No. 24-871

In the
Supreme Court of the United States

B.W., A MINOR, BY NEXT FRIENDS M.W. AND B.W., FORMERLY KNOWN HEREIN AS JON AISD DOE
Petitioner,

V.

AUSTIN INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Stephanie A. Hamm
Christopher B. Gilbert
Counsel of Record
THOMPSON & HORTON LLP
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027
cgilbert@thompsonhorton.com
(713) 554-6744

Counsel for Respondent

QUESTIONS PRESENTED

This case has devolved into a publicity stunt fueled by partisan rhetoric and political opportunism. When Brooks Warden attended the Austin Independent School District, he frequently complained about harassment based on his conservative political beliefs. When he later sued Austin ISD, he asserted claims stemming from alleged harassment "because of [his] political views" only. But after nearly a year of litigating, Brooks hired a new lawyer who asserted, for the very first time, that Brooks's race also motivated the harassment that allegedly occurred several years earlier. Meanwhile, Brooks inexplicably abandoned his First Amendment claims.

Austin ISD does not condone harassment or bullying of any kind, and it regrets that Brooks had negative experiences with its students and staff members, but this is not a Title VI case. The Petition manufacturers disputes about causation and liability standards that have nothing to do with the disposition of Brooks's Title VI claim below, and asks the Court to conflate politics and race—an invitation correctly rejected by numerous judges during the course of this litigation.

The questions presented are:

1. Whether a student can assert a Title VI harassment claim absent allegations that the funding recipient had actual knowledge of *race-based* harassment.

2. Whether a student can assert a Title VI harassment claim absent allegations of severe and pervasive *race-based* harassment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

INTRODUCTION

This is a First Amendment case hiding in Title VI's clothing. Throughout his enrollment with Austin ISD, Brooks Warden never once complained that anyone mistreated him because of his race. Instead, he very specifically complained that students and staff members targeted him because of his conservative political beliefs in violation of his constitutional rights secured by the First and Fourteenth Amendments to the United States Constitution. And, at one point, Brooks specifically invoked Title IX of the Education Amendments of 1972, claiming that someone had made a derogatory comment about his gender. But he never alleged or reported race-based harassment or bullying, nor did the laundry list of alleged legal violations that he submitted with his internal complaints and grievances mention Title VI of the Civil Rights Act of 1964.

That only came later. Much later, in fact, when Brooks filed his third and fourth amended complaints in May 2021—more than a year after he stopped attending classes at Austin ISD (and nearly a year after he filed this lawsuit). By that point, Brooks had already failed three separate times to state a valid constitutional claim, and a magistrate judge had already recommended granting Austin ISD's motion to dismiss.

So how did Brooks's allegations of political animus abruptly transform into claims of race-based harassment, long after he left Austin ISD? The answer is as simple as it is troubling—he retained a new attorney. And just like that, the phrase "because of his race" suddenly joined the chorus of "because of his political beliefs," along with a relatively small number of race-

related factual allegations—many of which are constitutionally-protected political statements about race that happened to be made in front of Brooks, as opposed to harassing statements directed at Brooks because of his race.

While Brooks is undeniably the master of his complaint, rewriting history does not change it. Which is precisely the reason the Fourth Amended Complaint goes into great detail explaining how Brooks experienced and reported harassment based on his political beliefs, but then offers little factual information about the race-based harassment he allegedly suffered, and carefully avoids alleging that he reported race-based harassment to anyone at Austin ISD. Simply put, Brooks's belated and conclusory assertion of a Title VI violation amounted to a flood of empty words, rather than a plausible claim that Austin ISD had actual knowledge of severe and pervasive *race-based* harassment.

Perhaps that is why the Petition invents causation and liability disputes that bear no relation to the lower courts' decisions. No court below relied on an improper causation standard to dismiss Brooks's Title VI claim. Nor did any court below impose a heightened liability standard based on Brooks's race. Instead, they found that Brooks failed to satisfy this Court's well-established framework for student harassment claims. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633, 645 (1999) (finding an implied right of action under Title IX for student-on-student harassment only where the school district "acts with deliberate indifference to known acts of harassment in its programs and activities" and where the harassment "take[s] place in a context subject to the school dis-

trict's control" and is "so severe, pervasive, and objectively offensive that if effectively bars the victim's access to an educational opportunity or benefit").[1]

The only confusing part of this case is why Brooks decided to pursue a Title VI claim at the expense of his First Amendment claims. But regardless of how many times Brooks changes his legal theories, certain truths remain constant: Harassment based on political beliefs is not actionable under Title VI. Harassment based on gender is not actionable under Title VI. Harassment based on religion is not actionable under Title VI.

Brooks could have pursued—and, for a while, did pursue—such claims under the appropriate legal frameworks, but for reasons unknown to Austin ISD, he abandoned them. While Brooks may now regret that strategy, the Court should not carry his sorrow by rewriting Title VI's plain language to regulate conduct unrelated to an individual's race, color, or national origin. Nor should it open the proverbial floodgates to civil liability by allowing students to sue their schools for race-based harassment every time they hear a political viewpoint about race that they do not share.

The Court should deny the Petition.

---

[1] Congress modeled Title IX after Title VI "and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." *Fitzgerald v. Barnstable Sch. Committee*, 555 U.S. 246, 258 (2009); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 694–95 (1979) ("Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefitted class.").

STATEMENT OF THE CASE

After years of litigation and ever-changing legal theories, this case now narrowly involves a claim for race-based harassment under Title VI of the Civil Rights Act of 1964, which is construed *in pari materia* with Title IX of the Education Amendments of 1972. *Fitzgerald*, 555 U.S. at 258; *Cannon*, 441 U.S. at 694–96. The courts below properly relied on the *Davis* liability standard when dismissing Brooks Warden's Title VI harassment claim.

I. Factual Background

In October 2017, Brooks Warden ("Brooks" or "B.W.") wore a MAGA hat on a middle school field trip. According to Brooks, he "[a]lmost immediately [] experienced an attitudinal change by staff and other students from friendly and inviting to cold and hostile."[2] App.63a. Brooks's parents met with Austin ISD administrators to make suggestions on how the school could better support "diversity of thought." Despite these efforts, Brooks allegedly suffered "an increase in verbal attacks, vitriol, hatred and overall disgust . . . on almost a daily basis and **always because of his political allegiance to President Trump**." App.63a (emphasis added).

Several months later, two students allegedly discussed their personal views about "the evils of the white race in American history" in front of Brooks, but they did not direct any comments towards Brooks. App. 63a. Additionally, according to Brooks, a math

[2] Even though his race obviously remained constant throughout his time at Austin ISD, Brooks has never alleged that he experienced harassment or bullying based on his race (or anything else) *before* he wore the MAGA hat on his school field trip.

aide called him "Whitey," and a principal asked him if he was listening to "Dixie" music. App.24a. Brooks has never alleged that he reported these (or any other alleged race-related) incidents to anyone at Austin ISD.

But Brooks did routinely complain to Austin ISD that he experienced harassment based on his political beliefs. For example, on September 18, 2018 (during his freshman year of high school), Brooks and his parents filed a bullying complaint pursuant to Austin ISD's internal grievance policy. App.64a. Brooks has never alleged (and he cannot truthfully allege) that this grievance raised claims of race-based discrimination or harassment.

Brooks and his parents filed a second grievance on January 22, 2019, which "specifically pointed out that [Brooks] has a constitutional right to political free speech, which was being chilled by [] ongoing bullying and harassment." App.64a. This grievance did not allege race-based discrimination or harassment, but did assert political- and gender-based bullying in violation of the First and Fourteenth Amendments to the United States Constitution and Title IX. App.64a–65a.

The alleged verbal harassment that Brooks otherwise experienced over the course of three years (his eighth- through tenth-grade years) included (1) a student insulting Brooks for wearing a Ted Cruz shirt; (2) students and teachers making negative statements about Donald Trump and conservatives in front of Brooks; (3) students calling Brooks a racist and a "homophobe;" (4) students expressing their opinion, in front of Brooks, that "America is only for white people;" (5) a substitute teacher telling Brooks: "When

you are old enough to think for yoursel[f], you will no longer be a conservative;" and (6) a teacher asking Brooks if he enjoyed listening to "White Gospel Music."[3] App.30a, 42a, 44a–45a, 64a. Additionally, one of Brooks's former friends created a meme depicting Brooks as a member of the Ku Klux Klan (KKK)[4]—not because of Brooks's race, but because the friend's father told him not to be friends with anyone who identified as a conservative. App.41a.

On February 5, 2019, a student assaulted Brooks in class and damaged his laptop computer (which Brooks had decorated with Trump stickers). App.44a. Brooks and his parents filed another grievance, again specifically alleging violations of Brooks's constitutional rights under the First and Fourteenth Amendments, as well as Title IX. App.65a. Although Brooks supposedly "found out" later that the student assaulted him because he is white, he has never alleged (and cannot truthfully allege) that he told Austin ISD that the student assaulted him because of his race. Regardless, Austin ISD disciplined the student for assault, and Brooks admits that his school implemented various safety measures, referred him to a school counselor, and reaffirmed his right to express his political beliefs. And Brooks has never alleged that Austin ISD responded differently to bullying or harassment complaints brought by non-white students.

---

[3] "White Gospel" is a distinct genre of music that is sometimes also referred to as "Country Gospel" or "Christian Country."

[4] The student who created the meme told Brooks the following year: "You're dumber than I thought, the meme of you was as a Nazi officer, not a Klansman." App. 26a. This is the only Nazi-related statement made to Brooks. *See* App.21a–30a.

All Austin ISD schools shut down in March 2020 due to COVID-19. When schools re-opened, Brooks did not return to Austin ISD. App.45a.

II. Relevant Procedural History

Brooks filed this lawsuit on July 14, 2020, claiming that Austin ISD allowed him to be harassed by other students because of his "political views," in violation of the First and Fourteenth Amendments to the United States Constitution. He also asserted a common law negligence claim. App.46a. But Brooks's original, first amended, and second amended complaints did not assert any claims (or facts that would support claims) for race-based discrimination or harassment.

After Austin ISD moved to dismiss each version of the complaint, a magistrate judge recommended that the district court dismiss Brooks's claims. App.66a. Brooks then retained new counsel, who requested permission to replead instead of filing objections to the magistrate's report and recommendation. The district court granted the request, and Brooks filed a Third Amended Complaint on May 14, 2021, and a corrected Fourth Amended Complaint on May 26, 2021. App. 67a.

These new complaints re-urged Brooks's constitutional claims, but also for the first time asserted claims for race-based harassment under Title VI. App.46a.[5] Austin ISD moved to dismiss the Fourth Amended Complaint, arguing that Brooks had failed to plead sufficient facts to state a plausible claim. Regarding the newly-asserted Title VI claim, Austin ISD

---

[5] Brooks also added a claim for alleged violations of his First Amendment right to freedom of religion. *See* App. 68a.

argued that Brooks failed to plead facts to suggest that he experienced severe and pervasive harassment because of his race, as opposed to his political beliefs. App.76a.

The magistrate judge recommended dismissing the Fourth Amended Complaint in its entirety. Analyzing Brooks's Title VI race-based harassment claim using Title IX's standard for sex-based harassment,[6] the magistrate judge found that "the few allegations that appear to be racially-related are more political statements about race made in B.W.'s presence (such as the statements about the 'evils of the white race in American history'), than they were attacks on B.W. because of his race." App.76a (cleaned up). The magistrate judge also noted that Brooks "only alleges a handful of vaguely race-related comments that span more than two years at two different schools," and concluded that "[t]hese few isolated incidents do not amount to the 'severe, pervasive, and objectively offensive' requirement for a race-based harassment claim under Title VI." App.76a (citing *Davis*, 526 U.S. at 650).[7]

The district court adopted the magistrate judge's report and recommendation and dismissed Brooks's claims with prejudice. App.58a. On appeal, Brooks abandoned all his causes of action against Austin ISD

---

[6] App.76a–77a; *see Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 408 (5th Cir. 2015) (citing *Davis*, 526 U.S. at 644) (noting that "[s]ince *Davis*, courts of appeals presented with Title VI student-on-student harassment claims have applied the deliberate indifference standards from *Davis*").

[7] The magistrate judge also found that Brooks failed to state a Title VI retaliation claim because he did not allege any facts suggesting that the students and staff members who allegedly retaliated against him had any knowledge of his grievances. 76a–77a.

except his Title VI claim. App.47a. Accordingly, any claims that Austin ISD mistreated Brooks because of his political beliefs, his religion, or his gender are no longer at issue in this case.

A Fifth Circuit panel affirmed the dismissal of Brooks's Title VI claim, finding that (1) the allegations of *race-based* harassment were not severe, pervasive, and objectively offensive; and (2) Brooks's efforts to conflate politics and race did not state a plausible Title VI claim. App.49a–54a. The panel specifically noted that "the allegations that B.W. argues should be considered within the totality of the circumstances lie outside the scope of racial animus," and cited the KKK meme and related name-calling that stemmed from Brooks's *political beliefs* as "just one of his many flawed attempts to conflate political with racial animus." App.53a–54a.

The panel also rejected Brooks's argument that the court could "infer that the political animus he suffered had racial undertones as well," because:

> By his reasoning, an attack on a white person because of his conservative or Republican views is necessarily an attack on him because of his race. But the inferences required to come to this conclusion are unreasonable as membership in either group is not foreclosed to those who are not white. And the Complaint itself belies this reasoning as it alleges that D.K. "admitted . . . that he made the KKK meme about B.W. because D.K.'s father told him not to be friends with anyone who was a Conservative."

App.54a (alteration omitted). Ultimately, the panel decided that Brooks failed to state a claim because his detailed factual allegations of harassment based on

his political beliefs "failed to connect this political animus to the racial animus he must show for his Title VI claim." App.54a.

The Fifth Circuit granted rehearing *en banc* and vacated the panel's decision. App.80a–81a. The *en banc* court later affirmed the district court's decision through an evenly divided vote with no majority opinion. App.1a–2a. Accordingly, the district court's rulings are the operative decisions in this appeal.

Judge Richman, joined by Judges Douglas, Southwick, and Ramirez, concurred in the affirmance—not because Brooks alleged facts suggesting that his harassers had mixed motives, with political animus outweighing racial animus (as the Petition contends)—but because (1) Brooks's allegations are "conclusory as to how A[ustin] ISD had notice of harassment or discrimination *based on race*;"[8] and (2) even assuming Brooks adequately alleges that Austin ISD had actual knowledge of race-based harassment, he "does not allege harassment based on his race, as opposed to political differences, that was so severe, pervasive, and objectively offensive that it can be said to deprive [him] of access to the educational opportunities or benefits provided by the school." App.3a (cleaned up); *see also* App.4a ("Title VI claims require that the harassment was based on the victim's race, color, or national origin. The allegations that pertain to race do not surmount the threshold required in *Davis*[] . . .").

---

[8] Brooks raised the issue of actual knowledge in his appellate briefs, and an appellate court can affirm dismissal for any reason supported by the record. *See, e.g., Gonzalez v. Blue Cross Blue Shield Assoc.*, 62 F.4th 891, 898 (5th Cir. 2023); *Thole v. U.S. Bank, Nat'l Assoc.*, 873 F.3d 617, 626 (8th Cir. 2017); *Worthy v. City of Phenix City, Ala.*, 930 F.3d 1206, 1216 (11th Cir. 2019).

In other words, contrary to the arguments in the Petition and the *en banc* dissents (discussed below), the *en banc* concurrence found that Brooks failed to state a valid Title VI harassment claim because the facts he alleged demonstrated that "**the impetus** for the harassment and bullying was his political beliefs, actions, and expressions and those of his classmates." App.6a (emphasis added). By contrast, "[t]he relatively few race-based comments" in the Fourth Amended Complaint "are not the sort of harassment that is actionable under Title VI." App.6a.

Chief Judge Elrod agreed that *Davis* governs Brooks's racial harassment claim, but disagreed that he failed to state a Title VI violation. In a dissent joined by Judges Jones, Smith, Willett, Ho, Duncan, Engelhardt, Oldham, and Wilson, Judge Elrod argued that the panel opinion and the *en banc* concurrence "improperly weigh the allegations and base their decisions off what they thought was the most likely motive behind the harassment directed at B.W., political animus." App.12a. Judge Elrod's analysis does not distinguish alleged harassment directed at Brooks because of his *race* from alleged harassment directed at Brooks because of his *political beliefs* (or from alleged comments about race or politics that Brooks did not like, but which happened to be made in his presence by students or teachers during class). *See* App.21a–30a (listing examples of alleged harassment).

Judge Ho, joined by Judge Duncan, filed a separate *en banc* dissent opining that "[i]t's racist to characterize whites as racist" because "[i]t's racist to attach any negative trait to a group of people based on their race"

and "it's no less racist just because the victimized racial group is white." App.32a.[9] Judge Ho also discussed the Court's recent decision to grant certiorari in an inapposite Title VII case, *Ames v. Ohio Dep't of Youth Servs.*, 145 S. Ct. 118 (2024), but he notably stopped short of claiming that any judge had required Brooks to present special evidence of "background circumstances" to justify relief under Title VI. App.34a–35a.

REASONS FOR DENYING THE PETITION

I. Resolving any purported dispute over Title VI's causation requirement will not impact this case because Brooks failed to allege that Austin ISD had actual knowledge of severe and pervasive race-based harassment.

Title VI provides that "[n]o person in the United States shall, on the ground of **race, color, or national origin**, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (emphasis added). Like Title IX, Title VI "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). And the Court has made clear that such intentional discrimination

[9] Brooks never alleged that anyone characterized him as racist because he is white. Instead, he alleged that people assumed he is racist because of his political beliefs. As noted above, Brooks alleged in his Fourth Amended Complaint that (1) he experienced "verbal attacks, vitriol, hatred and overall disgust . . . on almost a daily basis and always because of his political allegiance to President Trump;" and (2) his former friend created the KKK meme because his father "told him not to be friends with anyone who was a conservative." There are no specific facts alleged that would tie any accusations that Brooks is racist to his race, as opposed to his political beliefs.

must be attributable to the entity itself—Title VI does not allow for vicarious liability. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1988); *Davis*, 526 U.S. at 640–41.

Accordingly, when evaluating race-based harassment claims involving students, circuit courts have uniformly modeled Title VI's liability standard after *Davis*, and have held that school districts receiving federal funds can be liable for race-based harassment if:

> (1) the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school" (a racially hostile environment), and the district (2) had actual knowledge, (3) had "control over the harasser and the environment in which the harassment occurs," and (4) was deliberately indifferent.

Fennell v. Marion Indep. Sch. Dist., 804 F.3d 398, 408 (5th Cir. 2015) (quoting *Davis*, 526 U.S. at 644, 650); *see also Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 664–65 (2d Cir. 2012); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 272–73 (3d Cir. 2014); *Ricketts v. Wake Cnty. Pub. Sch. Sys.*, 125 F.4th 507, 521 (4th Cir. 2025); *Thompson v. Ohio St. Univ.*, 639 Fed. App'x 333, 342–43 (6th Cir. 2016); *Doe v. Galster*, 768 F.3d 611, 617 (7th Cir. 2014); *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty.*, 334 F.3d 928, 934 (10th Cir. 2003); *Adams v. Demopolis City Schools*, 80 F.4th 1259, 1273 (11th Cir. 2023). The courts below relied on this standard—and only this standard—to reject Brooks's Title VI harassment claims.

A. Brooks complained to Austin ISD about harassment based on his political beliefs, not his race.

Title VI liability cannot attach unless a plaintiff alleges that an "appropriate person"—*i.e.*, "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf"—had "actual knowledge" of severe and pervasive race-based harassment, but "fail[ed] to adequately respond." *Gebser*, 524 U.S. at 290.

Brooks argued below that Austin ISD had actual knowledge of race-based harassment because he and his parents routinely complained to campus administrators, and pursued grievances to the Board of Trustees. But this argument glossed over the fact that the Fourth Amended Complaint specifically alleged that Brooks and his parents complained that: (1) "several teachers and students had been treating [Brooks] poorly since he wore the MAGA hat;"[10] (2) Brooks "was becoming an object of derision because of his political beliefs;"[11] (3) the District needed "an assembly and bulletin board addressing the importance of *diversity of thought*, to cultivate respect for those who hold a different, or even an opposing view;"[12] (4) a classmate created a meme depicting Brooks as a KKK member because the classmate's father "told him not to be

---

[10] Fourth Amended Complaint, ¶ 29

[11] *Id.* at ¶ 30.

[12] *Id.* at ¶ 31; *see also id.* at ¶ 37 ("B.W.'s father again spoke with Principal Malott about his concerns and again suggested she adopt a program supporting *diversity of thought* but she did not.").

friends with anyone who was a Conservative;"[13] (5) at middle school graduation, the classmate who created the meme stated during his commencement speech that "[t]here had been no bullying" under his term, and a teacher did not support Brooks wearing his MAGA hat while crossing the stage to receive his diploma, but made encouraging statements to other students who shared the teacher's "political and social beliefs;"[14] (6) Brooks "has a constitutional right to political free speech, which was being chilled" in violation of his "Constitutional Rights, the 1st and 14th Amendments, the Equal Protection and Due Process Clauses," which also constituted "Sex Discrimination pursuant to Title IX;"[15] (7) a student assaulted Brooks in a classroom where the teacher (who is white) previously told Brooks that his Halloween candy would be "filled with hatred and oppression;"[16] (8) "Conservative and Republican political opinions were being targeted in many school's [sic] across the country;"[17] and (9) a student stated, in Brooks's presence, that she wanted to "kill all Trump supporters."[18]

The specificity and numerosity of these allegations regarding Brooks's non-race-based complaints only serve to highlight the fact that Brooks never explicitly claims that he or his parents complained about race

---

[13] *Id.* at ¶¶ 49–50.

[14] *Id.* at ¶¶ 57–61.

[15] *Id.* at ¶ 90.

[16] *Id.* at ¶¶ 94. The Fourth Amended Complaint does *not* claim that Brooks reported that the assault was based on his race. Instead, it later claims that Brooks at some point allegedly "found out" that the student assault him because of his race. *Id.* at ¶ 96.

[17] *Id.* at ¶ 100.

[18] *Id.* at ¶¶ 118, 120.

discrimination or alleged Title VI violations. Which is why the *en banc* concurrence noted that the Fourth Amended Complaint is conclusory as to how Austin ISD purportedly had notice of "harassment or discrimination *based on race*." App.3a.

Brooks's vague and conclusory allegations regarding Austin ISD's actual knowledge of *race-based* harassment are a direct consequence of his after-the-fact reimagining of his dispute with the school district. Dropping his First Amendment claims in favor of a never-before-mentioned Title VI claim was his strategic decision to make, but politics and race are not the same, actual knowledge of harassment based on one is not actual knowledge of harassment based on the other, and the belated addition of new legal theories cannot retroactively change facts.

The Petition should be denied.

B. Brooks did not experience severe and pervasive *race-based* harassment.

To be actionable under Title VI, harassment "must be more than the sort of teasing and bullying that generally takes place in schools." *Fennell*, 804 F.3d at 408. "[E]arly on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and [race]-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in [race]." *Davis*, 526 U.S. at 651–52. Instead, alleged harassment must be "so severe, pervasive, and objectively offensive that it effectively

bars the victim's access to an educational opportunity or benefit." *Id.* at 633.[19]

Here, setting aside any alleged conduct motivated by Brooks's political beliefs, as opposed to his race,[20] the verbal harassment Brooks claims he suffered does not meet the *Davis* standard. During the 2017–2018 school year, (1) a math aide called Brooks "Whitey;" (2) a teacher stated in front of Brooks that she was "getting concerned about how many white people there are;" and (3) students talked about the "evils of the white race in American history" in front of Brooks.

During the 2018–2019 school year, (1) a substitute teacher told Brooks that she did not want a "white man talk[ing] to [her] about gender issues;" and (2) a student stated in front of Brooks that "America is only for white people."

Finally, during the 2019–2020 school year, (1) a group of students referred to Brooks and his Cross County teammates as "the white boys;" and (2) a teacher asked Brooks if he enjoyed listening to "White Gospel Music."

---

[19] The Court in *Davis* did not limit the definition of actionable harassment to cases involving student-on-student harassment. *See Davis*, 526 U.S. at 650. Additionally, the Court noted that "the relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to education benefits and to have a systematic effect on a program activity," and that "[p]eer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment." This language implies that the *Davis* standard applies to all harassment claims.

[20] Brooks's efforts to conflate politics and race are addressed in detail below.

Several of the race-related comments that Brooks complains about involve people discussing political viewpoints about race in his presence, which does not constitute race-based harassment against Brooks. A contrary ruling would turn First Amendment jurisprudence on its head. Because while it may be difficult for a conservative student like Brooks to listen to other students' political viewpoints, such as "America is only for white people," the government has no obligation under the First Amendment to prevent public hostility to a person's viewpoint because the First Amendment embodies negative, as opposed to positive, rights. *See Kessler v. City of Charlottesville*, 41 F. Supp. 3d 277, 286–90 (W.D. Va. 2020). And "it is a 'bedrock principle' that speech may not be suppressed simply because it expresses ideas that are 'offensive or disagreeable.'" *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 205–06 (2021) (Alito, J., concurring) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

The few remaining benign and sporadic comments involved different individuals at different schools during different school years, and do not themselves constitute "severe, pervasive, and objectively offensive" harassment sufficient to give rise to a damages claim against Austin ISD. *See, e.g., Sewell v. Monroe Cnty. Sch. Bd.*, 974 F.3d 577, 585 (5th Cir. 2020) (finding severe and pervasive harassment where a Dean of Students verbally "ridiculed" the plaintiff "every other day for much of the school year," "discouraged other students from talking" to the plaintiff," and "tried to convince a student to concoct an allegation that [the plaintiff] sexually assaulted her"). Indeed, Brooks alleges no facts suggesting that any of the *race-related* comments deprived him of any educational opportunities or benefits.

The only severe allegation Brooks makes is that, in February 2019, a student physically assaulted him because of his race. Even assuming the vague allegation of racial animus is true, the courts below properly determined that this single physical altercation does not rise to the level of actionable harassment, even when considered alongside the few race-related comments discussed above. *See Davis*, 526 U.S. at 652–53 ("Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have [the systemic effect of denying the victim equal access to an educational program of activity], we think it unlikely that Congress would have thought such behavior sufficient to rise to such level . . . ."); *AA v. Hammondsport Central Sch. Dist.*, 527 F. Supp. 3d 501, 511 (W.D.N.Y. 2021) ("[T]he conduct plaintiff alleges in connection with the initial assault on AA—over-the-clothes touching and sexual comments—does not, as a matter of law, arise to the level of 'severe and pervasive' harassment for which Title IX liability can attach to a one-time incident."); *Carabello v. New York City Dep't of Educ.*, 928 F. Supp. 2d 627, 643 (E.D.N.Y. 2013) (holding that over-the-clothes groping and biting of the plaintiff's neck hard enough to leave a mark, "although unfortunate, was not so severe, pervasive, or objectively offensive that it deprived her of access to educational opportunities"); *McCallum v. Dep't of Corrections*, 496 N.W.2d 361, 367 (Mich. App. 1992) (finding that a single incident of a prisoner grabbing a female prison guard's crotch was not sufficient severe or pervasive to establish a hostile work environment under Title VII).[21]

---

[21] Even if the Court believes that the lower courts reached the wrong conclusion, the misapplication of facts to a properly stated rule of law rarely warrants review. SUP. CT. R. 10.

Only by ignoring the distinction between politics and race can Brooks's allegations rise to the level of severe and pervasive harassment. As explained below, such an approach is inconsistent with Title VI's plain language, and impermissibly expands liability to harassment unrelated to a person's race, color, or national origin.

II. Politics and race are not synonymous, and harassment based on political beliefs is not actionable under Title VI.

Title VI's plain language prohibits discrimination "on the ground of race, color, or national origin." 42 U.S.C. § 2000d. Because it does *not* prohibit discrimination based on political beliefs, religion, or sex, it necessarily follows that Title VI confers no private right of action for harassment based on those characteristics. *See Armstrong v. Exceptional Child Care Ctr., Inc.*, 575 U.S. 320, 332 (2015) ("Spending Clause legislation [] is much in the nature of a contract . . . Our precedents establish that a private right of action under federal law is not created by mere implication, but must be unambiguously conferred.") (cleaned up); *Douglas v. Indep. Living Ctr. of Southern Calif., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, J., joined by Scalia, Thomas, and Alito, JJ., dissenting) (noting that "Congress, not the Judiciary, decides whether there is a private right of action to enforce a federal statute," and that "the States under the Spending Clause agree only to conditions clearly specified by Congress, not any implied on an ad hoc basis by the courts"). Nor would it need to, given the protections afforded by the First Amendment and Title IX.

And while Brooks argues that a court should infer that his race motivated *all* of the harassment he experienced, simply because he alleged that *some* of the harassment involved race (or that political viewpoints about race were discussed in front of him), his efforts to conflate politics and race cannot salvage his Title VI claim. First, recall that Brooks's harassment allegations are directed at different people in different roles, and are based on conduct that occurred at different times and at different schools. Is it reasonable to infer that a high school teacher made negative comments about conservatives in front of Brooks *because of his race*, simply because middle-school students previously discussed "the evils of the white race in American history" in front of Brooks? Or that a student insulted Brooks for wearing a Ted Cruz shirt in September 2018 *because of his race*, simply because a teacher asked Brooks a year later if he enjoyed "White Gospel Music?" The answer to both questions is no.

Unsurprisingly, several courts have expressly rejected the notion that Title VI prohibits politically-motivated discrimination. *See, e.g., Yang v. Ardizzone*, 540 F. Supp. 3d 372, 375 (W.D.N.Y. 2021), *aff'd sub. nom. Yang v. Eastman Sch. of Music*, 2022 WL 1040418 (2d Cir.), *cert. denied*, 143 S. Ct. 308 (2022); *D.S. v. Rochester City Sch. Dist.*, 2020 WL 7028523 (W.D.N.Y. 2020).

In *D.S.*, a third-grade teacher asked a white student which candidate she would vote for in the upcoming election. After the student responded "Donald Trump," she became "unpopular" and was "mistreated by her teacher and bullied by certain black and Hispanic classmates." *D.S.*, 2020 WL 7028523 at *2. The harassment continued for three school years, and intensified the second year, when a Hispanic classmate

harassed, bullied, and physically assaulted the student by stomping on her foot so hard that a doctor had to remove part of her toenail. *Id.* Teachers and other adults allegedly harassed the student as well, including by publicly calling her a racist. *Id.* at *3.

The court rejected the argument that the three-year bullying campaign amounted to race discrimination or harassment under Title VI, noting that "harassment is actionable only where it is severe, pervasive, offensive, and impermissibly discriminatory in nature," and finding that the plaintiffs failed to allege that the harassment the student experienced "was discriminatorily race-based and driven by the fact that she is white." *Id.* at *10. Instead, the plaintiffs repeatedly alleged that the bullying and harassment "was in response to and driven by Plaintiffs' perceived beliefs about race and their preferred presidential candidate." *Id.* The court also noted that "[b]eing treated differently as a result of one's political beliefs is not the equivalent of discrimination that arises from an individual's particular race," and that "even if certain instances of the harassment Plaintiff D.S. faced could be considered to be related to her race, she has not alleged that the harassment was so severe, pervasive, and objectively offensive that it deprived her of access to the educational benefits or opportunities provided by the school." *Id.*

Similarly, in *Yang*, the University of Rochester revoked a prospective student's acceptance into its music school after the student posted negative comments about African Americans and Hispanics on Facebook—including that it is a "statistical fact" that "African Americans and Hispanics commit more crimes than whites," and "African Americans are unfamiliar

with the usage of their newly acquired freedom"—because the University felt the statements reflected racial bias *Yang*, 540 F. Supp. 3d at 375. The student sued under Title VI and the Fourteenth Amendment, claiming that the University discriminated against him based on his race (Asian) and national origin (Chinese), and that the University gave in to political pressure from the Chinese government due to his family's anti-communist political opinions. *Id.* at 380. The district court easily dismissed the Title VI claims, reasoning that the plaintiff failed to allege any "facts that would support an inference that he was discriminated against due to his race or national origin," but instead claimed to have been "falsely branded a racist by Defendants, which does not "fall within the purview of Title VI." *Id.* (citations omitted). The court also rejected the argument that any political discrimination could be equated with race discrimination, holding that "[b]eing treated differently as a result of one's political beliefs is not the equivalent of discrimination that arises from an individual's particular race, as is required to establish a violation of Title VI." *Id.* at 381 (quotations omitted).

The Second Circuit affirmed, noting the absence of facts suggesting that any action was taken against the plaintiff "because of his race or national origin, that would not have been taken against a person of a different race or national origin who posted the same article." *Yang*, 2022 WL 1040418 at *2.

The logic of these cases makes sense—calling someone a racist is not the same as discriminating against them *based on their race* because "race and racism are not concepts that are inextricably intertwined," and "people of all races may harbor racist beliefs." *Ledda v. St. John Neumann Reg'l Academy*,

2021 WL 1035106, *6 (M.D. Pa. 2021); *see also Phillips v. Starbucks Corp.*, 624 F. Supp. 3d 530, 548 (D.N.J. 2002) ("[A]llegations that an adverse action was taken against an employee because he was falsely accused of being 'racist,' rather than because of the employee's own race, do not suffice to constitute "race discrimination."). Simply put, "[r]acism is a state of mind or a belief, whereas race is a state of being. To equate them . . . would [] be a false equivalence." *Ledda*, 2021 WL 1035106 at *6; *see also* App.5a–6a (*en banc* concurrence) ("Being called a racist is not the equivalent of being harassed based on the harassment victim's race. Being accused of racism says nothing about the race of the accused. A racist or alleged racist could be a person of virtually any color. The pejorative term is used because of the accused's own alleged views about race, not because of the accused's race.")

And recall that in this case, Brooks never even alleged that anyone called him as racist because he is white (nor did he allege any facts suggesting that Austin ISD responded more favorably to harassment complaints brought by non-white students). He instead admitted that he experienced "verbal attacks, vitriol, hatred and overall disgust . . . on almost a daily basis and always because of his political allegiance to President Trump," and that his classmate created the KKK meme because the classmate's father dislikes conservatives. No court needs to guess or infer why people called Brooks a racist or jokingly affiliated him with the KKK. Brooks himself tells us that the meme and the related name-calling stemmed from his conservative political beliefs, rather than his race. The two are not one and the same, and the Petition should be denied.

III. *Ames* is a red herring.

No one held Brooks to a heightened legal standard because he is white. Although some courts *in Title VII employment discrimination cases* require plaintiffs who are members of majority groups to show "background circumstances to support the suspicion that the defendant is the unusual employer who discriminates against the majority," *see Ames v. Dep't of Youth Servs.*, 87 F.4th 822, 825 (6th Cir. 2023), *cert. granted*, 145 S. Ct. 118 (2024), the *Ames* decision itself notes that the Fifth Circuit does not impose that requirement. *Id.* at 827 (Kethledge, J., concurring) (citing *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000)). And in this case, both the Fifth Circuit panel and the *en banc* concurrence expressly relied on the well-established *Davis* standard to reject Brooks's Title VI harassment claim, finding that he failed to allege that any *race-based* hostility he experienced rose to the level of severe and pervasive *race-based* harassment. App.3a–7a, 48a–54a. Brooks's efforts to analogize the legal issues in this case to the legal issues presented in *Ames* are spurious, at best.

The facts Brooks focuses on to make his "heightened standard" argument are equally unconvincing. Brooks focuses on two incidents that occurred in middle school (*i.e.*, several years before he left Austin ISD): (1) his principal asked him one time about listening to "Dixie" music, and (2) a classmate created a single meme depicting him as either a KKK member or a Nazi.[22] The Petition, of course, conveniently ig-

[22] As noted above, the classmate who created the meme told Brooks the following year that the meme actually depicted him as a Nazi officer, not a Klan member. App.24a, 26a.

nores that Brooks himself alleged that his conservative political politics, not his race, motivated the meme—which is precisely why the *en banc* concurrence discounted it. App.5a ("*B.W.'s own pleadings*, which we 'must accept as true,' assert that the meme was motivated by politics and not race.") (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Given the frequency and severity of racially-motivated behavior alleged in Brooks's complaint (or, more accurately, the lack thereof), the courts below did not need to impose a heightened standard to find that Brooks failed to allege severe and pervasive *race-based* harassment under *Davis*. *See, e.g.,* App. 6a (*en banc* concurrence) ("B.W's complaint, thirty-nine pages long, makes clear that the impetus for the harassment and bullying was his political beliefs, actions, and expressions and those of his classmates. The relatively few race-based comments recounted in the operative Complaint are not the sort of harassment that is actionable under Title VI."); App.53a–54a (panel opinion) (noting that "the allegations that B.W. argues should be considered within the totality of the circumstances lie outside the scope of racial animus," and citing the KKK meme and related name-calling as "just one of his many flawed attempts to conflate political with racial animus"); 76a (report and recommendation) (noting that Brooks's complaint contained only a "handful of vaguely race-related comments that span more than two years at two different schools" and that "the few allegations that appear to be racially-related are more political statements about race made in B.W.'s presence" rather than "attacks on B.W. because of his race").

The Title VII cases cited in the Petition do not change the calculus. While Brooks claims that "exposing Black people to 'KKK' and similar symbols constitutes discrimination on the basis of race," the questions of whether a symbol is "based on race" is different than whether the symbol is used in a manner that constitutes actionable harassment. One of the cases that Brooks relies on illustrates that truth. *See Ellis v. CCA of Tennessee LLC*, 650 F.3d 640 (7th Cir. 2011). In *Ellis*, African-American employees witnessed "two incidents of an employee wearing clothing marked by the confederate flag," along with other instances of alleged race-based behavior. *Id*. at 648. Although the court agreed that exposure to confederate flag garb *could* support a claim for racial harassment, it found that "it is not supported by record evidence in this case" because "their limited number of claims are insufficiently severe to support a hostile work environment claim." *Id*. at 647–48.[23]

Regardless, the very idea of relying on Title VII hostile work environment cases to evaluate Title VI student harassment claims is itself problematic. Title VII "is a vastly different statute" than Title VI. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Title VI conditions federal funding on a

---

[23] The Petition also claims that accusing someone of being part of a group popularly associate with race can support a claim for race discrimination. *See* Pet. at pp. 25–26 (citing *Ford v. Jackson Nat'l Life Ins. Co.*, 45 F.4th 1202 (10th Cir. 2022)). *Ford* is inapposite. As noted above, Brooks admits that his political beliefs, as opposed to his race, motivated the KKK/Nazi meme. Also, while the plaintiff in *Ford* alleged that her co-workers accused her of being a member of the Black Panther Party, she also alleged that they used overt racial terms "on a daily basis with impunity"—including "black bitches from Atlanta" and "the n-word.." *Ford*, 45 F.4th at 1214, 1230, 1233.

recipient's promise not to discriminate, "in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser*, 524 U.S. at 286. And because Congress enacted Title IX pursuant to its authority under the Spending Clause of the Constitution, this Court insists that "Congress speak with a clear voice" when imposing conditions on the recipient of federal funds, "recognizing that there can, of course, be no knowing acceptance of the terms of the putative contract if a State is unaware of the conditions imposed by the legislation or is unable to ascertain what is expected of it.'" *Davis*, 526 U.S. at 640 (cleaned up); *see also Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219 (2022) ("Unlike ordinary legislation, which imposes congressional policy on regulated parties involuntarily, Spending Clause legislation operates based on consent: in return for federal funds, the recipients agree to comply with federally imposed conditions. For that reason, the legitimacy of Congress' power to enact Spending Clause legislation rests not on its sovereign authority to enact binding laws, but on whether the recipient voluntarily and knowingly accepts the terms of that contract.") (cleaned up); *Pennhurst St. Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.").

By contrast, Title VII "is framed in terms not of a condition but of an outright prohibition" of discrimination. *Gebser*, 524 U.S. at 286. Additionally, Congress enacted Title VII pursuant to the Commerce Clause, which grants Congress expansive regulatory authority. *See, e.g., Arkansas v. United States Dep't of Educ.*, 742 F. Supp. 3d 919, 942–943 (E.D. Mo. 2024) ("Title VII was enacted pursuant to the Commerce

Clause, which grants Congress expansive regulatory power. For these reasons, the requirement that recipients receive adequate notice of Title IX's proscriptions bears on the proper definition of "discrimination" in the context of a private damages action, whereas whether a specific application of Title VII was anticipated is irrelevant.") (cleaned up).

These differences explain why Title VII and Title VI have distinct liability standards. For example, an employer is liable under Title VII for severe *or* pervasive peer harassment—about which it has actual *or* constructive knowledge—if it negligently controls the work environment. *Vance v. Ball St. Univ.*, 570 U.S. 421, 424 (2013); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002); *see Davis*, 526 U.S. at 647. But under Title VI, a plaintiff must show that they lost out on educational benefits or opportunities due to the funding recipient's deliberate indifference to known acts of severe *and* pervasive race-based harassment. *Davis*, 526 U.S. at 633. Deliberate indifference is a higher standard than mere negligence, and liability requires proof of actual (not constructive) knowledge. *Id.* at 649.

Notably, in the analogous Title IX context, several courts have expressed concern over applying Title VII's causation and liability standards to Title IX claims, where doing so would expand liability to alleged discriminatory acts that are not expressly prohibited by Title IX's plain language. *See, e.g., Texas v. United States*, 740 F. Supp. 3d 537, 547 (N.D. Tex. 2024) (arguing that Title VII's prohibition on sexual orientation discrimination, which is premised on the notion that sex is necessarily a but-for cause of such discrimination, "is wrong in the Title IX context" be-

cause "[i]t does not follow that because sexual orientation and gender identity are related to biological sex that discrimination 'because of' the former amounts to discrimination 'on the basis of' the latter") (citing *Bostock v. Clayton Cnty, Georgia*, 590 U.S. 644, 660, 661 (2020)); *Tennessee v. Becerra*, 739 F. Supp. 3d 467, 478 (S.D. Miss. 2024) ("*Bostock*'s holding hinged on the broad 'but for' causation standard applicable to Title VII, while the present case pertains to a very different statutory standard."); *Texas v. Cardona*, 743 F. Supp. 3d 824, 880–81 (N.D. Tex. 2024) (appeal filed) ("Title VII differs from Title IX in important respects. Chief among these differences is that the workplace is not the same as the educational environment . . . Given the differences between Title VII and Title IX, what counts as discrimination under one statute is not necessarily discrimination under the other.").

Overall, there are several problems with analogizing Title VII hostile work environment claims to Title VI harassment claims involving students. And if the Court were to accept Brooks's invitation to impose Title VII's liability standards on student harassment claims brought under Title VI—and to conflate a student's race (which is protected by Title VI) with their political beliefs (which is not)—the consequences will reach far beyond this one case, and will usher in a tidal wave of litigation against schools across the country.

CONCLUSION

Austin ISD agrees that no one should be discriminated against—or held to a higher standard to state a valid discrimination claim—because of their race. But those policy issues are completely irrelevant to this case. The Court should deny the Petition.

Respectfully submitted,

Stephanie A. Hamm
Christopher B. Gilbert
Counsel of Record
THOMPSON & HORTON LLP
3200 Southwest Freeway, Ste. 2000
Houston, Texas 77027
cgilbert@thompsonhorton.com
(713) 554-6744
Counsel for Respondent

DATED: May 27, 2025