No. 24-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When Brooks Warden (B.W.) was in middle school in the Austin Independent School District, he wore a MAGA hat on a school field trip. This innocent act triggered a years-long campaign of bullying and harassment against him based on his race and political views by both his classmates and teachers. Brooks is a white, Christian male whose former school district is predominantly Hispanic. Once his teachers and peers found out he supported President Trump, he became a target. Brooks sued for racial harassment under Title VI of the Civil Rights Act of 1964. The district court dismissed the complaint, and a Fifth Circuit panel affirmed because, in its view, Brooks did not plausibly allege the harassment was due to his race as opposed to his political views. The Fifth Circuit granted *en banc* review, and the full court divided evenly, resulting in affirmance. Judge Richman concluded in a concurrence that Brooks failed to state a Title VI claim because the "primary impetus" for most of the harassment against him was his political views and not his race. In separate dissents, Chief Judge Elrod and Judge Ho concluded the case should proceed because Brooks plausibly alleged race was *one* reason for the harassment, *in addition* to his political views.

The question presented is:

Whether a plaintiff can state a claim for racial harassment under Title VI even if the "primary impetus" for the harassment was the plaintiff's political views.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner states as follows: the Petitioner is an individual.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

B.W. by M.W. v. Austin Indep. Sch. Dist., No. 1:20-CV-00750-LY, 2022 WL 20470051, U.S. District Court for the Western District of Texas. Report and recommendation issued on January 28, 2022.

B.W. by M.W. v. Austin Independent School District, No. A-20-CV-00750-LY, U.S. District Court for the Western District of Texas. Judgment entered on February 15, 2022.

B.W. v. Austin Independent School District, 22-50158, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on January 9, 2023.

B.W. v. Austin Independent School District, 22-50158, U.S. Court of Appeals for the Fifth Circuit, sitting *en banc*. Judgment entered on November 13, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit *en banc* decision is reported at 121 F.4th 1066 and reproduced at App.1a to App.37a. The order granting rehearing *en banc* and vacating the panel opinion is reported at 72 F.4th 93 and reproduced at App.80a to App.81a. The Fifth Circuit panel opinion is reported at 2023 WL 128948 and reproduced at App.38a to App.57a. The district court's order dismissing the action is reported at 2022 WL 20470054 and reproduced at App.58a to App.60a. The magistrate judge's report and recommendation is reported at 2022 WL 20470051 and reproduced at App.61a to App.79a.

JURISDICTION

The Fifth Circuit issued its *en banc* decision on November 13, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VI of the Civil Rights Act of 1964 (Civil Rights Act) is codified at 42 U.S.C. § 2000d, *et seq.* It provides, in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be

> excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

INTRODUCTION

The Court has yet to decide whether Title VI creates a cause of action for students who experience hostile environment discrimination. The Court has, however, recognized such claims under Title IX, and the circuits that have considered the question have been unanimous in extending those holdings to Title VI. But the decision below reflects obvious confusion over the proper causation standard for this common anti-discrimination claim. Such confusion demands clarity from the Court.

Brooks Warden is a white male who was harassed for over three years at school in part because of his race.[1] When Brooks was in middle school in the predominantly Hispanic Austin Independent School District (AISD or the District), which is based in Austin, Texas, he openly supported President Donald Trump at school. When Brooks's peers and teachers became aware of his conservative political beliefs and support for President Trump, they began to bully and harass him daily.

Much of the bullying Brooks suffered had explicit political motivations. It started when he wore a MAGA hat

1. At the time this action commenced, Brooks was a minor and thus proceeded under his initials. Fed. R. Civ. P. 5.2(a)(3). Because he has reached the age of majority, Brooks now proceeds under his name.

on a school field trip, and his peers sometimes mentioned his support for President Trump as a reason for their vitriol. Yet much of the bullying also had explicit racial motivations. Brooks's classmates and even district staff would routinely mention his race and include white tropes alongside their invectives. When Brooks was laying on the floor with blood on his face after a fellow student attacked him, it didn't matter what motivated the cruelty—he just wanted it to stop. Nonetheless, based on the facts alleged in his complaint, it is evident that the bullying and harassment Brooks experienced occurred, in part, because he is white.

The harassing environment to which Brooks was regularly subjected for over three years caused him severe emotional distress and psychological harm that persists to this day. Though his parents pleaded with AISD to act, the District failed to stop the harassment. Not until Brooks left the District at the beginning of the COVID-19 pandemic did he escape the bullying.

Shortly thereafter, Brooks filed suit against AISD alleging, among other things, violations of Title VI for hostile educational environment based on race. The magistrate judge, the district court, and a Fifth Circuit panel concluded Brooks failed to plausibly allege that the harassment he experienced was based on his race, and not his political beliefs. And while the Fifth Circuit *en banc* court did not issue a majority opinion, Judge Richman stated in her *en banc* concurrence that she was voting to affirm the dismissal because the "primary impetus" for the bullying was Brooks's political beliefs.

Departing from the holdings of its sister circuits and this Court's recent precedent in the Title VII context, the concurrence applied the wrong legal causation standard under the Civil Rights Act. Under that precedent, the question is not whether the complaint plausibly alleged race was the "primary impetus" for the harassment. Rather, the question is whether, looking to the totality of the circumstances surrounding the harassing environment, the complaint plausibly alleged that race was *one* "but-for" cause of the harassment, even if not the *only* "but-for" cause. In other words, the concurrence failed to recognize that discrimination with multiple "but-for" causes nevertheless violates Title VI if one of those causes is race.

The Court should grant this petition for three reasons. First, the *en banc* concurrence directly contravenes the holding of other circuits and this Court's holding just a few terms ago in *Bostock v. Clayton County* that discrimination claims under the Civil Rights Act can have multiple "but-for" causes. The concurrence's failure to apply this standard in the Title VI context after nearly a year and a half of e*n banc* review is evidence of significant confusion among lower courts as to the proper standard to apply.

Second, the outcome below likely would have been different under this Court's forthcoming decision in *Ames v. Ohio Department of Youth Services*. That case involves the question of whether Title VII of the Civil Rights Act applies equally to "majority" and "minority" plaintiffs. Like the Sixth Circuit in *Ames*, the concurrence below applied a heightened standard to Brooks's claims because he is part of a majority population—*i.e.*, because he is white. The court discounted statements made toward

Brooks that, in cases involving non-white plaintiffs, would have been deemed to be racially motivated. The concurrence's failure to conclude these allegations were due to Brooks's race reflects the same type of heightened standard applicable only to majority plaintiffs adopted by the Sixth Circuit in *Ames*. At the very least, the Court should hold this petition until it decides *Ames* and then grant the petition, vacate the lower court's decision, and remand this case to the Fifth Circuit for consideration under *Ames*.

Finally, as Judge Ho discussed in his *en banc* dissent below, societal acceptance of racism against white individuals is a national issue of growing concern. The acquiescence to—and, in some cases, celebration of—overt racist acts toward white people is a troubling feature of our culture that has become all too common. Congress enacted the Civil Rights Act to eliminate race-based discrimination within its ambit in its entirety. In so doing, Congress did not intend to limit its protections only to non-whites. As Judge Ho explained below, dismissing Brooks's complaint as implausible is yet another example of this growing—and disturbing—trend.

The *en banc* Fifth Circuit's failure to reach even a bare majority as to the correct standard for racial harassment claims under Title VI reflects the need for this Court's intervention. If allowed to stand, the decisions below will sow further confusion among the lower federal courts, and Brooks will be denied the opportunity to hold AISD accountable for its discrimination against him.

STATEMENT OF THE CASE

I. Legal Framework

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title VI is enforceable through an implied private right of action for damages against the funding recipient. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001).

This Court has yet to hold that Title VI creates a cause of action for students who experience harassment. But the Court has held that Title IX of the Education Amendments of 1972 creates such a cause of action. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644, 650 (1999) (student-on-student harassment); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (teacher-on-student harassment). And because Title IX "was modeled after Title VI," *Gebser*, 524 U.S. at 286, the circuits that have considered the question have uniformly held that Title VI—like Title IX—creates a cause of action for harassment against students based on a protected characteristic, *see*, *e.g.*, *Ricketts v. Wake Cnty. Pub. Sch. Sys.*, No. 22-1814, ___ F.4th ___, 2025 WL 37342, at *7 (4th Cir. Jan. 7, 2025); *Adams v. Demopolis City Sch.*, 80 F.4th 1259, 1273 (11th Cir. 2023); *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 408 (5th Cir. 2015); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 272 (3d Cir. 2014); *Doe v. Galster*, 768 F.3d 611, 617 (7th Cir. 2014); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 664–65 (2d Cir. 2012); *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty.*, 334 F.3d 928, 934 (10th Cir. 2003).

Following *Davis*, the circuits hold that to state a claim for student-on-student harassment under Title VI, the plaintiff must allege (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," and the school district, (2) "had actual knowledge," (3) had "control over the harasser and the environment in which the harassment occurs," and (4) "was deliberately indifferent." App.15a; *see*, *e.g.*, *Ricketts*, 2025 WL 37342, at *7 (citing *Davis*, 526 U.S. at 646–52). There is less agreement regarding the standard for alleging actionable teacher-on-student harassment.[2]

The only issue in the appeal below was whether the complaint plausibly alleged sufficient harassment on the ground of race. App.16a.

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2. The circuits are split on whether *Davis*'s conjunctive "severe, pervasive, *and* objectively offensive" test applies in the context of teacher-on-student harassment or whether the disjunctive "severe *or* pervasive" test from Title VII case law applies. *Compare Jennings v. Univ. of N.C.*, 482 F.3d 686, 716 (4th Cir. 2007) (concluding that disjunctive "severe *or* pervasive" test applies to coach-on-student harassment under Title IX), *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 745, 750 (2nd Cir. 2003) (same with respect to teacher-on-student harassment under 42 U.S.C. § 1983 and Title IX), *and J.F.K. v. Troup Cnty. Sch. Dist.*, 678 F.3d 1254, 1256 (11th Cir. 2012) (noting that the "severe, pervasive, *and* objectively offensive" test does not apply to teacher-on-student harassment under Title IX), *with Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 408 (5th Cir. 2015) (concluding that teacher-on-student harassment must satisfy conjunctive "severe, pervasive, *and* objectively offensive" test to be actionable under Title VI). Regardless of which of these two standards applies, Brooks has stated a plausible claim. If this Court grants this petition, Brooks reserves the right to argue that the conjunctive "severe or pervasive" test applies.

II. Brooks Warden and the Racial Harassment he Experienced

Brooks Warden is a child of country music. His father, Monte Warden, is an award-winning musician and inductee in the Texas Music Hall of Fame. Brooks also plays music, having the honor of performing at the Grand Ole Opry just last year. Brooks is a white, Christian male with conservative political beliefs.

In 2017, when Brooks was in middle school, he wore a MAGA hat on a school field trip. App.62a. He wore the hat because he supports President Trump and wanted to express that support at school. App.63a. What followed was over three years of relentless bullying and harassment at the hands of his peers, teachers, and school administrators based on his race, religion, and political views. App.63a–66a.

AISD is predominantly Hispanic.[3] Brooks's fellow students lamented the "evils of the white race in America" in his presence, App.4a, and a teacher's aide regularly referred to him as "Whitey" in class in front of other students, App.4a. On one occasion, his middle school principal yanked Brooks's earbud out of his ears and asked

3. *See 2019-2020 Demographic Analysis*, Austin Independent School District, at 45, https://www.austinisd.org/sites/default/files/dept/planning-asset-management/2020-2021-Austin%20ISD_Demographic_Report.zip (last visited Jan. 27, 2025). This official report, produced by Respondent, is publicly available on Respondent's website and is subject to judicial notice under Federal Rule of Evidence 201(c)(2). *See*, *e.g.*, *Murthy v. Missouri*, 603 U.S. 43, 84 (2024) (Alito, J., dissenting) (noticing Congressional committee report under Rule 201).

him in front of a room full of people if he was "listening to Dixie." App.9a. His fellow classmates would routinely—and without foundation—accuse him of being "racist." App.5a. One fellow student made a meme of Brooks that portrayed him as being a member of the Ku Klux Klan. App.5a. Another student threatened to "beat the sh—" out of Brooks because he is white, and then followed through with the threat, leaving Brooks bloodied on the floor. App.13a. And yet another student stated an intent to "kill all Trump supporters" while looking directly at Brooks. App.45a. Students called him a "Nazi," "school shooter," and routinely accused him of being homophobic. App.42a–43a, 54a. Brooks is none of these things. Yet he became a pariah at his school because of who he is and what he believes.

The bullying and harassment occurred daily and lasted for over three years, causing Brooks severe emotional and psychological distress. App.39a–47a. Throughout that time, Brooks's parents met with school administrators on multiple occasions to report the harassment and to put an end to what Brooks was going through. App.21a–30a. Brooks's parents filed formal grievances on three separate occasions and even appealed to the school board for intervention. *Ibid.* Yet despite their efforts, the harassment persisted.

Mercifully, when Brooks began remote learning at the beginning of the COVID-19 pandemic, he finally found respite from the harassment. App.45a–46a. Though he was stuck inside at home, he was away from his fellow students and the school staff who bullied him. *Ibid.* But the trauma he experienced had lasting impact and plagues him nearly five years later.

III. The Proceedings Below

In July 2020, shortly after Brooks left AISD for good, he filed this suit against the District. App.46a. In the operative complaint, Brooks alleges Section 1983 claims for violations of the First and Fourteenth Amendments for actions taken against him based his political views and religion, Title VI racial harassment and retaliation claims, and state-law claims for racial discrimination. *Ibid.*

A. The District Court's Dismissal

AISD moved to dismiss under Rule 12(b)(6), and the motion was referred to a magistrate judge for a report and recommendation (R&R). *Ibid.* In evaluating Brooks's Title VI racial harassment claim, the R&R concluded Brooks "failed to plead factual allegations to support his claim that the harassment he suffered . . . was because of his race, as opposed to [his] political views." App.76a. According to the R&R, the "handful of vaguely race-related comments" did "not amount to the 'severe, pervasive, and objectively offensive' requirement for a race-based harassment claim under Title VI." *Ibid.* (citation omitted).

The district court adopted the R&R and dismissed the complaint. App.58a–60a.

B. The Fifth Circuit Panel's *Per Curium* Affirmance

As relevant here, Brooks appealed the dismissal of his Title VI harassment claim. App.47a. Because AISD did not contend that the complaint insufficiently alleged it was deliberately indifferent to the harassment, App.16a,

the only issue on appeal was whether Brooks alleged sufficient race-based harassment. *Ibid.* In a *per curium* opinion issued without oral argument, a panel of the Fifth Circuit affirmed. App.39a.

The panel first noted that "the bulk of the Complaint's allegations do not mention [Brooks's] race at all." App.49a. And regarding those that did, the panel concluded they were not "so severe, pervasive, and objectively offensive that [they] can be said to [have] deprive[d] [Brooks] of access to educational opportunities or benefits provided by [his] school[s]." *Ibid.* (citation omitted). The panel went on to note that "only one [allegation] is truly severe—where [a fellow student] made it known that he had assaulted [Brooks] because he was white." *Ibid.* According to the panel, however, this allegation was "not enough to establish harassment, even when considered alongside the few, less severe, race-based allegations." *Ibid.*

Central to the panel's conclusion was its disagreement with Brooks's reliance on the "totality of the circumstances." App.53a. Though the panel admitted the "bullying as alleged in this case is a cause for concern," it concluded that because only some of the bullying overtly involved statements about race, the totality of the harassment Brooks experienced could not be said to be "because of his race." App.57a. In the panel's view, Brooks's legal theory was a "flawed attempt[] to conflate political with racial animus." App.54a.

The panel also discounted all of Brooks's allegations regarding harassment by district staff, concluding that such allegations must be set forth in a separate cause of action from the student-on-student allegations. App.54a

n.1. Without the teacher-on-student allegations—some of which explicitly mentioned Brooks being white—the panel concluded it was not plausible that the harassment he experienced was based on his race. App.54a.

C. The Fifth Circuit's Evenly Decided *En Banc* Opinion

The Fifth Circuit granted *en banc* review. App.80–81. Nearly a year and a half later, the court affirmed the district court by an evenly divided 9–9 vote with no majority opinion. App.2a. Concurring in the affirmance, Judge Richman, joined by Judges Southwick, Douglas, and Ramirez, considered all of Brooks's allegations (including those by teachers) using this Court's standard for student-on-student harassment under Title IX, and thus considered whether the bullying Brooks experienced 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." App.3a (citing *Davis*, 526 U.S. at 650). The concurrence observed that it is "sickening and reprehensible that a middle-school and later high-school student would be subjected to what [Brooks] says he had to endure and that school officials did not act decisively to bring an end to the bullying and harassment." App.6a. Nonetheless, the concurrence concluded that, based on the facts alleged in the complaint, the "primary impetus of the bullying" was Brooks's "political beliefs," not his race. App.3a. And even though the complaint included express allegations that Brooks experienced bullying because he was white, the concurrence concluded it was not "reasonable" to infer that his race—rather than his political views—was the reason he was bullied. *Ibid.*

In dissent, Chief Judge Elrod, joined by Judges Jones, Smith, Willett, Ho, Duncan, Engelhardt, Oldham, and Wilson, would have held Brooks plausibly stated a claim for racial harassment. App.8a. Judge Elrod thought this "should be a relatively easy case under Rule 12(b)(6), applying the standards for a well-pleaded complaint." *Ibid.* She detailed the numerous allegations of racial harassment described in the complaint—including those allegations of district staff participating in the bullying—and concluded these allegations were sufficient to satisfy the plausibility standard. App.11a–20a. In Judge Elrod's view, "whether [Brooks's] harassers were more likely to have been motivated by political animus as opposed to racial animus is irrelevant to proper 12(b)(6) analysis." App.12a–13a. Because Brooks alleged that he was "physically attacked and verbally abused" at least in part because of his race, she concluded, such allegations were sufficient to state a claim. App.20a.

In a separate dissent, Judge Ho, joined by Judge Duncan, observed that "the allegations in this case are more substantial than in other cases where [the Fifth Circuit has] found racial harassment." App.31a (collecting cases). In their view, Brooks was "harassed for both racial and political reasons." *Ibid.* Judge Ho concluded that it is "racist to characterize whites as racist. Because it'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. Judge Ho also suggested that the outcome of this case would likely be different under this Court's forthcoming decision in *Ames v. Ohio Dep't of Youth Servs.*, 2024 WL 4394128, __ U.S. __ (2024) (granting petition for certiorari), which involves the appropriate standard for disparate treatment

under Title VII of the Civil Rights Act brought by "majority" population plaintiffs. App.34a. Finally, Judge Ho commented that our "culture today increasingly accepts (if not celebrates) racism against whites." App.36a. In his view, what happened to Brooks, and the *en banc* court's treatment of his allegations, was a function of a larger problem within our society of accepting racism against white people. App.37a. And because "cultural permission is not Congressional permission," he would have allowed Brooks's case to proceed. *Ibid.*

* * *

Brooks files this petition for a writ of certiorari to establish the correct standard for stating a racial harassment claim under Title VI when the complaint includes allegations that other reasons, such as political beliefs, also motivated the harassment.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's failure to apply the "but for" causation standard to Title VI demands this Court's intervention because of the disagreement among the circuits.

Because this Court has yet to decide whether students have a claim for harassment under Title VI, the circuits are left guessing as to the proper causation standard to apply to this increasingly common anti-discrimination claim. The near year-and-a-half review of this case by the *en banc* Fifth Circuit reflects a need for this Court's guidance.

Judge Richman's concurrence below represents a serious departure from this Court's decisions regarding the causation standard for claims under Title VII and other anti-discrimination statutes, as reaffirmed most recently in *Bostock v. Clayton County*, 590 U.S. 644 (2020), and as recognized by other circuits. If left undisturbed, the decision will sow further confusion regarding the causation standard under Title VI and other anti-discrimination statutes the Court has yet to interpret.

A. Racial Harassment Claims Under Title VI

As noted, this Court has not decided whether students have a cause of action under Title VI for harassment, nor has it announced the contours of such a claim. But it has recognized such a cause of action for sex-based harassment under Title IX. *See Gebser*, 524 U.S. at 286 (teacher-on-student claim); *Davis*, 526 U.S. at 633 (student-on-student claim).

Because Title IX was enacted pursuant to the Spending Clause, "private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." *Davis*, 526 U.S. at 640. When "Congress acts pursuant to its spending power, it generates legislation much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Ibid.* Under Title IX, the plaintiff therefore must demonstrate "deliberate indifference" by the funding recipient to establish liability. *Ibid.* (holding that "only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities.").

Under this framework, the elements of a Title IX harassment claim for student-on-student harassment are: (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," and the school district, (2) "had actual knowledge," (3) had "control over the harasser and the environment in which the harassment occurs," and (4) "was deliberately indifferent." App.15a (citing *Davis*, 526 U.S. at 644, 650 (cleaned up)).

This Court generally interprets "Title IX consistently with Title VI." *Barnes v. Gorman*, 536 U.S. 181, 185 (2002); *Grove City Coll. v. Bell*, 465 U.S. 555, 566 (1984) ("The drafters of Title VI envisioned that the receipt of student aid funds would trigger coverage, and, since they approved identical language, we discern no reason to believe that the Congressmen who voted for Title IX intended a different result."), *superseded by statute on other grounds*, Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, § 6, 102 Stat. 28, 31 (1988) (codified at 42 U.S.C. § 2000d–4a), *as recognized in DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1384 (10th Cir. 1990). Accordingly, every circuit that has considered the question has concluded that Title VI—like Title IX—creates a cause of action in favor of students who are harassed based on race. And each of these circuits has held the elements of a Title VI student-on-student harassment claim are identical to the elements of student-on-student harassment claims under Title IX. *See Ricketts*, 2025 WL 37342, at *7; *Adams*, 80 F.4th at 1273; *Fennell*, 804 F.3d at 408; *Blunt*, 767 F.3d at 272; *Doe*, 768 F.3d at 617; *Zeno*, 702 F.3d at 664–65; *Bryant*, 334 F.3d at 934.

B. The "but-for" causation standard applies under Title VI, under which the protected characteristic need only be one "but-for" cause of the harassment

The only question in the appeal below was whether the complaint plausibly alleged sufficient harassment on the ground of race. App.15a–16a. The *en banc* concurrence applied the wrong causation standard to answer this question.

While this Court has not decided the causation standard for alleging or establishing discrimination "on the ground of" a protected category under Title VI, 42 U.S.C. § 2000d, it has held that the "but for" causation standard applies under other anti-discrimination statutes, including other provisions of the Civil Rights Act. *See Bostock*, 590 U.S. at 656 (Title VII discrimination); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013) (Title VII retaliation); *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 333 (2020) (42 U.S.C. § 1981); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009) (ADEA discrimination); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 289 (2023) (*SFFA*) (Gorsuch, J., concurring) (concluding the "but-for" causation standard applies to Title VI discrimination claims).

Just a few terms ago, in *Bostock*, the Court held that a Title VII plaintiff must demonstrate that the alleged discrimination would not have occurred "but for" the protected characteristic. 590 U.S. at 656. The Court observed that the "but for" causation standard is a "sweeping" one insofar as "events [often] have multiple

but-for causes." *Ibid.* For this reason, under "but-for" causation, "a defendant cannot avoid liability just by citing some other factor that contributed to its" allegedly discriminatory act. *Ibid.*

More recently, in *SFFA*, Justice Gorsuch, joined by Justice Thomas, concluded that the "but-for" causation standard applied under Title VI. 600 U.S. at 289 (Gorsuch, J., concurring). Justice Gorsuch observed that, just as under Title VII, it "does not matter if the recipient can point to 'some other . . . factor' that contributed to its decision to disfavor that individual." *Ibid.* (*citing Bostock*, 590 U.S. at 656). Instead, Title VI prohibits "intentionally treating any individual worse *even in part* because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert." *Ibid.* (emphasis added).

Unlike the Fifth Circuit below, the other circuits have applied the "but-for" causation standard under the Civil Rights Act, including Title VI. *See*, *e.g.*, *Murguia v. Childers*, 81 F.4th 770, 775 (8th Cir. 2023) (holding that "'[o]n the ground of' means but-for causation" under Title VI); *Doe v. Sch. Dist. No. 1*, 970 F.3d 1300, 1310 (10th Cir. 2020) (same under Title IX); *see also Ricketts*, 2025 WL 37342, at *7 (concluding that students' labelling plaintiff as an "angry Black girl" was sufficient to raise inference of race-based treatment under Title VI despite the fact label was also sex-based).

Under this Court's recent holding in *Bostock*, and as explained by Justice Gorsuch in *SFFA*, a plaintiff satisfies the causation standard in a claim for harassment under Title VI when the complaint alleges facts that give rise

to a reasonable inference that the harassment would not have occurred "but for" the protected characteristic, even if that protected characteristic is not the sole cause of the harassment.

C. The *en banc* concurrence deviates from the other circuits and will confuse courts as to the causation standard for Title VI claims.

The *en banc* concurrence below applied an incorrect causation standard to determine whether the harassment here was "on the ground" of race. Specifically, rather than apply the "but-for" standard, the concurrence applied a standard that looks to the "primary impetus" of the harassment. This was error, and if left untouched, will sow confusion in light of the split among the courts, resulting in plaintiffs with otherwise meritorious claims being left without recourse under Title VI and, potentially, other anti-discrimination statutes.

Instead of applying the "but-for" causation standard, the *en banc* concurrence evaluated whether the "primary impetus" of the harassment Brooks suffered was his race. App.3a. According to the concurrence, because the "primary impetus" of the harassment was due to Brooks's political beliefs, he did not state a claim. *Ibid.* But in *Bostock*, this Court rejected a similar standard under Title VII, observing that if Congress wanted to adopt a "primary cause" causation standard, it would have said so. 590 U.S. at 656 (noting that Congress "could have written 'primarily because of' to indicate that the prohibited factor had to be the main cause of the defendant's challenged [conduct]."). Indeed, Congress adopted a causation standard similar to the "primary cause" standard applied

by the concurrence under Section 504 of the Rehabilitation Act of 1973, which provides that "no qualified individual with a disability . . . shall [be subject to discrimination] *solely* by reason of [the] disability." 29 U.S.C. § 794 (emphasis added), But the text of Title VII—like the text of Title VI—says otherwise.

Here, the concurrence failed to recognize what this Court stated in *Bostock*: that there can be multiple "but-for" causes for discrimination. 590 U.S. at 656. The concurrence concluded Brooks did not state a claim because it was implausible to conclude race, instead of political beliefs, was the but-for cause of the harassment. App.5a–6a. In arriving at this conclusion, the concurrence ignored that a plaintiff states a Title VI harassment claim when he alleges sufficient facts to give rise to the reasonable inference that race was *one* but-for cause of the harassment, even if race is not the *only* but-for cause. *See Bostock*, 590 U.S. at 656; *Murguia*, 81 F.4th at 775; *Doe*, 970 F.3d at 1310; *Ricketts*, 2025 WL 37342, at *7.

Moreover, the facts here easily give rise to a reasonable inference that the harassment was "on the ground" of race. While a plaintiff need not point to "a contemporaneous statement of animus [for harassment] to be actionable," *Strothers v. City of Laurel, Maryland*, 895 F.3d 317, 330–31 (4th Cir. 2018), even considering only the harassment that was explicitly race-based, these allegations were more than enough to plausibly state a claim:

- Students made fun of Brooks while in band class, mocking his race and discussing "the evils of the white race in American history" in his presence.

- Brooks's middle school principal made fun of him while he was walking in the hall, "yank[ing]" out his ear bud, laughing to herself and stating sarcastically, "Are you listening to Dixie?" after which bullying from other students increased.

- A teacher said to Brooks, "Man, I'm getting concerned about how many white people there are."

- A teacher's aide repeatedly referred to Brooks as "Whitey" in class, speaking down to him by saying things like "Can't figure this one out Whitey?"

- A teacher asked Brooks if he "enjoyed his White Gospel Music" in a derisive and mocking manner.

- One student made a meme of Brooks dressed as a hooded Ku Klux Klansman and circulated it to other students. The student later told Brooks, "You're dumber than I thought[;] the meme of you was a Nazi officer, not a Klansman."

- A teacher asked students if any of them had Halloween candy to offer. Brooks raised his hand, and the teacher responded, "Your candy would be filled with hate and oppression."

- While Brooks and his friends were discussing another friend, a teacher told Brooks, "I will not have a white man talk to me about gender issues!"

- As Brooks stood to recite the Pledge of Allegiance, another student told him, "America is only for white people."

- A student drew a swastika on the back of one of Brooks's friends and stated to Brooks, "I'm going to beat the s—out of you." He then punched Brooks repeatedly. The student told others that he beat Brooks up because he "was white."

- Students regularly called Brooks a "racist," swore at him, and made obscene gestures toward him.

App.21a–30a. These allegations state a compelling case of behavior "on the ground" of race. By focusing on what it believed to be the "primary impetus" of the harassment, the *en banc* concurrence improperly weighed the allegations of non-race-based harassment against the allegations of race-based harassment rather than granting Brooks all reasonable inferences from the allegations as a whole. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (holding courts must look at the "constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed").[4]

The concurrence's deviation from other circuits' application of the "but-for" causation standard, coupled with the fact that the full Fifth Circuit split evenly in this case, reveals a need for this Court to provide clarity as to the correct causation standard for harassment claims under Title VI. After nearly a year and a half

4. Brooks does not concede that the "primary impetus" for the harassment he experienced was his political views. But even if his political views triggered the harassment he suffered, his race was still one "but for" cause of the harassment, which renders it actionable under Title VI.

of consideration, the full Fifth Circuit could not reach a majority consensus in what should have been an easy case. This failure evinces significant confusion as to the appropriate causation standard under Title VI that demands this Court's intervention.

II. The *en banc* concurrence applied a heightened legal standard to claims by majority plaintiffs, which will likely be impacted by this Court's forthcoming decision in *Ames*.

In addition to failing to apply the proper causation standard, the *en banc* concurrence also implicitly applied a heightened legal standard because Brooks is a member of a "majority" race. This heightened legal standard is similar to the heightened legal standard applied by the Sixth Circuit in *Ames v. Ohio Dep't of Youth Servs.*, 87 F.4th 822, 825 (6th Cir. 2023), which is currently before the Court. If the Court rules in *Ames* that Title VII applies to majority and minority populations equally, such a ruling would change the analysis and outcome of this case. At the very least, the Court should hold this petition until after it decides *Ames*, and then grant, vacate, and remand with instructions to reconsider under *Ames*.

A. *Ames* asks whether Title VII applies equally to majority and minority plaintiffs.

In *Ames*, the Court will consider whether Title VII applies in the same way to both majority and minority population plaintiffs. *See* Question Presented, No. 23-1039. The Court's decision in that case will have ripple effects across other anti-discrimination laws, including Title VI. *See SFFA*, 600 U.S. at 290 (Gorsuch, J., concurring) (noting

that the "essentially identical terms" in Titles VI and VII should be read to 'have the same meaning'" (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005))).

Under Title VII, plaintiffs can prove they were discriminated against based on a protected characteristic through circumstantial evidence if they satisfy the burden-shifting framework set forth in this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). But some circuits require plaintiffs belonging to "majority" populations also to demonstrate, as part of their prima face case, the existence of "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Ames*, 87 F.4th at 825. Yet the effect of this requirement is that Title VII imposes a more onerous legal standard on individuals who are from a majority population despite the fact there is no clear textual command requiring such a result. *Ames*, No. 23-1039, Pet. Br. at 25–36. As the petitioner in *Ames* correctly argues, the Court should interpret Title VII to provide the same protections for both majority and minority plaintiffs. *Ibid.*

While the specific question at issue in *Ames* pertains to the evidence required to make out a prima facie case of discrimination under Title VII, the implications of the Court's forthcoming decision are likely to be much broader. If, for example, the Court were to conclude that Title VII must be interpreted to provide the same protections for both majority and minority plaintiffs, the logic of that conclusion would likely also mean that the same legal standard applies under Title VI regardless of whether the plaintiff is from a majority or minority population. *SFFA*, 600 U.S. at 289 (Gorsuch, J., concurring).

B. The *en banc* concurrence improperly applied a heightened standard because Brooks is white.

The *en banc* concurrence below implicitly held Brooks to a heightened legal standard because he is white, a standard that could run afoul of this Court's forthcoming decision in *Ames*.

A central component of Brooks's claim is that the harassment he experienced was "on the ground" of race, in part, because he was accused of being affiliated with racist white groups. App.18a. Specifically, Brooks alleges he was accused of being a member of the Ku Klux Klan—an organization of white men who terrorized Black individuals beginning during Reconstruction; accused of listening to "Dixie"—a song typically associated with white Southerners during the Civil War; and being a Nazi—a European political party that terrorized racial minorities in the 1920s and 30s. App.18a, 31a n.1. These accusations may not be explicitly about race, but, in context, they represent negative tropes commonly associated with white people in modern American culture. App.31a n.1

The *en banc* concurrence rejected the argument that these statements were "on the ground" of race. But if Brooks were any racial classification other than white, similar statements would almost assuredly have given rise to an inference of race-based treatment.

Courts—including the Fifth Circuit—have held that accusing Black or brown individuals of being a member of groups closely associated with race is based on race or

national origin precisely because of this close association between race or national origin and membership in these organizations. *See Ford v. Jackson Nat'l Life Ins. Co.*, 45 F.4th 1202, 1233 (10th Cir. 2022) (concluding that being called a member of the "Black Panther Party" contributed to harassing environment based on race); *E.E.O.C. v. WC&M Enterprises, Inc.*, 496 F.3d 393 (5th Cir. 2007) (concluding that being called "Taliban" creates inference that harassment of middle eastern individual is based on national origin); *Hussain v. Highgate Hotels, Inc.*, 126 F. App'x 256 (6th Cir. 2005) (same); *Saleh v. Pretty Girl, Inc.*, 2022 WL 4078150, *21 (E.D.N.Y. Sept. 6, 2022) (holding being called "Al Qeada" is based on race, religion, and national origin); *Emad v. Boeing Co.*, 2015 WL 4743897, *5 (W.D. Wash. 2015) (same); *Yehia v. Michigan Department of Corrections*, 2020 WL 6393898, at *15 (E.D. Mich. Nov. 2, 2020) (same with respect to "ISIS"). If these statements give rise to a reasonable inference of discrimination based on protected categories for Black and brown individuals, similar statements about white people should also give rise to a reasonable inference of discrimination based on race.

Similarly, because of the close association between the Ku Klux Klan and race-based activity, courts—including the Fifth Circuit—have held that exposing Black people to "KKK" and similar symbols constitutes discrimination on the basis of race. *See*, *e.g.*, *Bell v. Ingalls Shipbuilding, Inc.*, 207 F.3d 657 (5th Cir. 2000) (*per curium*) (holding exposing employee to "KKK graffiti" creates reasonable inference of race-based harassment); *Jackson v. Flint Ink N. Am. Corp.*, 382 F.3d 869, 870 (8th Cir. 2004) (same); *Bryant*, 334 F.3d at 932 (same for Confederate flags, swastikas, and Ku Klux Klan symbol); *Jones v. UPS*

Ground Freight, 683 F.3d 1283, 1300 (11th Cir. 2012) (same for Confederate flag); *Ellis v. CCA of Tenn. LLC*, 650 F.3d 640, 648 (7th Cir. 2011) (same). For the same reason, accusing a white person of being a member of the Ku Klux Klan and other organizations closely associated with white individuals is based on race.

Here, the complaint's allegations that Brooks was accused of being a member of the Ku Klux Klan, accused of listening to Dixie, and accused of being a Nazi plausibly allege harassment "on the ground" of race. Moreover, all the complaint's allegations must be read against the backdrop of these race-based statements. *Oncale*, 523 U.S. at 82; *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 584 (5th Cir. 2020) (holding it was reasonable to infer that "discriminatory view [of] African American males" motivated the harassment, even though the harassing statements did not explicitly mention race); *Ricketts*, 2025 WL 37342, at *7 (recognizing that "a discrimination analysis must concentrate not on individual incidents, but on the overall scenario"). But rather than give Brooks the benefit of all reasonable inferences, the *en banc* concurrence concluded these statements were insufficient to raise an inference of treatment "on the ground" of race. App.5a–6a. The *en banc* concurrence may well be correct that "[b]eing called a racist is not the equivalent of being harassed based [on race]," App.5a, but that is not what happened here. Rather, Brooks was accused of being a member of racist groups that are typically associated with white people, an accusation that would have given rise to an inference of discrimination "on the ground" of race had Brooks not been white.

As Judge Ho correctly observed, the *en banc* concurrence—like the Sixth Circuit in *Ames*—impliedly held Brooks to a higher legal standard because he is white. App.34a. And as Judge Ho pointed out, this Court's forthcoming decision could alter the outcome of this case because the heightened standard the *en banc* concurrence applied reflects the same error as the Sixth Circuit in *Ames*—that is, imposing a heightened legal standard on plaintiffs from majority populations. App.35a. ("The Court granted certiorari precisely because [the heightened standard is] a question on which the circuits today are divided.").

For these reasons, this Court should, at the very least, hold this petition until it decides *Ames*, and then grant, vacate, and remand to the Fifth Circuit for further proceedings consistent with the test the Court sets forth in that case.

III. Increasing social and legal acceptance of racism against white people is an issue of national importance that the Court should address.

Finally, the Court should grant the petition because the decisions below—and the harassment Brooks faced—is an example of the growing trend in which American society tolerates overt discrimination against white individuals.

As Judge Ho observed in his dissent below, our "culture today increasingly accepts (if not celebrates) racism against whites." App.36a. Judge Ho cataloged numerous statements emblematic of the American zeitgeist from influential figures such as journalists,

academics, and public luminaries that extol efforts to demonize white people as a group. App.36a–37a.[5]

These racist opinions—printed in the pages of some of our nation's most storied publications—represent a new middle point of the modern Overton window, where castigating white people is now not only acceptable, but desirable. Those who write these opinions, and those who print them, advance a mounting narrative that it is acceptable to cast white people as a whole in a negative light to advance the broader goal of social justice. But this narrative undermines one of our nation's core values—the goal of a colorblind society in which all individuals are treated as equal under law.

What Brooks experienced at AISD is the unfortunate consequence of this growing trend. When his teachers and classmates at his predominantly Hispanic school found out that he was not only a white male but also a Trump supporter, it was open season. App.62a. His harassers acted with impunity because they felt justified in categorically demonizing a perceived oppressor—taking

5. Ta-Nehisi Coates, *Letter to My Son*, The Atlantic, July 4, 2015 ("White America' is a syndicate arrayed to protect its exclusive power to dominate and control our bodies."); Robin DiAngelo, *White Fragility* 149 (2018) ("White identity is inherently racist," and "white people do not exist outside the system of white supremacy."); Ibram X. Kendi, *How to Be an Anti-Racist* 6 (2019) ("Racist ideas make [w]hite people think more of themselves, which further attracts them to racist ideas."); Jordan Boyd, *In Racist Screed, NYT's 1619 Project Founder Calls 'White Race' 'Barbaric Devils,' 'Bloodsuckers,' Columbus 'No Different Than Hitler'*, The Federalist, (June 25, 2020) ("[T]he white race is the biggest murderer, rapist, pillager, and thief of the modern world.").

their rage out on a fellow classmate simply because he belonged to the undesirable race and held views different from their own. App.21a–30a. The harassment persisted for over three years despite the District knowing about it, which furthered the perception that it was permissible to treat a white person less favorably than those of another race. And all of this occurred against the backdrop of a growing crisis of bullying at school—something that has become far too common in America.

Congress enacted Title VI to ensure that "no person" be discriminated against in federally funded programs "on the ground" of race. 42 U.S.C. § 2000d. The category of individuals protected by Title VI includes white people. Yet increasingly, overt racism permeates throughout federally funded programs against whites, with many excuses used to justify it. What Brooks experienced was just one example of this growing trend. The Court should grant this petition to ensure that Title VI categorically prohibits discrimination based on race, even when the victim is white.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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February 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED NOVEMBER 13, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50158

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

Plaintiff-Appellant,

versus

AUSTIN INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Filed November 13, 2024

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-750

OPINION

Before ELROD, *Chief Judge*, and KING, JONES, SMITH, STEWART, RICHMAN, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, WILSON, DOUGLAS, and RAMIREZ, *Circuit Judges.*

Appendix A

CAROLYN DINEEN KING, *Circuit Judge*, joined by STEWART, RICHMAN, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, DOUGLAS, and RAMIREZ, *Circuit Judges*:

By reason of an equally divided en banc court, the decision of the district court is AFFIRMED. The panel opinion was vacated by the grant of rehearing en banc.

Appendix A

PRISCILLA RICHMAN, *Circuit Judge*, joined by SOUTHWICK, DOUGLAS, and RAMIREZ, *Circuit Judges*, concurring:

Accepting B.W.'s allegations as true, AISD students unquestionably bullied him, although the primary impetus of the bullying was, according to B.W., his political beliefs. Faculty also made inappropriate statements and remarks. The Fourth Amended Complaint is also conclusory as to how AISD had notice of harassment or discrimination *based on race,* though AISD certainly was apprised that B.W. was harassed due to his conservative political views. But assuming that B.W.'s Fourth Amended Complaint does assert that AISD knew he suffered discrimination or harassment based on race and failed to take corrective measures in a timely manner, B.W. does not allege "harassment [] based on [his] 'race,'"[1] as opposed to political differences, that was "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to [the] educational opportunities or benefits provided by the school."[2] Therefore, I would affirm the district court's dismissal of his case.

Title VI claims require that "the harassment was based on the victim's 'race, color, or national origin.'"[3] The allegations that pertain to race do not surmount the threshold required in *Davis ex rel. LaShonda D. v.*

1. *Fennell v. Marion Indep. Sch. Dist.,* 804 F.3d 398, 409 n.23 (5th Cir. 2015) (quoting 42 U.S.C. § 2000d).

2. *Id.* at 408 (quoting *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.,* 526 U.S. 629, 650 (1999)).

3. *Id.* at 409 n.23 (quoting 42 U.S.C. § 2000d).

Monroe County Board of Education.[4] B.W.'s operative Complaint alleged that a math class aide "repeatedly called B.W. 'Whitey,'" and a group of students shouted at him and other Cross Country teammates, "here are all the white boys!" A teacher asked him if he "enjoyed his White Gospel Music." A substitute teacher told B.W., "I will not have a white man talk to me about gender issues!" A teacher told B.W. that she was "getting concerned about how many white people there are." A student told B.W., "America is only for white people," and another student "repeat[ed] the evils of the white race in American history" to B.W. These comments over the course of years do not constitute "severe, pervasive, and objectively offensive"[5] conduct sufficient to give rise to a cause of action for damages.

The fact that some of these comments were made by faculty, not students, does not cause the circumstances faced by B.W. to rise to the level of severity or pervasiveness required for racial harassment to be actionable. We have explained that "[i]ntense verbal abuse that comes from an authority figure—like a school administrator—and persists for most of the school year can constitute a hostile educational environment."[6] In *Sewell v. Monroe City School Board*,[7] the plaintiff alleged that the Dean of Students "verbally 'ridiculed' him 'every other day' for much of the school year," "discouraged other students

4. 526 U.S. 629, 650 (1999).

5. *Fennell,* 804 F.3d at 408.

6. *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 585 (5th Cir. 2020).

7. 974 F.3d 577 (5th Cir. 2020).

from talking" to him, and "tried to convince a student to concoct an allegation that [the plaintiff] sexually assaulted her."[8] B.W. does not allege the same level of "[i]ntense verbal abuse."[9]

B.W. alleged that a student made a meme of him as a KKK member.[10] The pleading standards require that "all *reasonable* inferences that can be drawn from the pleading are drawn in favor of the pleader."[11] However, *B.W.'s own pleadings,* which we "must accept as true,"[12] assert that the meme was motivated by politics and not race. B.W.'s complaint specifically alleges that "D.K. admitted to the school 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."

B.W. alleges that he was called a "racist," and that during the latter part of the 2019 school year, "other students called him a racist daily, he was 'flicked off' daily, and also cussed at daily." This continued in the 2019 fall semester. 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

8. *Id.* at 581, 585.

9. *Id.* at 585.

10. *Post* at 14.

11. 5B Charles Alan Wright & Arthur R. Miller, Federal Practice And Procedure § 1357 (4th ed. 2024) (emphasis added).

12. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

the accused's own alleged views about race, not because of the accused's race. The "flicking off" and "cussed at" allegations, read in context, were alleged to have been motivated by B.W.'s "Conservative and Republican political opinions" and his support for Donald Trump. The complaint does not allege they were racially motivated.

B.W.'s Fourth Amended Complaint sets forth the intense bullying and even physical assaults that he suffered over a course of years while in Austin public schools. It is sickening and reprehensible that a middle-school and later high-school student would be subjected to what B.W. says he had to endure and that school officials did not act decisively to bring an end to the bullying and harassment. But 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.

Harassment based on race, as opposed to political differences, must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to [the] educational opportunities or benefits provided by the school."[13]

13. *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 408 (5th Cir. 2015) (quoting *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)); *cf. Bhombal v. Irving Indep. Sch. Dist.*, 809 F. App'x 233, 235 (5th Cir. 2020) (per curiam) (unpublished) (describing allegations that: school officials prohibited the father of Z.B., a Muslim student, from bringing

That did not happen here. I would affirm the district court's dismissal of B.W.'s claim.

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halal food to his son for lunch so that his son could learn to be "independent"; when Z.B. spilled his halal food at lunch his teacher told him to either eat "like a normal person" or "go hungry"; on a different occasion, a school official told Z.B. to "eat school food or starve to death"; Z.B. was kicked in the face by a student on the playground and at another time was hit in the neck; students asked if he was Muslim and challenged him to fight; students called him "Tally," meaning "Taliban"; while questioning Z.B. about whether his parents abused him, school officials asked Z.B. to touch his own genitals; Z.B.'s school questioned him without his parents present about a rumor that he brought a bomb to school; Z.B. was suspended from school for a day in connection with questioning about the bomb rumor; Z.B. was asked whether his father taught him how to make a bomb; and Z.B.'s father was banned from school property); *Johnson v. PRIDE Indus., Inc.*, 7 F.4th 392, 397, 400-03 (5th Cir. 2021) (holding, in the employment context, that an employee alleged sufficiently severe or pervasive harassment where supervisor on multiple occasions referred to him using racial slurs, including "mayate," and a coworker called him the n-word, "[t]he most noxious racial epithet in the contemporary American lexicon" (quoting *Fennell,* 804 F.3d at 409)); *Wantou v. Wal-Mart Stores Tex., L.L.C.*, 23 F.4th 422, 433-34 (5th Cir. 2022) (stating harassment was "likely" sufficiently severe or pervasive where comments about Wantou included likening black people to animals by "continuously" referring to Wantou as "chimp" or "monkey").

JENNIFER WALKER ELROD, Chief Judge, joined by JONES, SMITH, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges,* would reverse the district court's judgment and remand for the following reasons:

B.W. sued Austin Independent School District alleging, *inter alia,* racial harassment under Title VI of the Civil Rights Act. In his complaint, B.W. avers that his public-school experience was marred by repeated verbal harassment and physical attacks on account of his white race. Because our court is equally divided, we are required to affirm the district court's judgment. *See United States v. Garcia,* 604 F.3d 186, 190 n.2 (5th Cir. 2010) ("Decisions by an equally divided en banc court are not binding precedent but only affirm the judgment by operation of law."). This is most unfortunate. This should be a relatively easy case under Rule 12(b)(6), applying the standards for a well-pleaded complaint. The subject matter of the case should not create confusion as to those standards. Because these factual allegations plausibly amount to severe, pervasive, and objectively offensive racial harassment, we should reverse the district court's dismissal of his claims and remand for further proceedings.

I

Before his parents withdrew him, B.W. attended middle school and high school in the Austin Independent School District. B.W. was mocked, physically beaten, and verbally abused throughout his time in the district.[1] According to the complaint, one student promised to "beat

1. For a more complete list of events in the complaint, *see* Appendix, *infra.*

the s—out of" B.W.—and then did so—because B.W. was white. A teaching aide pejoratively referred to B.W. as "Whitey" and repeatedly belittled him for struggling with class material: "Can't figure this one out Whitey?"; "Need help Whitey?" Students repeatedly recited the "evils of the white race" to B.W. in class. A teacher mocked B.W. for listening to what she called "White Gospel Music." Another teacher told B.W. that she was "concerned about how many white people there are." A third teacher told B.W. that "I will not have a white man talk to me about gender issues!" In another incident, a student went so far as to make a meme of B.W. dressed as a hooded Ku Klux Klansman and circulate it to the whole school.

All the while, Austin ISD administrators stood by and took no significant action to stop the bullying.[2] Shockingly, some of the administrators joined in the harassment. B.W.'s middle school principal, for instance, "yanked" B.W.'s ear bud out of his ear, retorted sarcastically "Are you listening to Dixie?", and then walked away, laughing to herself. Further, B.W. avers that he was subjected to daily name-calling, tripping, and obscene gestures from his classmates. He alleges that these and other similar instances occurred time and again over the course of two-and-a-half years.

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2. B.W. alleges that his parents informed the school of the race-based harassment that he was experiencing on numerous occasions: "[E]ven though Plaintiff 's parents made a number of explicit complaints, believing B.W. to be a victim of bullying and harassment because of his political beliefs, and *racial stereotypes,* no school staff person or official ever reported such complaints to the School District Superintendent as required by School Board Policies and Procedures." (emphasis added).

The complaint also alleges that B.W. faced discrimination because of his political beliefs. Among other things, B.W. avers that he was attacked and insulted by students for wearing a shirt supporting Texas Senator Ted Cruz. He also alleges that one student threatened him because of his stated support for former President Donald Trump: "Oh my F—ing G-d, I'm going to kill all Trump supporters, I don't give a s—who hears it. I want to kill all of them." B.W. asserts in his complaint that he "was not only ostracized for being a Republican, but a broader stereotype about being a Trump supporter, Caucasian, and a Christian emerged. For example, he was soon harassed for being a racist, and anti-feminist and anti-gay when he and his family are absolutely not."

The district court dismissed B.W.'s complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The panel opinion affirmed that decision, thus denying B.W. the opportunity to proceed to discovery. It ignored the vast majority of the allegations in B.W.'s complaint because, in its view, "the bulk of the Complaint's allegations do not mention B.W.'s race at all." *B.W. ex rel. M.W. v. Austin Indep. Sch. Dist.,* No. 22-50158, 2023 WL 128948, at *5 (5th Cir. Jan. 9, 2023), *reh'g en banc granted, vacated,* 72 F.4th 93 (5th Cir. 2023). The panel opinion held that B.W.'s claim was a "flawed attempt[] to conflate political with racial animus." *Id.* at *6. That holding departs from well-settled principles of both civil procedure and antidiscrimination law.

II

When reviewing a district court's dismissal of the complaint for failure to state a claim, we are required to: (1) construe the complaint "in the light most favorable to the plaintiff"; (2) take all non-conclusory allegations as true; and (3) make all reasonable inferences that can be drawn from the complaint in favor of the plaintiff. 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (4th ed. 2024) ("Federal pleading standards . . . dictate that . . . all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader."); *Walker v. Beaumont Indep. Sch. Dist.,* 938 F.3d 724, 735 (5th Cir. 2019); *Franklin v. United States,* 49 F.4th 429, 435 (5th Cir. 2022) ("We review a district court's ruling on a motion to dismiss de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." (internal quotation marks omitted)); *see Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555-56 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that *all the allegations in the complaint are true* (even if doubtful in fact)." (emphasis added) (internal citations omitted)); *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 508 n.1 (2002) ("Because we review here a decision granting [Defendant's] motion to dismiss, we must accept as true all of the factual allegations contained in the complaint.").

At the 12(b)(6) stage, we are not permitted to ask what the "more reasonable" interpretation of the complaint is. We merely ask whether B.W.'s allegations, taken as true,

plausibly state a claim for relief—even if ultimate success seems unlikely. *Twombly,* 550 U.S. at 556 ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations. . . . " (first alteration in original) (quoting *Neitzke v. Williams,* 490 U.S. 319, 327 (1989))); *id.* ("[A] well-pleaded complaint may proceed even if it appears 'that a recovery is very remote and unlikely. . . .'" (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974))).

As a result, facts supporting harassment of other kinds do not render facts alleging racial harassment untrue at the motion-to-dismiss stage. *See Wilson v. Birnberg,* 667 F.3d 591, 600 (5th Cir. 2012) ("The plausibility standard [for a complaint] is not akin to a probability requirement. . . ." (alterations in original) (internal quotation marks omitted) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009))). However, the panel opinion and JUDGE RICHMAN's *en banc* concurrence both 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. This is inappropriate at the 12(b)(6) stage. That a plaintiff alleges facts consistent with other theories "does not mean that the mere existence of an alternative explanation entitles a defendant to dismissal." Wright & Miller, *supra,* § 1357. Rule 12(b)(6) only requires courts to ask if the plaintiff's allegations, taken as true, plausibly state a claim for relief. *See Iqbal,* 556 U.S. at 678-79; Wright & Miller, *supra,* § 1357 ("[T]here must be a factual context that supports an inference of liability as one plausible explanation for what has been alleged."). Accordingly, whether B.W.'s

harassers were more likely to have been motivated by political animus as opposed to racial animus is irrelevant to proper 12(b)(6) analysis. *Birnberg,* 667 F.3d at 600; *see also Cicalese v. Univ. of Tex. Med. Branch,* 924 F.3d 762, 767-68 (5th Cir. 2019).

This principle extends to incidents that "could be race-neutral or racially charged, depending on context." *Sewell v. Monroe City Sch. Bd.,* 974 F.3d 577, 584 (5th Cir. 2020). "At the pleading stage, [B.W.] is entitled to the latter characterization." *Id.* at 585; *see Johnson v. PRIDE Indus., Inc.,* 7 F.4th 392, 402 (5th Cir. 2021) (determining that, at summary judgment, the court was required to draw the inference that the word "mijo" was used offensively, even though it often is a term of endearment). Simply put, the fact that B.W. was bullied in part based on other characteristics in addition to his race does not eliminate the race-based nature of the harassment. *See Frappied v. Affinity Gaming Black Hawk, LLC,* 966 F.3d 1038, 1049 (10th Cir. 2020); *see also Sewell,* 974 F.3d at 584 (Title VI claim plausible even though the verbal abuse implicated both race and sex); *EEOC v. Boh Bros. Constr. Co.,* 731 F.3d 444, 456-60 (5th Cir. 2013) (en banc).

The panel opinion and JUDGE RICHMAN's *en banc* concurrence fail to draw all plausible inferences in B.W.'s favor. B.W.'s allegations of daily bullying—taken in context—plausibly amount to racial harassment. Recall that B.W. alleges that another student (I.L.) threatened to "beat the s—out of [B.W.]." I.L. then followed through on that threat by repeatedly punching B.W. until B.W. was lying on the floor bleeding. Afterwards, B.W. found

out that I.L. told other students that he assaulted B.W. because B.W. was white. B.W. then heard that I.L.'s friends were out to get him because he reported the assault. For the remainder of his time at Austin ISD, B.W. experienced repeated harassment from students calling him a racist, tripping him, swearing at him, and giving him the middle finger.

When a student is physically attacked because of his race, his attacker brags about it to the whole school, and other students, teachers, and administrators mock him with specific reference to his skin color, it is certainly reasonable to infer that continued harassment of the victim is—at least in part—based on the victim's race. *Sewell,* 974 F.3d at 584 (holding that the plaintiff was entitled to a characterization of the word "thug" as racially charged at the pleading stage, despite that word being "race-neutral" in some contexts); *see Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (explaining that use of the term "boy" could be evidence of discriminatory animus based on contextual factors); *Johnson,* 7 F.4th at 403 (noting that when "further evidence of mistreatment" was considered "in the context of [a fellow employee's] verbal harassment, it could be inferred that these actions were likewise motivated by racial animus"). Further, it is reasonable to infer that the verbal abuse from students, such as calling B.W. a racist, was at least partly based on B.W.'s race because he alleges that he was subject to a "broader stereotype" that included his race. At this stage, B.W. is entitled to those inferences. *See White v. U.S. Corr., L.L.C.,* 996 F.3d 302, 306-07 (5th Cir. 2021) (requiring review of a 12(b)(6) dismissal to "accept all well-pled facts as true, construing all reasonable inferences in

the complaint in the light most favorable to the plaintiff"); *Bellow v. LeBlanc,* 550 F. App'x 181, 183 (5th Cir. 2013) (citing *Toy v. Holder,* 714 F.3d 881, 883 (5th Cir. 2013)) (same).

III

To prevail against a school district on a claim for racial harassment under Title VI of the Civil Rights Act, the plaintiff must establish four conditions:

> (1) [T]he 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" . . . , 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 ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.,* 526 U.S. 629, 644, 650 (1999)).

At this stage of the proceedings, Austin ISD does not contest prongs two, three, or four, which require, on the part of the school district, actual knowledge, control over the harasser, and deliberate indifference. Indeed, in both its panel and *en banc* briefing, Austin ISD has stated that "the district agrees that at least in this case *as pled,* the issue of 'deliberate indifference' was probably not amenable to resolution on a Rule 12(b)(6) motion." Mr. Gilbert (Austin ISD's attorney) reiterated this point at oral

argument: "One thing I think it's important to remember in this case is we did not move to dismiss on the grounds of deliberate indifference."[3]

The only contested condition is prong one, which asks whether the complaint plausibly alleges racial harassment that is sufficiently "severe, pervasive, and objectively offensive." To satisfy these conditions, "the harassment must have had a 'concrete, negative effect'" on the plaintiff's education. *Sewell,* 974 F.3d at 585 (quoting *Fennell,* 804 F.3d at 410). In examining that question, courts consider "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes" with the student's education. *See Shepherd v. Comptroller of Pub. Accts.,* 168 F.3d 871, 874 (5th Cir. 1999) (Title VII). To be sure, "the harassment must be more than the sort of teasing and bullying that generally takes place in schools." *Fennell,* 804 F.3d at 409 (quoting *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.,* 647 F.3d 156, 167 (5th Cir. 2011)). But at bottom, all that is required is that the harassment "detracts from the victims' educational experience, [such] that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis,* 526 U.S. at 651.

B.W. clearly alleges facts that meet this prong. In his complaint, B.W. includes recurrent incidents of

3. When asked to confirm this statement, Mr. Gilbert once more stated that the district was not contesting deliberate indifference at the motion-to-dismiss stage. Q: "So you're saying the complaint is sufficient for deliberate indifference? You didn't move for dismissal on that basis?" A: "That's correct."

harassment that explicitly reference his race. He alleges that students repeatedly recited the "evils of the white race" to B.W.; that students ran into the locker room and proclaimed (with B.W. present) "here are all the white boys!"; and that students daily abused B.W. both physically and verbally. Worst of all, B.W. alleges that another student beat him bloody and then bragged to the school that he had done so "because B.W. was white." B.W. alleges that he was subjected to daily harassment from his classmates following that public pronouncement of racial animus. Adding insult to B.W.'s obvious physical injuries, much of the harassment came from *school teachers*.[4] B.W.

4. The panel opinion disregarded B.W.'s allegations of harassment from school district employees, reasoning that B.W. had forfeited the argument that Title VI recognizes a cause of action for teacher-on-student harassment. However, B.W. does not need a second *cause of action* for us to take account of teacher-on-student harassment. In a Title VI claim, the ultimate question is whether the totality of the events created a "hostile environment" such that it deprived B.W. of equal educational benefit. *Sewell,* 974 F.3d at 584. We have held that a teacher's conduct is relevant to that question. *See id.* at 581-82, 584-85 (concluding that actions taken by the school principal and dean of students were sufficient to plead a harassment claim at the motion-to-dismiss stage); *see also Est. of Lance v. Lewisville Indep. Sch. Dist.,* 743 F.3d 982, 995 (5th Cir. 2014). For this reason, I account for the allegations that concern B.W.'s teachers and school administrators—including both their affirmative harassment of B.W. and failure to prevent harassment by other students—when considering whether the harassment at issue is actionable. At least one of our sister circuits has affirmed a Title VI judgment where school teachers were responsible for some of the harassment. *Zeno v. Pine Plains Cent. Sch. Dist.,* 702 F.3d 655, 665 (2d Cir. 2012) ("[I]n the educational setting, a school district is liable for intentional discrimination when it has been 'deliberately indifferent' to teacher or peer harassment of a student.").

avers that teachers and administrators continually made derogatory racial comments toward him.

Finally, and most importantly, the harassment plainly affected B.W.'s education. B.W. was forced to withdraw from Austin ISD. These allegations satisfy the requirement that the harassment "detract[] from the victim[']s educational experience." *Davis,* 526 U.S. at 651; *see also Sewell,* 974 F.3d at 585 (requiring that the harassment have a "concrete, negative effect" on the plaintiff's education).

The KKK meme is further evidence of race-based harassment. Groups like the KKK and the Nazis are white-supremacist organizations that generally have a racial association tied to membership. Thus, a meme depicting B.W. as a member of the KKK has a racial component, particularly in the context of the other overtly race-based harassment that B.W. alleges occurred here. When an individual is accused of membership in a politically odious organization associated with that individual's protected characteristic, such an accusation amounts to stereotyping based on that protected characteristic. Suppose instead that a student made a meme of an Afghan classmate as a member of the Taliban or Al Qaeda. Such a meme obviously implicates the student's protected characteristics. The perpetrator's statement that he made the meme because his "father told him not to be friends with anyone who was a Conservative" does not eliminate the KKK meme's racial aspects, especially when B.W. alleges that his harassment was based on a "broader stereotype" that encompassed both his race and his political beliefs. Taunting an

individual as being a member of a loathsome group based upon that individual's race is race-based harassment, even if additional motivations are present.

Austin ISD and JUDGE RICHMAN's *en banc* concurrence contend that there are not enough incidents for the harassment to be considered "pervasive" over a two-and-a-half-year period. On the contrary, B.W. specifically alleges that he suffered *repeated* physical and verbal abuse. B.W. alleges that many of the incidents of racial harassment—such as a teaching aide pejoratively calling B.W. "Whitey"—were recurring incidents. In addition, B.W. alleges daily instances of name-calling, tripping, and vulgar language. Where a student alleges harassment explicitly referencing his race along with more generic instances of bullying, especially when those instances follow harassment expressly because of the student's race, it is reasonable to infer at the 12(b)(6) stage that the generic harassment is also motivated by racial animus. *Sewell,* 974 F.3d at 584 (at the pleading stage, plaintiff is entitled to racially charged characterization of a word that is race-neutral in some contexts); *Toy,* 714 F.3d at 883 ("We review dismissal under Rule 12(b)(6) *de novo,* 'accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff.'" (quoting *Bustos v. Martini Club Inc.,* 599 F.3d 458, 461 (5th Cir. 2010)).

Cicalese v. University of Texas Medical Branch is instructive. 924 F.3d 762 (5th Cir. 2019). There, in the analogous Title VII context, we rejected the district court's 12(b)(6) dismissal of the complaint. *Id.* at 766, 768. The district court dismissed the case because it did

not think that some of the plaintiffs' co-workers were "similarly situated" and because it thought that the alleged derogatory statements amounted to "stray remarks." *Id.* at 768. Our court held that such "rigorous factual or evidentiary analysis" "was more suited to the summary judgment phase." *Id.* at 767-68. Therefore "[t]he district court erred by holding [Plaintiffs] to a heightened pleading standard." *Id.* at 768. So too here.

* * *

Taking the allegations in the complaint as true, B.W. was physically attacked and verbally abused because of his race. On top of this, B.W. was the victim of daily name-calling, tripping, and harassment that was, at least in part, based on race. At this stage, the allegations in B.W.'s complaint plausibly state a Title VI claim for race-based harassment. In ruling otherwise, half of our court would force B.W. to meet a higher pleading standard than any other litigant. *See id.* ("The district court erred by holding Appellants to a heightened pleading standard."). Instead, we should uphold long-settled precedent establishing that where the plaintiff pleads facts that even plausibly amount to a viable claim, he is permitted to continue his case and obtain discovery. For these reasons, I would reverse the dismissal of B.W.'s complaint for failure to state a claim and remand for further proceedings consistent with this opinion. As we must affirm the judgment because we are equally divided, I respectfully dissent from that affirmance.

Appendix A

APPENDIX

Summary of Incidents

Date	Event	Citation
1. Oct. 2017	B.W. and classmates attend field trip to Enchanted Rock. B.W. wears a "MAGA" hat. Faculty and students begin to treat B.W. "poorly."	Fourth Am. Compl. ¶¶ 28, 29
2. Oct. 2017	B.W.'s father mentions to middle school counselor that students were treating B.W. poorly. Counselor responds that B.W.'s hat was "pretty inflammatory."	Fourth Am. Compl. ¶ 29
3. Nov. 2017	B.W.'s parents meet with middle school principal to discuss other incidents of students mistreating B.W. Principal promises future action, but none is taken. The incidents increase in severity.	Fourth Am. Compl. ¶¶ 30–32

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Date	Event	Citation
4. Jan. 2018	B.W.'s parents meet with the middle school principal again. Future action is promised, but none is taken.	Fourth Am. Compl. ¶¶ 33–34
5. Feb. 2018	Middle school students stage a walkout to protest "gun violence." B.W. refuses to participate. One student tells B.W., "I'm gonna make you an 'I heart school shootings t-shirt.' " B.W.'s father speaks with the principal again, but no action is taken.	Fourth Am. Compl. ¶¶ 35–37
6. Spring 2018	B.W.'s relationship with other students deteriorates. He begins to be "ostracized" for being white, Christian, a Republican, and a "Trump supporter" and harassed based on rumors he is a racist, "anti-feminist," and "anti-gay."	Fourth Am. Compl. ¶ 38

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Date	Event	Citation
7. Spring 2018	A student makes fun of B.W. while in Latin class, saying, "Ah, Christians should understand Latin."	Fourth Am. Compl. ¶ 40
8. Spring 2018	Students make fun of B.W. while in band class, mocking his race and characterizing "the evils of the white race in American history."	Fourth Am. Compl. ¶ 41
9. Spring 2018	The middle school principal makes fun of B.W. while he is walking in the hall, "yank[s]" out his ear bud, laughs to herself, and states sarcastically, "Are you listening to Dixie?" Bullying from other students increases.	Fourth Am. Compl. ¶¶ 42–43
10. Spring 2018	A teacher says to B.W., "Man, I'm getting concerned about how many white people there are."	Fourth Am. Compl. ¶ 44

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Date	Event	Citation
11. Spring 2018	Unprovoked, a student walks up to B.W. and says, "I don't like that you're forcing your religion on me."	Fourth Am. Compl. ¶ 45
12. Spring 2018	An aide in B.W.'s math class repeatedly calls B.W. "Whitey." She speaks down to him, saying things like, "Can't figure this one out Whitey?"	Fourth Am. Compl. ¶ 46
13. Spring 2018	One student makes a meme of B.W. dressed as a hooded Ku Klux Klansman and circulates it to other students. B.W.'s father complains to the principal, but she takes no action.	Fourth Am. Compl. ¶¶ 48–51
14. Spring 2018	A teacher is "hostile" to B.W. while on a field trip.	Fourth Am. Compl. ¶ 52

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Date	Event	Citation
15. Apr. 2018	B.W.'s parents write a letter to the middle school principal and associate superintendent of middle schools, complaining about the recent events. No action is taken.	Fourth Am. Compl. ¶¶ 53–56
16. May 2018	B.W. graduates middle school. "Many" students wear items or hats communicating "social messages." B.W. wears a "MAGA" hat to the graduation. A teacher ridicules B.W., saying, "Ya know, we're trying to create a safe environment here!"	Fourth Am. Compl. ¶¶ 57–58
17. June 2018	The associate superintendent follows up with B.W.'s parents, saying that "an apology is extended for all uncomfortable and negative experiences B.W. felt."	Fourth Am. Compl. ¶ 63

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Date	Event	Citation
18. Sept. 2018	B.W. begins high school. The student who made the meme of B.W. says to him, "You're dumber than I thought, the meme of you was a Nazi officer, not a Klansman." B.W.'s parents request and are granted a "Stay-Away Agreement" between B.W. and the student.	Fourth Am. Compl. ¶¶ 67–68
19. Sept. 2018	The student and his friends harass B.W. The student says to B.W. in front of other students, "So you really said that? Gay people don't exist?"	Fourth Am. Compl. ¶¶ 69–72
20. Sept. 2018	A student insults B.W. for wearing a Ted Cruz shirt. Other students kick him.	Fourth Am. Compl. ¶ 74
21. Sept. 2018	B.W.'s parents file a grievance. No action is taken.	Fourth Am. Compl. ¶ 70

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Date	Event	Citation
22. Oct. 2018	B.W. asks to write an English paper on the Second Amendment. The class chants "School Shooter!" The teacher does nothing to stop the chanting.	Fourth Am. Compl. ¶ 78
23. Nov. 2018	A teacher asks if anyone had any Halloween candy to offer. B.W. raises his hand, and the teacher responds, "Your candy would be filled with hate and oppression."	Fourth Am. Compl. ¶ 79
24. Nov. 2018	The school holds a conference to discuss B.W.'s parents' grievance. The high school assistant principal is assigned to investigate.	Fourth Am. Compl. ¶ 80
25. Nov. 2018	Students continue to harass B.W. One student asks "Why's he a homophobe?" and "Why's he a racist?" Other students call B.W. a "F—ing racist."	Fourth Am. Compl. ¶¶ 82–83

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Date	Event	Citation
26. Dec. 2018	B.W.'s best friend tells him that he heard a rumor that B.W. is a "homophobe."	Fourth Am. Compl. ¶ 39
27. Dec. 2018	The school responds to the grievance filed by B.W.'s parents. It finds no harassment or bias by faculty. The school asks the student who made the meme of B.W. to sign another "Stay-Away Agreement."	Fourth Am. Compl. ¶¶ 84–85
28. Dec. 2018	B.W. and his friends discuss a girlfriend. A teacher tells B.W., "I will not have a white man talk to me about gender issues!"	Fourth Am. Compl. ¶ 87
29. Fall 2018	B.W. stands to recite the Pledge of Allegiance. A student tells him, "America is only for white people."	Fourth Am. Compl. ¶ 88
30. Jan. 2019	B.W.'s parents file a second grievance, complaining of bullying by students and teachers.	Fourth Am. Compl. ¶ 90

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Date	Event	Citation
31. Feb. 2019	Another student draws a swastika on the back of one of B.W.'s friends. He then states to B.W. that "I'm going to beat the s— out of you." He then punches B.W. repeatedly. The student tells others that he beat B.W. because he "was white."	Fourth Am. Compl. ¶¶ 92–96
32. Feb. 2019	The school investigates the incident and concludes that B.W. was not harassed or bullied.	Fourth Am. Compl. ¶ 98
33. Spring 2019	Students regularly call B.W. a racist, swear at him, and make obscene gestures at him.	Fourth Am. Compl. ¶ 102
34. Summer 2019	B.W.'s parents file an administrative appeal of the no-action taken in relation to their grievance. The Board, hearing the appeal, ratifies the school's decision and takes no action.	Fourth Am. Compl. ¶ 103–04, 106–09

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Date	Event	Citation
35. Fall 2019	Daily, students call B.W. a racist, swear at him, make obscene gestures, and try to trip him.	Fourth Am. Compl. ¶ 111
36. Fall 2019	A teacher asks B.W. if he "enjoyed his White Gospel Music."	Fourth Am. Compl. ¶ 113
37. Fall 2019	A group of students say to B.W. and others, "here are all the white boys!"	Fourth Am. Compl. ¶ 114
38. Spring 2020	Students continue to harass B.W. on a regular basis.	Fourth Am. Compl. ¶ 116
39. Mar. 2020	A student, looking at B.W., says, "Oh my F—ing G-d, I'm going to kill all Trump supporters, I don't give a s — who hears it. I want to kill all of them." The school declines to investigate.	Fourth Am. Compl. ¶ 118–21

Appendix A

JAMES C. HO, *Circuit Judge*, joined by DUNCAN, *Circuit Judge,* dissenting:

I agree with Chief Judge Elrod that the allegations presented here state a viable claim of racial harassment under Title VI of the Civil Rights Act of 1964. Indeed, the allegations in this case are more substantial than in other cases where we have found racial harassment. *See, e.g., Wantou v. Wal-Mart Stores Texas, L.L.C.*, 23 F.4th 422, 434 (5th Cir. 2022); *see also id.* at 441-42 (Ho, J., concurring in part and dissenting in part).

The panel dismissed the case because it theorized that B.W. was bullied for political, not racial, reasons. But according to the allegations, B.W. was harassed for *both* racial and political reasons. As the panel noted, B.W. was "'harassed' for being racist" because he is "a supporter of former president Trump, white, and Christian." *B.W. v. Austin Ind. Sch. Dist.*, 2023 WL 128948, *1 (5th Cir.), *vacated on reh'g en banc,* 72 F.4th 93 (5th Cir. 2023).

So according to the complaint, B.W. was harassed on multiple occasions for multiple reasons—but being white was absolutely one of them.[1]

1. Just consider the numerous allegations as described in the panel opinion. "[T]wo students repeatedly harassed B.W. for being Caucasian by repeating the evils of the white race in American history." *Id.* The president of the student council "created a meme of B.W. as a hooded Ku Klux Klansman." *Id.* Racial comments were also made by school officials in the presence of fellow students. "On one occasion, when B.W. was listening to music using his ear buds, Principal Malott 'yanked one ear bud out of his ear and stated sarcastically, "Are you listening to Dixie?"' Principal Malott then walked away laughing to herself, and other students witnessed the

It's racist to characterize whites as racist. Because it'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.

* * *

Federal law protects every American against racial discrimination—including whites.

The Fourteenth Amendment secures the privileges or immunities of every citizen and guarantees them due process of law and the equal protection of the laws—regardless of their race. U.S. CONST. amend. XIV, § 1. Title VI mandates that "[n]o person . . . shall, on the ground of race, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. And Title VII makes

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entire incident." *Id.* A teacher "told B.W. very loudly that she was 'getting concerned about how many white people there are.'" *Id.* A teaching aide "repeatedly called B.W. 'Whitey' and said, 'You need help Whitey?' or 'Can't figure this one out Whitey?' when he raised his hand." *Id.* Another teacher told B.W. that "I will not have a white man talk to me about gender issues!" *Id.* at *2.

Moreover, B.W. was not only verbally harassed, but also physically assaulted because of his race. A fellow student, I.L., told B.W. that "'I'm going to beat the [expletive] out of you.' The next thing B.W. remembers is that he was lying on the ground bleeding after being struck multiple times. . . . B.W. later discovered that I.L. had told others that I.L. had assaulted B.W. because B.W. was white." *Id.* at *3.

A reasonable jury could easily conclude that B.W. was harassed because of his race.

it illegal for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1).

But it's one thing to have these laws on the books. It's another thing for courts to actually enforce them—and to enforce them for everyone, on equal terms, no matter how unpopular it may be in certain circles. *Cf.* Deuteronomy 1:17 ("Do not show partiality in judging; hear both small and great alike. Do not be afraid of anyone.").

For over a half century, courts failed to enforce the Fourteenth Amendment. From *Plessy v. Ferguson,* 163 U.S. 537 (1896), until *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954), the Supreme Court stood by as states openly engaged in explicit racial segregation in public transportation and education. *See, e.g., Gong Lum v. Rice,* 275 U.S. 78 (1927).

Then, for about another half century, from *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), until *Students for Fair Admissions v. President & Fellows of Harvard College,* 600 U.S. 181 (2023), the Supreme Court repeatedly gave its official blessing to explicit racial classifications in student admission decisions made by public and private educational institutions nationwide, notwithstanding both the Fourteenth Amendment and Title VI. *See, e.g., Grutter v. Bollinger,* 539 U.S. 306 (2003).

These are just the most infamous instances of judicial abdication when it comes to antidiscrimination law. They're hardly the only examples.

Appendix A

The Supreme Court's decision in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973), states the governing test for establishing a prima facie case of racial discrimination under Title VII. It's one of the most frequently cited decisions interpreting Title VII.

Yet the first prong of the *McDonnell Douglas* test suggests that Title VII does not apply to whites. It asks if the plaintiff "belongs to a racial minority." *Id.* at 802.

To be sure, the Supreme Court has since made clear that Title VII "prohibit[s] discriminatory preference for *any* racial group, *minority* or *majority.*" *McDonald v. Santa Fe Trail Transp.,* 427 U.S. 273, 279 (1976) (cleaned up). Title VII is supposed to "proscribe racial discrimination in private employment against whites *on the same terms* as racial discrimination against nonwhites." *Id.* (emphasis added).

Yet a surprising number of circuits still to this day deny whites "the same terms" of Title VII protection as members of other racial groups. *Id.*

The Supreme Court recently granted certiorari to decide whether "majority" group plaintiffs are subject to a stricter standard of proof under Title VII than members of "minority" groups. *See Ames v. Ohio Dep't of Youth Servs.,* — U.S. — (2024). The question presented in *Ames* is whether courts may require members of majority groups—and *only* members of majority groups, such as whites—to present special evidence of "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the

majority," before they can prevail under Title VII. Pet. at 2.

Perhaps the Court granted certiorari in *Ames* because it should be obvious that whites are entitled to the same Title VII protections as members of any other racial group. But that only proves the point: The Court granted certiorari precisely because it's a question on which the circuits today are divided. *See, e.g.*, *Briggs v. Potter*, 463 F.3d 507, 517 (6th Cir. 2006) ("A reverse-discrimination claim carries a different and more difficult prima facie burden."). And notably, the discriminatory test adopted by various circuits originated from the discriminatory language of *McDonnell Douglas* that the Supreme Court supposedly interred decades ago. Various circuits justified the discriminatory treatment of white plaintiffs who bring Title VII suits by invoking *McDonnell Douglas*.[2]

* * *

2. *See, e.g., Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981) ("The original *McDonnell Douglas* standard required the plaintiff to show 'that he belongs to a racial minority.' Membership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated, for only in that context can it be stated as a general rule that the 'light of common experience' would lead a factfinder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member. Whites are also a protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society."); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985).

Appendix A

Our culture today increasingly accepts (if not celebrates) racism against whites.

Law professors teach that "angry white people" are "fearful of racial diversity," and that "white evangelicals" in particular are "waging war on democracy." Rena Steinzor, AMERICAN APOCALYPSE 1, 10 (2024). University students are told that there is a "cost of talking to white people . . . the cost of your own life, as they suck you dry," and that "[t]here are no good apples out there." Michael Levenson, *A Psychiatrist Invited to Yale Spoke of Fantasies of Shooting White People,* N.Y. TIMES, June 6, 2021. As one university lecturer put it, "[w]hite people make my blood boil." *Id.*

Writers and journalists proclaim that "'White America' is a syndicate arrayed to protect its exclusive power to dominate and control our bodies." Ta-Nehisi Coates, *Letter to My Son,* THE ATLANTIC, July 4, 2015. "White identity is inherently racist," and "white people do not exist outside the system of white supremacy." Robin DiAngelo, WHITE FRAGILITY 149 (2018). "Racist ideas make [w]hite people think more of themselves, which further attracts them to racist ideas." Ibram X. Kendi, HOW TO BE AN ANTI-RACIST 6 (2019). "[T]he white race is the biggest murderer, rapist, pillager, and thief of the modern world." Jordan Boyd, *In Racist Screed, NYT's 1619 Project Founder Calls 'White Race' 'Barbaric Devils,' 'Bloodsuckers,' Columbus 'No Different Than Hitler',* THE FEDERALIST, June 25, 2020. *See also* Christopher F. Rufo, AMERICA'S CULTURAL REVOLUTION (2023) (government agencies and corporations teach that "all white people"

are racist and America is a "white supremacy system"); Heather Mac Donald, When Race Trumps Merit (2023); Barton Swaim, *How 'Antiracism' Becomes Antisemitism,* Wall St. J., Dec. 29, 2023; Jeremy Carl, The Unprotected Class: How Anti-White Racism Is Tearing America Apart (2024).

So it's not surprising that more institutions increasingly believe that they have cultural permission to tolerate (if not encourage) racism against whites, under the guise of promoting diversity. Racism is now edgy and exciting—so long as it's against whites.

But cultural permission is not Congressional permission. Federal laws like Title VI prohibit discrimination on the basis of race. So it may be politically correct in certain circles to discriminate against whites. But politically correct does not mean legally correct.

It's unlawful under Title VI to discriminate against anyone—*anyone*—because of their race. So it is the solemn responsibility of the federal judiciary to stop institutions from using "diversity . . . as a license to discriminate." *Price v. Valvoline,* 88 F.4th 1062, 1068-69 (5th Cir. 2023) (Ho, J., concurring in the judgment). *See also, e.g., Hamilton v. Dallas County,* 79 F.4th 494, 509 (5th Cir. 2023) (Ho, J., concurring).

I respectfully dissent.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 9, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50158

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

Plaintiff-Appellant,

versus

AUSTIN INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Filed January 9, 2023

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-750

Before KING, STEWART, and HAYNES, *Circuit Judges.*[*]

PER CURIAM:[**]

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* Judge Haynes concurs in the judgment only.

** This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Appendix B

B.W., a white high school student, appeals the dismissal of his complaint against AISD alleging that he was subject to race-based harassment and retaliation once he reported the harassment. For the following reasons, we AFFIRM.

I.

The events alleged below took place between Plaintiff-Appellant B.W.'s eighth- and tenth-grade years as a student in the Austin Independent School District ("AISD"), the Defendant-Appellee in this case. All of these allegations originate from B.W.'s fourth amended complaint (the "Complaint"), the operative complaint in this action.

The Complaint alleges that B.W. first experienced harassment while he was in the eighth grade at O'Henry Middle School following a field trip in October 2017 where he wore a hat emblazoned with the slogan "Make America Great Again." According to the Complaint, there was an almost immediate "attitudinal change by staff and other students from friendly and inviting to cold and hostile." In November 2017, B.W.'s parents met with the middle school's principal, Principal Malott, after a number of unspecified "incidents" in which B.W. had been treated "poorly" "to address concerns that B.W. was becoming an object of derision because of his political beliefs." Yet, although Principal Malott promised that an action plan was forthcoming, B.W. was subject to verbal attacks "on almost a daily basis . . . because of his political allegiance to President Trump." In January 2018, B.W.'s parents again

met with Principal Malott to express their concerns for B.W.'s safety and the continued absence of the promised action plan; no action plan was put in place, though, after this second meeting.

The Complaint alleges that the harassment escalated throughout the Spring 2018 semester. In February 2018, B.W. experienced "backlash and push back" after he refused to participate in a student walkout protesting gun violence. As the semester progressed, B.W. was "ostracized" for being a Republican, a supporter of former president Trump, white, and Christian. He was also "harassed" for being racist, anti-feminist, and anti-gay; B.W. asserts that he does not espouse these views. For example, the Complaint alleges that B.W. was "made fun of . . . for being a Christian" in Latin class when another student said, "Ah, Christians should understand Latin." And "[i]n band class, two students repeatedly harassed B.W. for being Caucasian by repeating the evils of the white race in American history." The Complaint also alleges that Principal Malott participated in this "stereotypical think." On one occasion, when B.W. was listening to music using his ear buds, Principal Malott "yanked one ear bud out of his ear and stated sarcastically, 'Are you listening to Dixie?'" Principal Malott then walked away laughing to herself, and other students witnessed the entire incident.

The Complaint alleges that B.W. "experienced more and more random derogatory comments" from students and teachers after Principal Malott's remarks. One teacher, Ms. Morgan, told B.W. very loudly that she was "getting concerned about how many white people there

are." An aide in B.W.'s math class, Ms. Cathey, repeatedly called B.W. "Whitey" and said, "You need help Whitey?" or "Can't figure this one out Whitey?" when he raised his hand. And Mr. Borders, a teacher, "was very hostile toward B.W." for the entirety of a school field trip. On another occasion, a student pointed to the cross around B.W.'s neck and loudly stated, "I don't like that your [*sic*] forcing your religion on me." B.W. was left in tears following an incident involving his former friend and then-student council president, D.K. D.K. had created a meme of B.W. as a hooded Ku Klux Klansman, and later admitted to creating the meme because his father had told him not to be friends with anyone who was a conservative.

In May 2018, B.W. wore his "Make America Great Again" hat while receiving his diploma at his middle school graduation. Mr. Borders responded by "meanly saying" to B.W.: "Ya know, we're trying to create a safe environment here!" The Complaint alleges that there were "no apparent consequences for anyone at O'Henry . . . for the way B.W. had been mistreated, simply because B.W. held a different political belief than other students and apparently met the harasser's stereotypical prejudices."

The Complaint alleges that the animus toward B.W. continued into his freshman year at Austin High School. At the beginning of the Fall 2018 semester, D.K. approached B.W. about the Ku Klux Klan meme he had created of B.W. during the previous school year. B.W. then filed for and received a "Stay Away Agreement" between himself and D.K. a few days later, but D.K. and his friends "continued to harass" B.W. after the Stay Away Agreement went into

effect. On one occasion, D.K. approached B.W. in front of a group of students saying, "So you really said that? Gay people don't exist?"; B.W., however had never made such a statement. The Complaint alleges that "Staff" then met with D.K. and his parents regarding his treatment of B.W., but D.K.'s behavior toward B.W. did not improve after this meeting.

B.W. struggled with other members of the student body that semester as well. He was insulted and kicked for wearing a Ted Cruz shirt. In his ELA class, B.W. asked if he could write a paper on the Second Amendment; the other students in the class responded by chanting "School Shooter! School Shooter!" while the teacher, Mr. Meadows, looked on in silence. And later in the semester, another student "mockingly asked" B.W., "Why are you a racist?" That same day, the same student approached B.W. again, this time in front of other students as well, and stated that B.W. was a "[f]ucking racist." Later in the semester, B.W. was the only student to rise in his home room class for the Pledge of Allegiance when it came on over the loudspeaker; a student then told B.W., "America is only for white people."

The Complaint also describes various interactions between B.W. and his teachers during the Fall 2018 semester. On B.W.'s birthday, his MAPS teacher, Mr. Mathney, walked into class and loudly stated, "Woke up this morning to see all the stupid things Trump had done!" During debate class, the teacher, Ms. Cooney, loudly stated, "Trump is running [*sic*] our democracy and he is a liar." A few days after Halloween, Mr. Meadows

asked the ELA class if anyone had any Halloween candy. When B.W. offered some of his, Mr. Meadows responded, "Your candy would be filled with hate and oppression" in front of the entire class. And when a substitute teacher, Ms. Mauser, overheard B.W. and his friends having a conversation regarding a girlfriend during a MAPS class, she told B.W., "I will not have a white man talk to me about gender issues!"

In September 2018, B.W. and his parents filed their first grievance with the school board describing their previous complaints regarding B.W.'s treatment and the lack of any investigation into those incidents. Two months later, after the family met with school officials, the high school assistant principal, Steven Maddox, was assigned to investigate B.W.'s parents' concerns. The Complaint alleges that B.W. began to suffer from retaliation shortly after the investigation was opened. A few days after the meeting with school officials, D.K. purposefully bumped into B.W. and said, "I don't deserve what's happening to me." D.K.'s friends also approached B.W. asking, "Why he's a homophobe?" and "Why he's a racist?" In December 2018, Assistant Principal Maddox provided a written response that summarized the conclusions from his investigation. In the written response, Assistant Principal Maddox determined that there was no teacher bias and harassment. He also concluded that D.K.'s treatment of B.W. qualified as bullying according to AISD's policies and procedures. Assistant Principal Maddox then spoke with D.K. and his parents and had B.W. and D.K. sign another Stay Away Agreement.

Appendix B

The Spring 2019 semester was no different for B.W. The Complaint alleges that the "verbal bullying and harassment" occurred multiple times a day and included B.W. being called a racist, "cussed at," and "flicked off" daily, often in front of teachers who never intervened. After B.W. had expressed his political opinion during a class discussion, the substitute teacher, Ms. Mosher, responded "When you are old enough to think for yourselves [*sic*], you will no longer be a conservative." She then proceeded to kick B.W. out of the class and into the cold outside. The Complaint alleges that Ms. Mosher generally "verbally harasse[d]" B.W. in front of his classmates "because of his political support for Republican Ideology."

In February 2019, B.W. was attacked while helping a fellow student with a math assignment. B.W. was using his laptop, which had stickers supporting Donald Trump on its casing. The encounter began when another student, I.L., began tracing a swastika on the back of the student that was being helped by B.W. I.L. then told B.W., "I'm going to beat the shit out of you." The next thing B.W. remembers is that he was lying on the ground bleeding after being struck multiple times. B.W. and his family reported this incident to the AISD police the next day, but the Complaint alleges that no action was taken. B.W. later discovered that I.L. had told others that I.L. had assaulted B.W. because B.W. was white; B.W. also heard that I.L.'s friends were "out to get [B.W.]" In March 2019, B.W. brought a poster of Justice Antonin Scalia to his debate class. The teacher, Ms. Cooney, was visibly irritated, yelled at B.W., and also told him, "You're pissing me off!" in front of the entire class.

Appendix B

The Complaint alleges that the harassment continued throughout B.W.'s sophomore year of high school as well. Like he was during the prior school year, B.W. was called a racist, "cussed at," and "flicked off" daily. D.K. and his friends also "continued to harass and intimidate B.W." I.L.'s friends did so as well and would try to trip B.W. as he would walk by. On one occasion, a student told B.W., "if you support Trump you must be stupid." In September 2019, B.W. returned to his debate classroom to retrieve his poster of Justice Scalia, but the poster was no longer there. In November 2019, B.W. was "berated" while serving as an aide in the attendance office by Ms. Lindsay when she saw a Trump/Pence sticker on his new computer. And during the Fall 2019 semester, while B.W. was in the locker room after cross country practice, "a number of African American students came in and said 'here are all the white boys!'" In March 2020, while B.W. was talking with some friends at lunch, a girl standing next to the group turned to look directly at B.W. and said very loudly, "Oh my Fucking [*sic*] God, I'm going to kill all Trump supporters, I don't give a shit who hears it. I want to kill all of them." After an investigation, the AISD police determined that they would be taking no further action because the student who had made the threat "did not have the means to kill all Trump supporters."

All AISD schools were shut down the day after the incident at lunch due to the COVID-19 outbreak. B.W. never returned to school and was homeschooled during the following 2021-22 school year. Throughout the period in question, B.W. and his family repeatedly submitted both formal and informal complaints to school administrators

recounting the alleged bullying and harassment. The Complaint alleges, though, that school administrators never acted to remedy the bullying and harassment.

On July 14, 2020, B.W. filed his initial complaint, asserting claims against AISD for violations of his First and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983 and for negligence. In its fifth iteration that was filed on May 27, 2021, the Complaint maintains the § 1983 claims and adds claims seeking redress under Title VI of the Civil Rights Act of 1964 and Chapters 106 and 110 of the Texas Civil Practices & Remedies Code. With respect to the Title VI claims, which are at issue before us, the Complaint alleges that AISD knew that B.W. was being harassed because of his race and race-based stereotypes, yet "failed to keep him safe from harm, and failed to provide him an environment that was not hostile," *i.e.*, that AISD acted with deliberate indifference. Additionally, the Complaint alleges that B.W. was a victim of retaliation due to his reporting of the harassment subject to Title VI. On May 28, 2021, AISD moved to dismiss the Complaint.

On January 28, 2022, the magistrate judge, who had been referred AISD's motion, issued his report and recommendations and recommended that the Complaint be dismissed in its entirety. Regarding the Title VI claims, the magistrate judge reasoned that the Complaint was devoid of facts that would evince race-based harassment and that the few racially related allegations resembled "political statements about race made in B.W.'s presence." Furthermore, the magistrate judge determined that the few racially related harassment allegations occurred

too infrequently to meet the standard for a race-based harassment claim under Title VI. The magistrate judge also concluded that B.W. had inadequately pleaded his Title VI retaliation claim because the Complaint did not allege that B.W.'s harassers were aware that he had filed grievances with either school. On February 15, 2022, the district court accepted and adopted the magistrate judge's report and recommendations. On appeal, B.W. only challenges the dismissal of his Title VI claims.

II.

We review a district court's grant or denial of a motion to dismiss for failure to state a claim under Rule 12(b)(6) *de novo*. *Whitley v. BP, P.L.C.*, 838 F.3d 523, 526 (5th Cir. 2016). To survive such a motion, a complaint must allege enough facts, accepted as true, "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Although "detailed factual allegations" are not required, the complaint must include "factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). Conclusory statements or "'naked assertion[s]' devoid of 'further factual enhancement'" are insufficient. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). "The plausibility standard . . . asks for

more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint pleading facts "that are 'merely consistent with' a defendant's liability . . . 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Whether the plausibility standard has been met is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

A.

Under Title VI, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title VI "prohibits only intentional discrimination." *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 407 (5th Cir. 2015) (emphasis omitted) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 280, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)). A school district receiving federal funds may also be liable for student-on-student harassment under Title VI's deliberate indifference standard 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.

Id. at 408 (quoting *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644, 650, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999)). Harassment "must be more than the sort of teasing and bullying that generally takes place in schools." *Id.* at 409 (quoting *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167 (5th Cir. 2011)); *see also Davis*, 526 U.S. at 651-52 ("Indeed, at least early 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 gender-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 gender.").

We first observe that the bulk of the Complaint's allegations do not mention B.W.'s race at all. And the few that do are not "so severe, pervasive, and objectively offensive that [they] can be said to [have] deprive[d] [B.W.] of access to educational opportunities or benefits provided by [his] school[s]." *See Fennell*, 804 F.3d at 408. Indeed, each of these few incidents occurred within a period spanning over two-and-a-half years and was perpetrated by a different actor. Of these incidents, only one is truly severe—where I.L. made it known that he had assaulted B.W. because he was white. But this alone is not enough to establish harassment, even when considered alongside the few, less severe, race-based allegations. Accordingly, taken

together, these few, relatively mild, and isolated incidents do not meet the standard for race-based harassment.

Two cases from this circuit are illustrative of this point. In *Fennell v. Marion Independent School District*, three black sisters alleged that their school district was deliberately indifferent to a racially hostile educational environment. 804 F.3d at 402. The district court dismissed their case on summary judgment. *Id.* at 401-02. This court affirmed the judgment on appeal but held that, while there was no genuine dispute as to the school district's deliberate indifference, the plaintiffs had raised a genuine dispute that a racially hostile environment existed. *Id.* at 409-10. Specifically, there were multiple instances of nooses being left for black students (or their parents) to find, which on one occasion was accompanied by a note that was filled with racial animus and epithets, *id.* at 402; frequent use of the n-word and other epithets were directed at black students, *id.* at 403-04; one of the plaintiffs was "admonished" for her hairstyle by the athletic director who referred to it offensively and required her to cut and redye her hair, *id.* at 404; one of the plaintiffs received a text from a white classmate of an animation of Ku Klux Klan members chasing former president Barack Obama, *id.* at 405; a teacher told one of the plaintiff's classes that "all black people [are] on welfare," *id.* at 405; and another plaintiff was told by her peers that "[b]lack girls [aren't] pretty enough to be cheerleaders" when she tried out for the cheerleading squad, *id.* at 406. The school district contended that the harassment was "too periodic and sporadic to constitute a racially hostile environment," but we disagreed. *Id.* at 409. First, we

reasoned that "[t]here is no question . . . that repeatedly being referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon, [and] being shamed and humiliated on the basis of one's race is harassment far beyond normal schoolyard teasing and bullying." *Id.* (internal quotations omitted). Relatedly, we also determined that the incident where a noose was accompanied "by a vitriolic and epithet-laden note . . . underscore[d] the severe, pervasive, and objectively offensive nature of the harassment." *Id.* Second, although we recognized that racial epithets being directed at black students may have occurred more infrequently than on a biweekly basis, we were persuaded that the degree to which those remarks were offensive counseled finding that they amounted to racial hostility. *See id.* ("Furthermore, this court has held that racially offensive remarks made every few months over three years was sufficient to raise a genuine dispute of whether a hostile environment exists under Title VII." (citing *Walker v. Thompson*, 214 F.3d 615, 626 (5th Cir. 2000), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006))).

In *Sewell v. Monroe City School Board*, 974 F.3d 577 (5th Cir. 2020), we revived Title VI and Title IX claims that had been dismissed in the district court. There, the plaintiff-student, Jaylon Sewell, had alleged that he had suffered harassment stemming from his wearing his hair in a hairstyle that purportedly violated the school board's dress code. *Id.* at 581-82. After Sewell was prohibited from attending the first day of school due to his hairstyle, the dean of students "ridiculed him every other day by calling

him a thug and a fool," and at one point asked him if he "was gay with that mess in his head." *Id.* at 581 (internal quotations omitted). The dean also discouraged students from talking with Sewell and encouraged a female student to lie and accuse Sewell of sexual assault; the dean told Sewell that he "wouldn't be getting in so much trouble if his hair were not that color." *Id.* In reversing the case's dismissal, we reasoned that it was plausible that the dean's harassment of Sewell originated "from a discriminatory view that African American males should not have two-toned blonde hair." *Id.* at 584. We noted the many ways that the dean treated Sewell and other black male students differently from students who were not black males: only black males were sent to the dean's office on the first day of school for not complying with the dress code, only Sewell was penalized for not adhering to the dress code despite other non-black and non-male students' failure to comply as well, and the verbal abuse Sewell suffered could be directly tied to his race and sex. *Id.* We therefore held that Sewell's complaint had adequately pleaded that the alleged harassment was sufficiently severe, pervasive, and offensive to deprive him of an educational benefit. *Id.* at 585. Of particular import to us were the dean's ridiculing of Sewell every other day, his discouraging of other students from talking to Sewell, and his encouraging of another student to "concoct an allegation that Sewell had sexually assaulted her." *Id.* at 585.

Here, B.W. does not allege that any epithets akin to those used in *Fennell* were directed at him. Nor does he point to a frequency of racially motivated verbal harassment like that in *Sewell*. Instead, he argues that the

"totality" or "constellation of surrounding circumstances" makes his case. In raising this argument, he points to a string of inapposite Title VI and Title IX cases. All of these cases describe events that either occurred with greater frequency or were more serious than what B.W. alleges. *See Carmichael v. Galbraith*, 574 F. App'x 286, 290 (5th Cir. 2014) (per curiam) ("Depending on the evidence at trial or summary judgment, the series of incidents where Jon's underwear was forcibly removed could plausibly constitute numerous acts of objectively offensive touching. Such acts plausibly fall outside the list of simple insults, banter, teasing, shoving, pushing, and gender-specific conduct which are understandable . . . in the school setting and are not actionable under Title IX." (internal quotations and citation omitted)); *Doe v. Bd. of Educ. of Prince George's Cnty.*, 982 F. Supp. 2d 641, 652 (D. Md. 2013) ("Plaintiffs' evidence supports the inference that Classmate subjected JD to a few instances of sex-charged conduct, including raunchy remarks, lewd gestures, self-exposure and, arguably, inappropriate touching."), *aff'd*, 605 F. App'x 159 (4th Cir. 2015); *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 448 (6th Cir. 2009) ("DP was repeatedly harassed over a number of years [more than 200 times in one school year]. . . . This pervasive harassment escalated to criminal sexual assault."), *abrogated on other grounds by Foster v. Bd. of Regents of Univ. of Michigan*, 982 F.3d 960 (6th Cir. 2020).

Furthermore, the allegations that B.W. argues should be considered within the totality of the circumstances lie outside the scope of racial animus. For example, B.W. contends that "the use of a Klu [*sic*] Klux Klan *meme*

and later being called a Nazi and racist over and over represents [*sic*] a type of racial animus like no other." But this is just one of his many flawed attempts to conflate political with racial animus. B.W. argues that we may infer that the political animus he suffered had racial undertones as well. 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 be [*sic*] friends with anyone who was a Conservative." The Complaint is replete with examples demonstrating that most of the incidents B.W. experienced were due to his ideological beliefs. B.W. fails to connect this political animus to the racial animus that he must show for his Title VI claim. Therefore, this claim was appropriately dismissed.[1]

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1. B.W. references some of the incidents involving his teachers in arguing that he was subject to severe and pervasive harassment due to his race but cites no authority for the proposition that a cause of action exists under Title VI for teacher-on-student harassment. Indeed, B.W.'s claim is predicated on our holding in *Fennell* where we determined that a cause of action for student-on-student harassment may be brought under Title VI. 804 F.3d at 408-09. The bounds of our decision in *Fennell*, however, did not extend to claims for teacher-on-student harassment. B.W. has modeled his Title VI claim as one for harassment as opposed to one for intentional discrimination. And in his reply, for the first time B.W. argues that a cause of action for teacher-on-student harassment exists citing *Gebser v. Lago Vista Independent*

B.

B.W. also challenges the district court's dismissal of his Title VI retaliation claim. As this circuit has done in recent decisions, we will assume without deciding that Title VI includes a claim for retaliation. *See Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 586 n.4 (5th Cir. 2020) ("Title IX encompasses retaliation claims. So we assume without deciding that Title VI does too." (citation omitted)); *Jones v. S. Univ.*, 834 F. App'x 919, 923 n.3 (5th Cir. 2020) ("We assume without deciding that Title VI encompasses a retaliation claim.") (per curiam); *Bhombal*

School District, 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998). In that case, the Supreme Court held that one may bring a deliberate indifference claim against a school district under Title IX for teacher-on-student harassment. *Id.* at 290, 292-93. In *Fennell*, we applied the Supreme Court's holding in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 646-47, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999), that a school district may be liable for student-on-student harassment based a deliberate indifference theory under Title IX, to Title VI due to the similarities between both legislative schemes. *Fennell*, 804 F.3d at 408. It appears as if B.W. would have us extend the holding in *Gebser* to claims falling under Title VI as well by utilizing our reasoning in *Fennell*. While this argument is compelling, B.W. fails to raise it at all in his opening brief and devotes less than one sentence to it in his reply without any analysis. Therefore, we consider the argument forfeited and do not weigh the incidents involving B.W.'s teachers in determining that his Title VI harassment claim is not well pleaded. *See Tharling v. City of Port Lavaca*, 329 F.3d 422, 430 (5th Cir. 2003) ("issues not raised in the opening brief are deemed waived"); *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("A party who inadequately briefs an issue is considered to have abandoned the claim.").

v. Irving Indep. Sch. Dist., 809 F. App'x 233, 238 (5th Cir. 2020) ("[a]ssuming, without deciding" that a Title VI retaliation claim "is available" for the purpose of ruling on its viability at the motion to dismiss stage) (per curiam). To successfully plead such a claim, a plaintiff must show "(1) that she engaged in a protected activity; (2) that the Defendants took a material action against her[;] and (3) that a causal connection existed between the protected activity and the adverse action." *Jones*, 834 F. App'x at 923 (citing *Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003)); *see also Sewell*, 974 F.3d at 586 ("A retaliation plaintiff must show that the funding recipient or its representatives took an adverse action against him because he complained of discrimination. That typically means the funding recipient itself signed off on the adverse action." (citation omitted)).

"As in other civil rights contexts, to show protected activity, the plaintiff in a Title VI retaliation case need only . . . prove that he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring." *Peters*, 327 F.3d at 320 (internal quotations omitted); *see also Bisong v. Univ. of Hous.*, 493 F. Supp. 2d 896, 911-12 (S.D. Tex. 2007) (applying same). In the educational context, it follows that the plaintiff must have been opposed to an unlawful educational practice. When describing the complaints to school administrators that B.W. raised in middle school, the Complaint provides scant detail as to their substance and only ever alleges that B.W. and his parents were concerned about diversity of thought and B.W. being harassed on account of his political ideology. The same can be said of most of the complaints

B.W. filed in high school as well. Notably, the Complaint provides more detail regarding one particular grievance, the second formal grievance that B.W. filed. Specifically, the Complaint states that B.W. alleged violations of the First and Fourteenth Amendments and Title IX, but it omits any mention of Title VI. There are no other factual allegations that could otherwise support a reasonable inference that B.W. and his parents engaged in a protected activity, *i.e.*, that they complained to AISD that B.W. had been harassed on account of his race. Therefore, B.W. cannot satisfy the first prong of the test for a Title VI retaliation claim.

III.

The bullying as alleged in this case is a cause for concern. But while we do not condone bullying in any form, Title VI does not support a claim for bullying generally. A plaintiff like B.W. must allege that he was harassed because of his race, color, or national origin. B.W. has failed to do so. Likewise, because he cannot show that he was engaged in a protected activity when reporting the alleged harassment to school administrators, B.W.'s retaliation claim cannot overcome a motion to dismiss. Therefore, for the foregoing reasons, the district court's dismissal of this action is AFFIRMED.

APPENDIX C — ORDER ON REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED FEBRUARY 15, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAUSE NO. A-20-CV-00750-LY

B.W., A MINOR, BY NEXT
FRIENDS M.W. AND B.W.,

PLAINTIFF,

v.

AUSTIN INDEPENDENT SCHOOL DISTRICT,

DEFENDANT.

Filed February 15, 2022

ORDER ON REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before the court in the above-styled and numbered action, the court referred to the United States Magistrate Judge for a report and recommendation Defendant the Austin Independent School District's ("District") Defendant's Motion to Dismiss Plaintiffs Fourth Amended Complaint and all related briefing (Docs.

##42, 48, 50, 51). The Report and Recommendation of the United States Magistrate Judge was filed January 28, 2022 (Doc. #58). The magistrate judge recommends that the court grant the District's motion and that all of B.W.'s claims be dismissed.

A party may serve and file specific written objections to the proposed findings and recommendations of a magistrate judge within fourteen days after being served with a copy of the report and recommendation and thereby secure *de novo* review by the district court. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b). A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation in a report and recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. United Services Auto Ass'n,* 79 F.3d 1415 (5th Cir. 1996) (en banc).

The parties received the report and recommendation on January 28 2022, and objections if any, were due to be filed on or before February 11, 2022. B.W. filed objections to the report and recommendation on February 8, 2022 (Doc. #59). In light of the objections, the court has undertaken a *de novo* review of the entire case file.

Having considered the motion, response, objections, the case file, and the applicable law, the court will overrule the objections and will accept and adopt the report and

recommendation for substantially the reasons stated therein.

IT IS ORDERED that B.W.'s Objections to the Magistrate Judge's Report and Recommendations filed February 8, 2022 (Doc. #59) are **OVERRULED.**

IT IS FURTHER ORDERED that for substantially the reasons stated therein the Report and Recommendation of the United States Magistrate Judge filed January 28, 2022 (Doc. #58) is **ACCEPTED AND ADOPTED.**

IT IS FURTHER ORDERED that the District's Defendant's Motion to Dismiss Plaintiffs Fourth Amended Complaint filed May 28, 2021 (Doc. #42) is **GRANTED.**

IT IS FURTHER ORDERED that all claims alleged by Plaintiff B.W., a minor, by next friends M.W. and B.W., against Defendant Austin Independent School District are **DISMISSED WITH PREJUDICE** for failure to state a claim for which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6).

IT IS FURTHER ORDERED that in light of these rulings, the parties' Joint Motion to Abate Scheduling Order Deadlines filed January 19, 2022 (Doc. #57) is **DISMISSED.**

SIGNED this 15th day of February, 2022.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX D — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED JANUARY 28, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

No. 1:20-CV-00750-LY

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

Plaintiff,

v.

AUSTIN INDEPENDENT SCHOOL DISTRICT,

Defendant.

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE:

Before the court are Defendant's Motion to Dismiss Plaintiff's Fourth Amended Complaint (Dkt. #42) and all related briefings. *See* Dkt. #48,

#51.[1] After reviewing the entire case file, relevant case law, and determining a hearing is not necessary, the undersigned issues the following Report and Recommendation to the District Court.

I. Background

Proceeding by and through his next friend parents, Plaintiff B.W. brings the instant suit against Defendant Austin Independent School District ("AISD") alleging that B.W. was impermissibly discriminated against, harassed, and physically and verbally assaulted by his teachers and fellow students at Austin High School on account of his political beliefs, religion, and race. *See generally* Dkt. #41.

In his Fourth Amended Complaint ("FAC"), B.W. describes himself and his family as "Caucasian, devout Christians, and Republicans." Dkt. #41 at ¶ 26. According to B.W., beginning in middle school and continuing during his time at Austin High School, B.W. has been the victim of verbal and physical abuse by other students as well as AISD staff members because of his conservative political views, Christian religion, and his race. *Id.* at ¶¶ 28-123.

Per the FAC, the alleged bullying and harassment began on or about October 13, 2017, after B.W. wore a MAGA (*Make America Great Again*) hat on a middle school

1. This motion was referred by United States District Judge Lee Yeakel to the undersigned pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

field trip and "[a]lmost immediately B.W. experienced an attitudinal change by staff and other students from friendly and inviting to cold and hostile." *Id.* at ¶ 28. After "a number of other incidents of concern," B.W.'s parents met with AISD administrators, "to address concerns that B.W. was becoming an object of derision because of his political beliefs." *Id.* at ¶ 30. At the meeting, B.W.'s parents made suggestions on how the school could better support "diversity of thought." *Id.* at ¶¶ 31-32. The FAC indicates that these suggestions were never implemented, and instead there was "an increase in verbal attacks, vitriol, hatred and overall disgust aimed toward B.W. on almost a daily basis and always because of his political allegiance to President Trump." *Id.* at ¶ 32.

The FAC goes on to allege that beginning in spring of 2018, "B.W. was not only ostracized for being a Republican, but a broader stereotype about being a Trump supporter, Caucasian, and a Christian began to emerge." *Id.* at ¶ 38. B.W. cites various examples, such as an incident during Latin class where "a student made fun of B.W. for being a Christian, saying 'Ah, Christians should understand Latin,'" or another incident during band class in which "two students repeatedly harassed B.W. for being Caucasian by repeating the evils of the white race in American history." *Id.* at ¶¶ 40-41. He also asserts that AISD administrators and teachers "participated in this stereotypical think as well," alleging for example that an AISD principal once "saw B.W. listening to music with his ear buds in and walked up to him, yanked one ear bud out of his ear and stated sarcastically, 'Are you listening to Dixie?'" in front of other students, leaving B.W. "humiliated." *Id.* at ¶ 42.

Appendix D

On September 21, 2018, B.W. and his parents filed a grievance (the Grievance) with the AISD Board detailing, among other things, the above complained of incidents and the alleged lack of response by the school administrators and teachers. *Id.* at ¶ 70. A Level I Conference was convened, AISD provided its Level I Response, and on December 7, 2018, the Austin High School Assistant Principal provided a written response of the Level I findings indicating his finding that there had been no teacher bias or harassment. *Id*. at ¶¶ 80-85.

Even after filing the Grievance, B.W. alleges the hostile educational environment continued, identifying several other alleged occurrences of harassment and bullying against him by students and AISD staff. *See id*. at ¶ 74 (including as an example an incident in which B.W. was allegedly insulted for wearing a Ted Cruz shirt and kicked by other students); *see also*, *e.g.*, *id.* at ¶¶ 87-89; *id*. at ¶ 102 (alleging that "students called [B.W.] a racist daily, he was 'flicked off' daily, and also cussed at daily," noting that "[m]uch of the time it was in front of a teacher, but no teacher ever intervened.").

On January 22, 2019, B.W. and his family filed a Second Grievance, which "specifically pointed out that B.W. has a constitutional right to political free speech, which was being chilled by the ongoing bullying and harassment" by students and teachers. *Id.* at ¶ 90. The Second Grievance further asserted that despite numerous conferences with AISD administrators and teachers, there had been no resolution of the bullying and harassment against B.W. *Id*. The Second Grievance also contained an

addendum "that specifically notes the violations of B.W.'s Constitutional Rights, the 1st and 14th Amendments, the Equal Protection and Due Process Clauses and Sex Discrimination pursuant to Title IX." *Id.* However, B.W. alleges the Second Grievance was never forwarded to the AISD Superintendent or the Title VI Coordinator, "even though this complaint explicitly makes claims that fall under each's ambit." *Id.*

On or about February 5, 2019, B.W. alleges he was physically assaulted by another student. *Id.* at ¶ 92.[2] The next day B.W. and his parents filed a Third Grievance relaying the details of B.W.'s assault and reiterating that their previous complaints to administrators had been ignored. *Id.* at ¶¶ 93-94. Again, the FAC alleges, the AISD administrator handling B.W.'s Third Grievance "fails to follow School Board Policies and Procedures," and did not forward the complaint to the AISD Superintendent or Title VI Coordinator. *Id.* at ¶ 95.

On June 6, 2019, B.W. and his family filed a Level III Appeal, and on September 16, 2019, the Board convened to hear it. *Id.* at ¶¶ 103-106. The FAC alleges that at this meeting the Board heard about the bullying and harassment that B.W. had experience beginning in middle school and continuing at Austin High School, as well as about the many emails, phone calls, and in-person complaints B.W. and his parents had made to AISD administrators, staff, and teachers over the years. *Id.* at

2. B.W. alleges, without any further detail, that he later found out the student had physically assaulted B.W. "because [he] was white." Dkt. #41 at ¶ 96.

¶ 106. "It was also reiterated that the District had done virtually nothing to help B.W., and the little that had been done actually made the treatment of B.W. worse, as B.W. subject to not only ongoing harassment, but also retaliation." *Id.* According to the FAC, the Board members ratified all the previous findings by AISD staff. *Id.* at ¶ 109.

Based on the foregoing, B.W.'s FAC asserts the following claims predicated under Section 1983: (1) deprivation of First Amendment rights to free speech and religious, and right to publicly seek redress; (2) deprivation of the right to a public education; (3) deprivation of equal protection rights under the Fourteenth Amendment; and (4) deprivation of procedural due process rights under the Fourteenth Amendment. Dkt. #41 at ¶¶ 13 8-148. B.W. also asserts claims of harassment, discrimination, and retaliation based upon his race under Title VI of the Civil Rights Acts of 1964. *Id.* at ¶¶ 149-152. Lastly, B.W. alleges state law claims of racial and religious discrimination under Chapters 106 and 110 of the Texas Civil Practice & Remedies Code. *Id.* at ¶¶ 153-154.

II. Procedural History

B.W. filed his original complaint on July 14, 2020. Dkt. #1. After B.W. amended his complaint several times and AISD moved to dismiss each complaint (*see* Dkt. #4, Dkt #12, Dkt. #14, Dkt. #18, Dkt. #20), the undersigned recommended to the district court that Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint be granted and that this case be dismissed. *See* Dkt. #24. However, after B.W.'s original attorney was forced

to withdraw from the case, B.W.'s new counsel sought permission to replead instead of filing Objections to the Recommendation. *See* Dkt. #33. The district court granted permission to B.W. to replead (Dkt. #35), and B.W. filed his Third Amended Complaint on May 14, 2021 (*see* Dkt. #36), and his corrected Fourth Amended Complaint ("FAC") on May 26, 2021 (*see* Dkt. #41).

On May 28, 2021, AISD filed the instant Motion to Dismiss, arguing that despite the addition of factual details to the FAC, B.W. has still failed to state a claim upon which relief may be granted. Dkt. #42. B.W. filed a response, Dkt. #48, and AISD filed a reply, Dkt. #51.

III. Legal Standard

When evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6) the complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). Although Federal Rule of Civil Procedure 8 mandates only that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief," this standard demands more than unadorned accusations, "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Bell Atl. v. Twombly*, 550 U.S. 544, 555-57 (2007). Rather, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that

is plausible on its face." *Id.* at 570. The Supreme Court has made clear this plausibility standard is not simply a "probability requirement," but imposes a standard higher than "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The requisite standard is properly guided by "[t]wo working principles." *Id.* First, although "a court must 'accept as true all of the allegations contained in a complaint,' that tenet is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678. Second, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Thus, in considering a motion to dismiss, the court must initially identify pleadings that are no more than legal conclusions not entitled to the assumption of truth, then assume the veracity of well-pleaded factual allegations and determine whether those allegations plausibly give rise to an entitlement to relief. If not, "the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* at 679 (quoting FED. R. CIV. P. 8(a)(2)).

III. ANALYSIS

A. Section 1983 Claims

B.W.'s FAC asserts Section 1983 claims against AISD for violation of B.W.'s rights to expression, religion, and

public redress under the First Amendment and deprivation of his right to procedural due process rights and equal protection rights under the Fourteenth Amendment. Dkt. #41 at ¶¶ 138-146.

Section 1983 provides a private cause of action against those who, under color of law, deprive a citizen of the United States of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. It is well established that a municipality or a local governmental unit, such as an independent school district, is not liable under Section 1983 on the theory of *respondeat superior*. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). That is, "[a] municipality is almost never liable for an isolated unconstitutional act on the part of an employee; it is liable only for acts directly attributable to it through some official action or imprimatur." *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009) (internal citations omitted); *see Monell*, 436 U.S. at 694-95 ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."). To state a Section 1983 claim against AISD, B.W. must allege facts capable of proving "three elements: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

Identification of the "final policymaker" is a question of state law. *See City of St. Louis v. Praprotnik*, 485 U.S. 112

(1988). "The 'final policymaker' is the official or officials whose decisions are unconstrained by policies imposed by a higher authority." *A. W. v. Humble Indep. Sch. Dist.*, 25 F. Supp. 3d 973, 1000 (S.D. Tex. 2014), *aff'd sub nom. King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754 (5th Cir. 2015); *see Beattie v. Madison County School District*, 254 F.3d 595, 603 (5th Cir. 2001) (explaining that a superintendent is not a final policymaker because her decision was subject to review by the school board). Under Texas law the final policy-making authority for a school district is the district's board of trustees. *See* TEXAS EDUC. CODE §§ 11.151 & 11.1511; *see also Rivera v. Houston I.S.D.*, 349 F.3d 244, 247 (5th Cir. 2003) ("Texas law unequivocally delegates to the Board 'the exclusive power and duty to govern and oversee the management of the public schools of the district.'")).

As it did in its previous motions to dismiss, AISD argues that B.W.'s Section 1983 claims should be dismissed because B.W. is impermissibly attempting to hold AISD liable under Section 1983 on a *respondeat superior* theory. *See* Dkt. #42 at 13-18. Specifically, AISD avers that B.W. has still failed to allege any facts showing that an AISD official policy or custom was the moving force behind the alleged constitutional violations. *Id.* The court agrees.

Even assuming that B.W.'s allegations rise to the level of a constitutional violation,[3] in order to hold AISD liable

3. Federal district courts have a limited role in reviewing the decisions of school officials:

> The system of public education that has evolved in this Nation relies necessarily upon the discretion and

under Section 1983, B.W. "must identify a policymaker with final policymaking authority and a policy that is the 'moving force' behind the alleged constitutional violation." *Rivera*, 349 F.3d at 247; *see Doe v. Round Rock Indep. Sch. Dist.*, 2019 WL 3891855, at *4 (W.D. Tex. Aug. 19, 2019) ("Plaintiff has failed to assert any facts showing that the RRISD Board of Trustees was the moving force behind any of the actions alleged in this suit and thus has failed to allege a § 1983 claim against RRISD."), *appeal dismissed*, 2019 WL 8359568 (5th Cir. Dec. 2, 2019). For purposes of Section 1983 municipal liability, the Fifth Circuit has clarified that an "official policy" is:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

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> judgment of school administrators and school board members, and [Section] 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.

Wood v. Strickland, 420 U.S. 308, 326 (1975), *rev 'd in part on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). As one district court stated: "It is a great leap from the principal's office to the federal courthouse, and, in order to invoke federal jurisdiction, plaintiffs are required to demonstrate fact issues indicating not merely that they may have gotten a 'raw deal,' but that their constitutional rights may have been violated." *J.W. v. Desoto Cnty. Sch. Dist.*, No. 2:09-cv-00155-MPM-DAS, 2010 WL 4394059, at *3 (N.D. Miss. Nov. 1, 2010).

> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under [Section] 1983 unless they execute official policy as above defined.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984).

In the case at bar, B.W. does not allege that the AISD Board of Trustees formally adopted any actual policies or regulations that contributed to his alleged injuries.[4] In fact, B.W.'s FAC concedes that the Board has adopted proper policies designed to prevent bullying

4. To the extent B.W. is attempting to allege that the Board's denial of his Grievance at the September 16, 2019 Board meeting constitutes an "official policy" of the Board, the undersigned has already rejected that theory. *See* Dkt. #24 at 11-12. The FAC adds no significant details relating to the Board meeting, and the court reaffirms its determination that the Board's denial of B.W.'s Grievance does not constitute an official policy for the purposes of Section 1983.

and harassment of students based on issues such as race or religion, as well as on exercise of free speech. *See* Dkt. #41 at ¶¶ 21-25. The FAC asserts that despite these policies, AISD had an "actual practice and custom" of failing to follow its own proper policies, arguing that the administrators and teachers with whom B.W. interacted failed to follow those policies. *Id*. at ¶ 137. It is true that Section 1983 liability may be imposed where a plaintiff demonstrates a "persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy," *see Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984), however, B.W. has failed to do so in this case.

The FAC does not plead factual allegations from which the court could reasonably infer that there was a pattern of misconduct involving similar acts. *See Zarnow v. City of Wichita Falls, Texas*, 614 F.3d 161, 169 (5th Cir. 2010) ("A customary policy consists of actions that have occurred for so long and with such frequency that the course of conduct demonstrates the governing body's knowledge and acceptance of the disputed conduct."). Nor does B.W. allege a pattern with any level of specificity. *See Peterson*, 588 F.3d at 851 ("[a] pattern requires similarity and specificity; [p]rior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question") (internal citations omitted). Importantly, "[i]solated violations, are not the persistent, often repeated, constant violations, that constitute custom and policy" as required for Section 1983 liability. *Bennett*,

728 F.2d at 768 n.3. The FAC does not allege that any other students were treated in a similar fashion because of an alleged custom of practice of disregarding AISD policies, nor any other facts that would plausibly suggest a pattern of behavior. Accordingly, B.W.'s custom and practice argument fails.

The FAC also attempts to hold AISD liable under Section 1983 based on B.W.'s allegations that AISD failed to properly train and/or supervise its staff. *See* Dkt. #41 at ¶¶ 147-148. To impose Section 1983 liability under a theory of failure to train or failure to supervise, B.W. must show three things: (1) the training or hiring procedures of the Board were inadequate; (2) the Board was deliberately indifferent in adopting the hiring or training policy, and (3) the inadequate hiring or training policy directly caused the B.W.'s injury. *See Baker v. Putnal*, 75 F.3d 190, 200 (5th Cir. 1996). Further, he must show that the "need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that [the Board] can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). In other words, the failure to train must have been an intentional choice by the Board, not a mere oversight. Here, there are simply no facts indicating that the Board was aware of any alleged custom or failure to train, much less that the Board intentionally disregarded such a need. On the contrary, B.W.'s FAC repeatedly alleges that AISD staff failed to report B.W.'s complaints to the District Superintendent and Board. *See* Dkt. #41 at ¶¶ 55, 90, 94, 128. Accordingly, B.W.'s failure to train/failure to

supervise theory of liability is unsupported by the FAC and should be dismissed.

In sum, the allegations in B.W.'s FAC fail to allege an official policy that was the moving force behind the alleged violations of his constitutional rights, and thus B.W. has failed to plead facts upon which AISD could be found liable under Section 1983. *See Iqbal*, 556 U.S. at 678; *Peña v. City of Rio Grande City*, 879 F.3d 613, 622 (5th Cir. 2018) (to proceed beyond the pleading stage, "a complaint's description of a policy or custom and its relationship to the underlying constitutional violation . . . cannot be conclusory; it must contain specific facts"); *see also Davis v. Austin Indep. Sch. Dist.*, 1:20-CV-353-LY, 2020 WL 6434853, at *7 (W.D. Tex. Nov. 2, 2020) (finding the plaintiff had failed to assert any facts showing an official policy that was the moving force behind the actions alleged in the suit and thus had failed to allege a Section 1983 claim against AISD). Consequently, the undersigned recommends that AISD's Motion to Dismiss (Dkt. #42) be **GRANTED** so far as it seeks the **DISMISSAL** of B.W.'s Section 1983 claims.

B. Title VI Claims

In his FAC, B.W. adds new claims of racial discrimination and harassment under Title VI. *See* Dkt. #41 at ¶¶ 149-152. Under Title VI of the Civil Rights Acts of 1964, a District may be held liable for claims arising from student-on-student 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 Independent School District*, 804 F.3rd 398, 408 (5th Cir. 2015) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644 (1999)).

AISD argues B.W.'s Title VI claims should be dismissed because B.W. has failed to plead factual allegations to support his claim that the harassment he suffered from other students was because of his race, as opposed to B.W.'s political views. Dkt. #42 at 25-26. Indeed, 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" (*see* Dkt. $41 at ¶ 41, ¶ 44), then they were attacks on B.W. because of his race. *See id*. at 25.

Moreover, the FAC only alleges a handful of vaguely race-related comments that span more than two years at two different schools. These few isolated incidents do not amount to the "severe, pervasive, and objectively offensive" requirement for a race-based harassment claim under Title VI. *See Davis*, 526 U.S. at 650; *see also Sanches v. Carrollton –Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011).

B.W.'s Title VI retaliation claim likewise is insufficient to survive AISD's motion to dismiss. B.W.'s allegation that

other students and AISD staff retaliated against him by bullying and harassing him after he filed complaints is unsupported by the pleadings. Significantly, B.W.'s FAC contains no allegations that other students or staff were ever made aware of the fact that B.W. filed any grievances. Without any factual allegations that the students or staff members who allegedly engaged in retaliatory harassment actually had knowledge of the fact B.W. had filed grievances, B.W. cannot establish the causal link necessary to hold AISD liable under Title XI. *See Balakrishnan v. Bd. of Supervisors*, 2011 WL 6003312, at *4 (5th Cir. 2011) ("An employer cannot engage in a retaliatory action if at the time of the alleged action it does not know about an employee's protected conduct."); *Walker v. Geithner*, 400 Fed.Appx. 914, 917 (5th Cir. 2010) ("Walker cannot establish a prima facie case of retaliation, because there is no evidence that his employers were aware of his protected activity, so there is no causal link."); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998) ("In order to establish the causal link between the protected conduct and the illegal employment action as required by the prima facie case, the evidence must show that the employer's decision to terminate was based in part on knowledge of the employee's protected activity.")

In sum, B.W. has failed to plead factual allegations to plausibly give rise to his claims of racial discrimination or retaliation under Title VI. Accordingly, AISD's motion should be granted as to B.W.'s Title VI racial discrimination and retaliation claims.

D. State Law Claims

In addition to his federal law claims, B.W.'s FAC alleges state-law claims of racial and religious discrimination under Chapters 106 and 110 of the Texas Civil Practice & Remedies Code. Dkt. #42 at ¶¶ 153-154. In its Motion to Dismiss, AISD argues that both claims must be dismissed because neither Chapter 106 nor Chapter 110 are applicable to this case. Dkt. # 42 at 18. AISD further asserts that B.W.'s claims under Chapter 110 would also be barred by the one-year statute of limitations. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE § 110.007. B.W.'s fails to address AISD's arguments related to his state-law claims.

As AISD asserts in its motion, B.W.'s Chapter 106 claim fails because none of the prohibited acts listed in TEX. CIV. PRAC. & REM. CODE § 106.001(a) apply to this case. His claim under Chapter 110 also must be dismissed because, as AISD notes, it is barred by the one-year statute of limitations – B.W. did not add the Chapter 110 claim until he filed his FAC on May 14, 2021, more than one-year after B.W. left school on March 13, 2020 (Dkt. #41 at 117-124). *See* TEX. CIV. PRAC. & REM. CODE § 110.007. Accordingly, AISD's Motion to Dismiss the state-law claims asserted against it should be **GRANTED**.

IV. Recommendations

Based on the foregoing, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss Plaintiff's Fourth Amended Complaint (Dkt. #42) be **GRANTED** and that all of B.W.'s claims be **DISMISSED**. If the above recommendations are adopted, this lawsuit will effectively be dismissed.

IT IS FURTHER ORDERED that this case be removed from the Magistrate Court's docket and returned to the docket of the Honorable Lee Yeakel

V. Objections

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*).

SIGNED January 28, 2022.

/s/
Mark Lane
United States Magistrate Judge

APPENDIX E — ORDER GRANTING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 27, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50158

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

Plaintiff—Appellant,

versus

AUSTIN INDEPENDENT SCHOOL DISTRICT,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-750

Filed June 27, 2023

ON PETITION FOR REHEARING EN BANC

(Opinion January 9, 2023, 22-50158, 2023 WL 128948)

Before RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT,

Appendix E

HO, DUNCAN, ENGELHARDT, OLDHAM, WILSON, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs. Pursuant to 5th Circuit Rule 41.3, the panel opinion in this case dated January 9, 2023, is VACATED.