No. 15-1144

IN THE

Supreme Court of the United States

CHARLES FLOWERS,

Petitioner,

v.

TROUP COUNTY, GEORGIA, SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

RUSSELL A. BRITT
HALL BOOTH SMITH, P.C.
191 Peachtree St., N.E.
Suite 2900
Atlanta, GA 30303
(404) 954-6939

CATHERINE E. STETSON
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, D.C. 20004
(202) 637-5491

KENNETH D. JONES
Counsel of Record
Hall Booth Smith, P.C.
191 Peachtree Street, N.E.
Suite 2900
Atlanta, GA 30303
(404) 954-6960
kjones@hallboothsmith.com

Counsel for Respondents

265809

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

RESTATEMENT OF QUESTION PRESENTED

Should this Court grant certiorari where the Eleventh Circuit properly applied *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), and the statement with which the petitioner takes issues is *dicta*; the lower court's decision would be affirmed under any standard; and there is no circuit conflict presented?

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INTRODUCTION

This petition meets none of the criteria warranting a grant of certiorari. S. Ct. R. 10. There is no circuit split on the issue presented, and petitioner's attempt to create one is not borne out by the decision below; indeed, the portion of the panel opinion with which the petition takes issue is pure *dicta*. The issue presented does not pose a question of fundamental importance for the resolution of Title VII cases. And the Eleventh Circuit panel's decision was in all events correct. The Eleventh Circuit has consistently recognized the standard set forth in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), for deciding cases under the Age Discrimination in Employment Act, and that court applies the same standard to other forms of discrimination cases, including those brought under Title VII.

Petitioner nevertheless maintains that that the panel ignored *Reeves* and required a "pretext-plus" rule for Title VII cases. Pet. 4, 16, 22, 25, 26, 31. He raised the same argument in his petition for rehearing and for rehearing en banc. The petitions were rejected without a dissenting vote. The Eleventh Circuit has applied *Reeves* time and again in Title VII cases. It did not overturn those decisions in this case. It simply affirmed the District Court's conclusion that Flowers did not set forth sufficient evidence to suggest that the School District's proffered legitimate, nondiscriminatory reason was false.

The petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

This case involves a "voluminous record" that is "admittedly complex." Pet App. 3a. Petitioner has littered the petition with numerous factual misstatements, but because they are irrelevant to the issue, respondents will not tax the Court's time with responses to each misstatement. The bottom line, however, is this: "Any indication that racial discrimination informed the School District's decision to fire Flowers is conspicuously absent from the evidence presented." Pet. App. 3a.

After retiring from teaching, petitioner Charles Flowers was hired by the Troup County School District in 2010 as a part-time, "49% employee." This arrangement allowed Flowers to coach football at Troup High School while simultaneously receiving retirement benefits.

During and after the hiring process, the School District received unsolicited reports of possible recruiting violations in which Flowers was involved. Specifically, in August 2010, school officials from the Lanett City School District contacted the Troup County School District about students who resided in Lanett but were attending school in Troup County.[1] The Lanett City School District sent a series of letters to officials in the Troup County School District advising them of its investigation. In February 2011, after Cole Pugh became the Troup County

1. The Georgia-Alabama state line separates the cities of Lanett, Alabama and West Point, Georgia in Troup County. West Point is within the Troup High School attendance zone.

Superintendent of Education, he received a packet from the Lanett City School District superintendent with a letter explaining his staff's investigation and including the prior letters sent to the Troup County School District. These letters included allegations that two students resident in Lanett, Jalen and Zanquanarious Washington, may have been recruited to play sports at Troup High School.

After receiving that packet of letters, Pugh instructed John Radcliffe, the School District assistant superintendent, to seek out a private investigator to look into the Lanett City School District superintendent's allegations. Duke Blackburn was subsequently hired to investigate the allegations. In May 2011, Blackburn submitted his initial report, stating that he had not uncovered evidence of School District employees assisting students to establish fraudulent residency in Troup County. However, Blackburn questioned whether the Washington brothers were, in fact, residents of Troup County.

Two months later, Blackburn notified Radcliffe that he had received information that Flowers had assisted the Washington brothers and their mother in securing an apartment within the Troup High School attendance zone. The information was received from Ric Hunt, co-owner of the apartment complex, who stated in a subsequent meeting with Pugh and Radcliffe that Flowers had called him directly and had paid the deposit and rent for the apartment where the Washington brothers resided. Hunt later provided a signed statement to the same effect.

Pugh chose to delay any action against Flowers because the 2011–12 football season had already begun,

and he did not want to disrupt the efforts of the student athletes by making a coaching change mid-season. Following the season, in February 2012, Pugh and Sequita Freemen, the School District's chief human resources officer, met with Flowers. Pugh informed Flowers that he was being terminated for recruiting violations by helping the Washington brothers and their mother obtain housing within the Troup High School attendance zone.

The next day, Flowers brought his friend Tseyonka Davidson—an uncle of one of the Washington brothers—to Pugh's office. Davidson contended that he, and not Flowers, secured the apartment from Hunt. To discredit the evidence that Hunt was called from Flowers's cell phone, Davidson maintained that *he*, and not Flowers, had called Hunt from Flowers's cell phone; according to Davidson, Flowers was with him when he was securing the apartment for the Washington brothers, and Davidson's own cell phone battery died at the exact moment Davidson attempted to call Hunt.[2] Flowers also provided signed statements contending that Davidson, and not he, had paid the deposit and rent.

Pugh was not convinced by that contorted and self-serving explanation, and did not rescind the termination.

B. Proceedings Below

Flowers filed this action in the Northern District of Georgia in October 2012, alleging that he was dismissed from his position because of his race in violation of (among other things) Title VII. Following discovery, the School District defendants moved for summary judgment.

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2. Doc. 107, p. 23 (depo. pages 90– 92).

The Magistrate Judge filed a fifty-three page report and recommendation on the defendants' summary judgment motion in December 2013, recommending that the motion be granted in its entirety. The Magistrate Judge recognized the *Reeves* standard for allowing a plaintiff to survive summary judgment, but found that "Flowers has failed to present sufficient rebuttal evidence to the [School District's] legitimate, non-discriminatory reason" for his termination. Pet. App. 119a. The Magistrate Judge thus concluded that Flowers had failed to create any genuine issue regarding pretext.

Following Flowers's objections to the report and recommendation, the District Court granted summary judgment to the defendants in March 2014. In its thorough, forty-seven-page published order, the District Court methodically addressed all the evidence presented by Flowers that purportedly showed that the School District's reason for terminating him was pretextual. However, after a comprehensive analysis, the District Court found that "Flowers has presented no evidence that calls into question the sincerity of Pugh's belief that Flowers had committed a recruiting violation as of the February 16, 2012 termination meeting." Pet. App. 57a. "Nor could a reasonable jury conclude that Pugh's refusal to reverse his decision was because Flowers is African-American." Pet. App. 58a. As a result, "Flowers has failed to present any evidence from which a reasonable jury could conclude that the proffered reason was pretext for race discrimination." Pet. App. 58a.

The District Court had no difficulty rejecting Flowers' contention that Pugh provided inconsistent reasons for firing him:

> First, in his answers to interrogatories, Pugh states that he fired Flowers for violating the [School District's Competitive Interscholastic Activities Policy (the "CIAP")] and the [Georgia High School Association's] by-laws by assisting the Washington brothers in obtaining a residence within the Troup County High School attendance zone.
>
> Second, during his deposition, Pugh testified that he was not sure whether Flowers had violated the CIAP but that he contacted Swearngin[3] to confirm that if someone made a call to secure an apartment for an athlete, this would constitute recruiting. Swearngin answered in the affirmative.

Pet. App. 58–59a. The District Court explained that these statements were not inconsistent: The first refers to Pugh's reason for firing Flowers *before* the February 2012 meeting. The deposition testimony refers to a period *after* the February meeting. *Id.* at 59a. The District Court accordingly concluded that Flowers failed to discredit the School District's proffered legitimate, nondiscriminatory reason. As a result, Flowers failed to create a jury question on the issue of pretext. Pet. App. 60a.

Flowers appealed. In a twenty-seven page published opinion, a unanimous panel of the Eleventh Circuit affirmed. As the panel explained, "[t]he only evidence that Flowers offers that even touches on his race is the

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3. Ralph Swearngin is the Georgia High School Association's executive director. Pet.App. 54a.

fact that he became the first black head football coach in Troup County since 1973." Pet. App. 21a. Indeed, the panel noted the "reality" that went "unaddressed" in Flowers' submissions: "the School District not only *hired* Flowers knowing of his race but also *rehired* him for a second yearlong contract." Pet. App. 21–22a (emphasis original).

As he had below, however, Flowers argued that Pugh's purportedly inconsistent reasons for firing him demonstrated sufficient "pretext" for his claim to survive summary judgment. Pet. App. 22a. The court of appeals panel rejected that contention, agreeing with the District Court's assessment that those alleged inconsistencies were "easily reconciled." Pet. App. 22a. Because there was no inconsistency, there was no showing of pretext, and summary judgment was properly awarded to the defendants.

The Eleventh Circuit panel went on to point out in *dicta* that "*[e]ven if*" Pugh's explanations had been not just inconsistent, but false, Flowers's discrimination claims still would have failed to survive summary judgment. Pet. App. 22a (emphasis added). As the panel explained, *Reeves* itself teaches that "'[c]ertainly there will be instances where, although the plaintiff has established a prima facie case and explanation, no rational factfinder could conclude that the [employer's] action was discriminatory.'" Pet. App. At 23a (quoting *Reeves*, 530 U.S. at 148). *See also* Pet. App. 23a-24a (observing that it would be "insufficient for Flowers merely to make a prima facie case and—*assuming he could do so*—call into question the School District's proffered legitimate, nondiscriminatory reason") (emphasis added).

Flowers sought rehearing and rehearing en banc. The Eleventh Circuit denied the petitions without a dissenting vote.

REASONS FOR DENYING THE PETITION

The Eleventh Circuit disposed of Flowers's discrimination claim in a thorough and well-reasoned opinion, concluding that he had failed to produce sufficient evidence suggesting that the School District's proffered reason for terminating him was pretext. The issue can end there. The question petitioner presents is solely directed at *dicta* in the panel's opinion. Even if the Eleventh Circuit's application of *Reeves* is somehow inconsistent with other circuits' precedent, moreover, it would not change the outcome of this case. Regardless, Flowers's conceived circuit split is fictional. Simply put, Flowers's claim fails under any scenario. Further review is not warranted.

I. There is no circuit split.

Flowers contends that the Eleventh Circuit panel ignored the *Reeves* standard of proof and charted a different path for Title VII cases. That is wrong.

The Eleventh Circuit has consistently recognized and applied *Reeves* to Title VII cases. *See Holland v. Gee*, 677 F.3d 1047, 1057 (11th Cir. 2012) ("a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated" (quoting *Reeves*, 530 U.S. at 148)); *Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001) (same);*Vessels v. Atlanta Ind. School Sys.*, 408 F.3d 763,

768 (11th Cir. 2005) ("Where the plaintiff succeeds in discrediting the employer's proffered reasons, the trier of fact may conclude that the employer intentionally discriminated" (citing *Reeves*)); *Ledbetter v. Goodyear Tire and Rubber Co.*, 421 F.3d 1169, 1185–86 (11th Cir. 2005) (In a Title VII case, "rejection of the reasons offered by the defendant, combined with the evidence supporting the prima facie case, 'will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.'" (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993)); *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079 (11th Cir. 2004) ("A plaintiff may prevail on an employment discrimination claim by . . . producing sufficient evidence to allow a rational trier of fact to disbelieve the legitimate reason proffered by the employer, which permits, but does not compel, the trier of fact to find illegal discrimination." (citing *Reeves*)). The Eleventh Circuit's long-established precedent is consistent with every other circuit.

Nor does the panel's decision in this case clash with that court's prior precedents. The panel simply rejected Flowers's showing of pretext. Pet. App. 22a. It merely further noted in *dicta* that—*assuming* Flowers *could* call into question the School District's proffered legitimate, nondiscriminatory reason—the record supported summary judgment even in that hypothetical event. Pet. App. 22–23a. As the panel explained, *Reeves* itself noted that there "[c]ertainly" will be instances "where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the [employer's] action was discriminatory." Pet. App. 23a (quoting *Reeves*, 530 U.S. at 148). Again quoting *Reeves*, the panel further explained that "[a]llowing the plaintiff

to survive summary judgment would be inappropriate, for example, if the record 'conclusively revealed some other, nondiscriminatory reason' or the 'plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.'" *Id.*

Keying off those express statements in *Reeves*, the panel concluded that given what little Flowers had put forward, it was "insufficient for Flowers merely to make a prima facie case and—*assuming he could do so*—call into question the School District's proffered legitimate, nondiscriminatory reason." Pet. App. 24a (emphasis added). In sum, after the Eleventh Circuit "hack[ed] back the thicket of factual disputes and excise[d] Flowers's conclusory allegations, [it was] left with nothing more than a routine disagreement between employer and employee." Pet. App. 3a.

With no evidence of discriminatory animus in the record, the District Court correctly concluded that Flowers's attempt to prove the School District's proffered reason untrue was not enough to preclude judgment for the School District, and the Eleventh Circuit correctly affirmed.

II. Flowers's discrimination claim fails even under petitioner's preferred *Reeves* standard.

Flowers' entire argument is premised on the notion that he demonstrated that the School District's proffered reason for terminating him was a pretext, and that his showing was ignored or passed over below. That is not so.

Flowers's premise—that the purported "inconsistency" was evidence of pretext—was considered at length and rejected at all stages of the proceedings below.

Even if the panel somehow misapprehended the *Reeves* standard of proof in this case, moreover, and even if that misapprehension amounted to more than dicta, it would not change the outcome. *Reeves* itself stands for the proposition that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148. Flowers did not satisfy this standard because he failed to present "sufficient *evidence* to find that the employer's asserted justification is false," *id.*—other, of course, than his repeated *insistence* that the justification was false.

III. The decision below was correct.

This case falls squarely in the mine-run of instances where a prima facie case and a refuted explanation are not sufficient in themselves to survive summary judgment. But again, that discussion is purely academic; the Eleventh Circuit correctly *held* that Flowers did not sufficiently rebut the School District's proffered reason for his termination. Pet. App. 22a.

Flowers attempts to pull sentences and phrases from the Eleventh Circuit decision and reassemble them to suggest that (despite legions of Eleventh Circuit precedent before it) the panel introduced a new requirement that a plaintiff must *always* introduce additional evidence of discrimination beyond an established prima facie case

and evidence that the employer's proffered reason is false. Not so.

First, Flowers claims that the Eleventh Circuit once repudiated, but now has revived, a general rule that "plaintiffs can demonstrate discrimination by proving that an employer's proffered justification for a disputed action is a fabrication," such that "in the Eleventh Circuit today proof that an employer is guilty of even a 'bald-face lie' will not suffice." Pet. 16. That is simply incorrect. As previously explained, that characterization is a significant overreading of the culprit sentence on which the petition so heavily relies (*see* Pet. 13, 16, 27, 28), and on top of that, the sentence is *dicta*. *See* Pet. App. 22a ("Even if * * *"), 24a ("assuming that he could do so").

The Eleventh Circuit correctly recognizes there are instances where a prima facie case coupled with a contradiction of the employer's proffered reason *is* enough to survive summary judgment. The panel below cited *Reeves* itself to that effect. Flowers's alternative interpretation—that the panel decision impliedly cancelled out all previous precedents to the contrary—simply is not reasonable. The Eleventh Circuit does not *always* require additional evidence where evidence suggests that an employer's explanation is false. It simply confirmed *Reeves*'s *own statement* that there are some circumstances where what little evidence of pretext the plaintiff has put forward simply cannot withstand summary judgment. Pet. App. 23a.

Flowers also contends that the Eleventh Circuit now requires a plaintiff to not only disprove the reasons an employer gives, but "also * * *negate every conceivable reason an employer might have given, and even reasons

that are the opposite of what the employer actual asserted." Pet. 17. That is wrong again. The panel in no way suggested that a plaintiff must negate every conceivable nondiscriminatory reason for the adverse action taken against him. It noted only, and correctly, that "Flowers has the burden of persuasion on this point, and it is his responsibility to advance sufficient evidence of racial discrimination to create a triable factual dispute." Pet. App. 21a. The reason Flowers's claim failed to survive summary judgment was because he did not offer sufficient evidence to call the School District's proffered reason into question—full stop.

The Eleventh Circuit applied the correct law and reached the correct result. For this reason as well, the petition should be denied.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted, this 23rd day of May, 2016.

Russell A. Britt
Hall Booth Smith, P.C.
191 Peachtree St., N.E.
Suite 2900
Atlanta, GA 30303
(404) 954-6939

Catherine E. Stetson
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, D.C. 20004
(202) 637-5491

Kenneth D. Jones
Counsel of Record
Hall Booth Smith, P.C.
191 Peachtree Street, N.E.
Suite 2900
Atlanta, GA 30303
(404) 954-6960
kjones@hallboothsmith.com

Counsel for Respondents