries, *id.* None of this is in the summary judgment record. The Form 990 surfaced for the first time with Petitioner’s motions for reconsideration, *see* Pet. 13, and the Superior Court never reached Petitioner’s motion for judicial notice of the NALP report. *See* Supp. App. 26–27 Dkt. generally. Where Petitioner does provide citations for his assertions, they are to his own brief, *see* Pet. 7 citing Pet. App. D & E, or his own Complaint, *see* Pet. 8. Neither is evidence of facts. A party opposing summary judgment must “go beyond the pleadings” and designate “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) ; *see* MASS. R. Civ. P. 56(e).

Petitioner is also wrong that Boston College “never disputed” his discrimination allegations “through admissible evidence.” Pet. 7. Boston College denied discrimination, Supp. App. 83–84, ¶ 9, and submitted evidence that the student-run affinity groups are open to all students. Supp. App. 90, ¶ 15.

Petitioner admitted that fact “insofar as Boston College does not have an official policy expressly prohibiting students from joining any Affinity Groups.” Supp. App. 90, ¶ 15. Petitioner also conceded that he did “not have personal knowledge as to whether Affinity Groups are intended to be exclusive to the particular demographic constituency specified in their names.” Supp. App. 107, ¶ 4. In addition, Petitioner cannot attribute the gaps in the record to a lack of discovery. By moving for summary judgment on October 19, 2022, Petitioner represented that the factual record was ripe for decision.

B. The Appeals Court did not infer a fact against Petitioner. It concluded that he failed to provide evidence of the fact.

Petitioner’s argument conflates two distinct concepts: an adverse inference drawn from ambiguous evidence, and a finding of failure of proof on an element the plaintiff was required to establish. They are not the same, and the distinction is dispositive here. The rule that courts must draw inferences in favor of the nonmoving party at summary judgment applies to genuinely disputed facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254–55 (1986) (“there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity”); *Kourouvacilis*, 410 Mass. at 711, 575 N.E.2d at 738 (affirming Superior Court finding that defendant had “affirmatively demonstrated the complete failure of proof concerning an essential element of the plaintiff’s claim”). It does not mean that a court must assume the existence of facts for which no evidence has been introduced. A court that finds no evidence of assent has not drawn an inference against the plaintiff; it has simply applied the burden of proof. The court must

draw all justifiable inferences in the nonmovant's favor, but an inference must have a basis in the evidence.

Petitioner argues that Boston College's briefs and affidavits did not address whether he saw the Notice. Pet. 12–13. From that silence, he contends that the court lacked a record basis to rule against him. Pet. 12–13. That argument misplaces the burden. On its cross-motion for summary judgment, Boston College needed to show the absence of a genuine dispute of material fact. *See Kourouvacilis*, 410 Mass. at 716, 575 N.E.2d at 740 (moving party that will not bear the burden at trial is entitled to summary judgment by demonstrating “that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case”). Boston College did so by identifying that the record contained no evidence that the alleged contract contained a nondiscrimination term. Supp. App. 114–15. The burden then shifted to Petitioner to produce evidence of notice and assent. Pet. App. A 10. *See Archer v. Grubhub, Inc.*, 490 Mass. 352, 361, 190 N.E.3d 1024, 1033 (2022) (enforceable contractual terms require notice and assent). The Appeals Court concluded that Petitioner had failed to carry his burden of providing facts necessary to establish that the Notice was an enforceable term. Pet. App. A 10–11 (“As the plaintiff failed to assert any additional facts in support of the conclusion that he even viewed, let alone assented to, the defendant's notice of nondiscrimination, the grant of summary judgment was appropriate”).

A party who deliberately neglected to pursue discovery on the stated ground that he did not believe he needed it cannot later complain that the court failed to

infer that the missing evidence would have been in his favor. The favorable inference rule exists to protect parties from having ambiguous evidence read against them, not to reward parties who made a calculated decision not to seek or offer evidence at all. Petitioner’s balls-and-strikes argument assumes he put the ball in play, and the umpire called it wrong. Not so. His present claim that he “undisputedly” viewed the Notice “[m]any times,” Pet. 12, comes with no record citation, and he concedes that the record says “[n]othing” on the point. Pet. 12; *see* Part I, *supra*.

C. Petitioner’s misunderstanding of the summary judgment standard is not correctable by certiorari.

Petitioner’s decision to streamline the record reflects a fundamental misunderstanding of what was required of him at the summary judgment stage. Petitioner represented to the Superior Court that he needed only to make a prima facie showing of discrimination to survive the cross-motion for summary judgment. Pet. App. F, Tr. 8:23–9:21. That is not the law.

Under Massachusetts law, once the moving party demonstrates the absence of a genuine dispute of material fact, the burden shifts to the nonmoving party to set forth specific facts showing a genuine issue for trial on the elements the motion challenges. *Kourouvacilis*, 410 Mass. at 716, 575 N.E.2d at 740–41. A party who elects to present only a prima facie case at summary judgment, on the mistaken belief that more is not required, has not been denied a fair opportunity to litigate. He has miscalculated the standard and suffered the predictable consequence.

The prima facie framework Petitioner invoked is a burden-shifting device

drawn from the Title VII employment discrimination context. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). It allocates the burden of producing evidence on a discrimination claim. It does not relieve a plaintiff suing in contract of the burden of proving that a contract exists containing the term he invokes. If Petitioner viewed the Notice prior to his matriculation, as he now vehemently insists he did, that fact was available to Petitioner when he filed his complaint. The absence of this fact from the record is not a product of concealment or court error; it is a product of Petitioner's own decision to file for summary judgment before discovery had closed.

Petitioner invokes the Chief Justice's balls-and-strikes metaphor to argue that the Appeals Court inferred against him a fact absent from the record: that he never saw or assented to the Notice. Pet. 5. The Appeals Court did not find that Petitioner never saw the Notice. It held that, after Boston College pointed to the absence of evidence that the Notice was a term of any contract, Petitioner produced no evidence from which a factfinder could find notice and assent. Pet. App. A 10–11; *see Kourouvacilis*, 410 Mass. at 716, 575 N.E.2d at 740–41; *Archer*, 490 Mass. at 361, 190 N.E.3d at 1033–34. The favorable inference rule resolves genuinely disputed facts in the nonmovant's favor; it does not supply facts the nonmovant never offered. *See Anderson*, 477 U.S. at 254–55. Applying the burden of proof to an evidentiary omission is not judicial factfinding.

III. THIS CASE IS AN UNSUITABLE VEHICLE FOR RECONSIDERING *BOMBOLIS*.

As shown in Part I, Petitioner did not timely raise his Seventh Amendment argument. Yet he now asks the Court to overrule *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916), and to hold that the Appeals Court violated the Seventh Amendment by affirming summary judgment. This argument fails, not only because this case is procedurally unsuitable, but also on the merits.

Respondent does not dispute that a live question exists as to whether the Seventh Amendment is incorporated against the states through the Fourteenth Amendment. But the existence of that question does not make this a suitable vehicle for resolving it. This Court recently had occasion to revisit *Minneapolis & St. Louis R.R. Co. v. Bombolis*, and declined to do so because the case then before the Court presented vehicle problems that made resolution inadvisable. *Thomas v. Humboldt Cnty.*, 146 S. Ct. 27, 27 (2025) (Gorsuch, J., respecting denial of certiorari) (agreeing with denial while noting *Bombolis* “warrants a second look”).

This case presents even greater vehicle defects than *Thomas*. *Thomas* arose from a government enforcement action imposing civil penalties, a context in which the asserted right to a civil jury trial has deep historical roots. *Thomas v. Humboldt Cnty.*, 124 F.4th 1179, 1185 (9th Cir. 2024). By contrast, this private contract dispute turns on the state law question of whether Petitioner proved mutual assent to an essential contractual term. *I & R Mech. Inc. v. Hazelton Mfg. Co.*, 62 Mass. App. Ct. 452, 454–455, 817 N.E.2d 799, 802 (2004) (“Contract formation requires a bargain in which there is a manifestation of mutual assent to

the exchange”). Reaching incorporation would require the Court to review settled Massachusetts law on a record Petitioner deliberately left undeveloped. The record contains no evidence that Petitioner viewed or assented to the website notice nor that Boston College posted the notice “widely and conspicuously.” Pet. 7. Likewise, Petitioner offered no evidence on summary judgment that the nondiscrimination term was included in his student handbook.

The procedural posture creates additional obstacles: an unreported trial court decision, a denial of direct appellate review, a nonprecedential Rule 23.0 affirmance, and a denial of further appellate review without opinion. Because the constitutional question would not affect the judgment unless Petitioner first overcame his independent failure of proof, this Court should await a case that cleanly and necessarily presents the jury trial issue. On this record the Court is being asked to render what amounts to an advisory opinion.

IV. THE APPEALS COURT DECIDED AN ELEMENT OF THE CLAIM THE PARTIES PRESENTED.

A. The court decided the question Petitioner’s own claim presented.

To prevail in a breach of contract claim, a plaintiff must first prove offer, acceptance, and consideration. *See Canney v. New England Tel. & Tel. Co.*, 353 Mass. 158, 164, 228 N.E.2d 723, 727 (Mass. 1967). Contract formation is not a separate issue that a plaintiff may reserve while presenting only a breach question for decision. Formation, as the Appeals Court aptly noted, is an antecedent question that must be answered before any court reaches the merits of whether an

alleged contract term was violated. Pet. App. A 8.⁴ By asking whether there was “an agreement between the parties, supported by valid consideration,” the Appeals Court did not venture beyond the claim presented. It performed the analysis that the claim required. *See 477 Harrison Ave., LLC v. JACE Boston, LLC*, 483 Mass. 514, 523, 134 N.E. 3d 91, 101 (2019).

Taken seriously, Petitioner’s argument would require courts to assume contract formation whenever a plaintiff chooses to label his claims “breach of contract” and to treat every element beyond breach as off-limits unless independently briefed. No court has ever adopted such a rule and for good reason. Adoption of this rule would relieve plaintiffs of the burden of proving the existence of the very contract and terms they allege were breached. Here, Petitioner filed the claim. He moved for summary judgment on that claim, asserting that the Notice was an “explicit promise.” Supp. App. 73. As such, he put every element of contract formation at issue.

B. The Appeals Court had the authority to affirm on formation grounds, and the record supports its conclusion.

Even if contract formation were somehow separable from the breach question, and it is not, the Appeals Court had independent authority to reach it. Massachusetts appellate courts may affirm on any ground supported by the record, regardless of whether the trial court relied on that ground. *Gabbidon v. King*, 414 Mass. 685, 686, 610 N.E.2d 321, 322 (1993); MASS. R. A. P. 23.0. That doctrine

⁴ The unpublished opinion of the Massachusetts Appeals Court in *Michelson v. Trustees of Boston College* (Pet. App. A 1-15) is noted at 105 Mass. App. Ct. 1132 and 261 N.E.3d 908 (table).

exists precisely so courts are not required to ignore dispositive legal deficiencies simply because the parties organized their briefing around a different issue.

The only meaningful limitation on the affirmance-on-any-ground doctrine is that the record must actually support the alternative ground. Petitioner insists it does not. But as the party asserting breach of contract, Petitioner bore the burden of proving every element of his claim, including the existence of an enforceable contractual term. *See Canney*, 353 Mass. at 164, 228 N.E.2d at 727 (“Where the existence of a contract is in issue, the burden is on the plaintiff to show it was made”). If the record is thin or non-existent on formation, that is the result of Petitioner’s failure of proof, not judicial overreach.

Petitioner’s theory was that Boston College made its promise “[b]y (inter alia) posting a ‘Notice of Nondiscrimination’ on its website,” Supp. App. 73, and he identified only Boston College’s “main website” and “the university’s employee handbook,” Supp. App. 145 n.15, as sources of the Notice. At the summary judgment hearing, Petitioner asserted for the first time that the policy also appeared in a student handbook. Pet. App. F, Tr. 7:19–22. But Petitioner never pled reliance on the student handbook, produced the student handbook, identified its relevant language, or submitted evidence that he received, reviewed, or assented to it. In short, while a student handbook may support a contract claim under Massachusetts law, *see Schaer v. Brandeis University*, 432 Mass. 474, 735 N.E.2d 373 (2000), Petitioner never established that he viewed or assented to any

nondiscrimination policy. An unpled and unproduced document does not create a genuine dispute merely because it was mentioned at a hearing.

The cases Petitioner does cite prove the point. Each involved a student handbook, not a notice on a website. *See* Pet. 9, 13. In *Sonoiki v. Harvard Univ.*, 37 F.4th 691, 703 (1st Cir. 2022), Harvard did not dispute that its student handbook was a binding contract, so the court “follow[ed] their lead.” Similarly, *Doe v. Amherst College*, 238 F. Supp. 3d 195, 206 (D. Mass. 2017), involved a handbook policy that expressly obligated the college to “provide for fair and impartial evaluation and resolution” of reports of sexual misconduct. Neither case suggests that a legally required notice posted on a university website, which the plaintiff never showed he saw or assented to, is a contractual term. Rather, this case is akin to *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 150–51 (D. Mass. 1997), where the court held that the plaintiffs had failed to allege breach of contract because they never established receipt of the brochure that contained the alleged contract terms. Pet. App. A 11 n.8.

Petitioner chose to litigate on contract grounds. He pleaded a breach of contract claim, and the courts below treated it as such under familiar rules. Petitioner complains that the courts treated the claim incorrectly. But a party who invokes the law of contracts invites the court to examine every element of a contract, including whether one exists at all. That is not judicial overreach.

V. PETITIONER RECEIVED NOTICE AND AN OPPORTUNITY TO RESPOND.

Petitioner would have this Court believe he was denied notice and opportunity to respond to the formation question. He is mistaken. Boston College's cross-motion for summary judgment expressly challenged whether Petitioner could establish that the parties entered into a contract containing the provision at issue and whether Petitioner had identified the contract's terms. Those are formation arguments, and Petitioner had notice of them when the College filed its cross-motion. Supp. App. 110, 114–122. Indeed, Petitioner had notice far earlier. Boston College's December 2021 motion to dismiss argued that he had not alleged that any contract between the parties contained a nondiscrimination provision, Supp. App. 51–52. In denying the Petitioner's Motion for Damages, the court also cautioned that the claim "came very close to dismissal." Supp. App. 24, Order on Dkt. 7.6.

The summary judgment briefing schedule provided Petitioner a meaningful opportunity to offer evidence of all elements of his contract claim. Petitioner could have opposed the formation arguments, introduced evidence of notice and assent, identified documents in which the alleged contractual term appeared, and developed the factual record necessary to survive the motion. His opposition did none of those things. Instead, he maintained that a *prima facie* showing was sufficient. That was not a denial of an opportunity to respond; that was his strategic decision. Procedural due process does not guarantee a favorable outcome, a particular framing of the issue, or a second chance to respond to arguments a party chose to address inadequately. It requires notice of the claims and a

meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Both requirements were satisfied here.

Procedural due process also does not insulate litigants from the consequences of their strategic choices. Petitioner knew Boston College challenged formation and argued that he had not identified the terms of the alleged contract. He nevertheless chose to present a streamlined record and rely on a prima facie showing. After that strategy failed, he moved for reconsideration twice and sought further appellate review. He lost at every stage. He now asks this Court to hold that the Fourteenth Amendment entitles him to more. It does not. The Fourteenth Amendment guarantees a fair opportunity to be heard. Petitioner was given that opportunity.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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