

No. 25-1404

In the Supreme Court of the United States

STANDWITHUS CENTER FOR LEGAL JUSTICE, ET AL.,

Petitioners,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,

Respondent.

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

**BRIEF ON BEHALF OF U.S. SENATORS TED
CRUZ AND RICK SCOTT, AND THE NATIONAL
JEWISH ADVOCACY CENTER, AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

Amici are Senators of the United States Congress who have a strong interest in the enforcement of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin, including discrimination against Jewish students on the basis of shared ancestry or ethnic characteristics, in any program or activity receiving federal financial assistance. As Senators, amici have participated in the legislative and appropriations processes that condition federal funding for higher education on compliance with Title VI, giving amici an institutional interest in ensuring that recipient institutions meet the standards Congress intended.

This brief is led by Senator Ted Cruz, Chairman of the Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, whose jurisdiction includes oversight of federal civil rights enforcement, as well as Senator Rick Scott, who recently led the passage of a bipartisan resolution both recognizing Jewish

¹ No counsel for any party either (a) authored this brief in whole or in part or (b) made a monetary contribution intended to fund the preparation or submission of the brief. *See* SUP. CT. R. 37.6. All parties have been timely notified of the filing of this brief pursuant to SUP. CT. R. 37.2(a).

American Heritage Month and condemning antisemitism. Senators Cruz and Scott have been particularly vocal on the issue of rising antisemitism, having worked closely with the American Jewish community on the matter and sponsored and voted on resolutions and legislation addressing antisemitism, especially since the Hamas terror attacks of October 7, 2023. Their degree of engagement gives them unique insight into the seriousness with which Congress views the failure of federally funded universities to protect Jewish students from a hostile educational environment.

Amici respectfully submit this brief to assist the Court in its evaluation of the conduct of the Massachusetts Institute of Technology and to emphasize the significance of ensuring that universities receiving federal funds fulfill their obligations to all students, including Jewish students, under federal civil rights law.

The National Jewish Advocacy Center (“NJAC”) is a non-profit legal organization dedicated to combating antisemitism and advocating for the rights of Jewish people through legal and public policy initiatives. NJAC addresses the rising tide of antisemitism through litigation, advocacy, and education.

NJAC and the community it serves have a direct and substantial interest in the questions

presented. The decision announces two legal rules—an “intent” element and a categorical “protected-speech” exemption—that, in combination, withdraw the protection of Title VI of the Civil Rights Act of 1964 from Jewish students. NJAC writes to explain, why these two rules operate uniquely to disable Jewish Americans from vindicating their federal civil rights, and why this Court’s intervention is warranted.

SUMMARY OF THE ARGUMENT AND INTRODUCTION

On October 7, 2023, terrorists from the U.S.-designated Foreign Terrorist Organization (“FTO”) Hamas invaded the sovereign nation of Israel, slaughtered over 1,200 individuals, wounded countless others, took numerous hostages, and subjected those hostages to rape and torture.

By October 8, 2023, a mere one day after the Hamas attack, organized groups of Hamas supporters were coordinating across campuses in the United States, including the campus of the Massachusetts Institute of Technology (“MIT” or “Respondent”), to engage in a second-wave campaign to complement and support Hamas’ slaughter in Israel. These coordinated campus actions were intended to whitewash Hamas’ record of terrorism, promote the narrative that what Hamas did was justified “resistance,” and silence Jewish students and their allies. Herein, the campus groups at MIT are referred to collectively as the “MIT Campus Groups.”

Many accounts document that these university campaigns were coordinated in advance with Hamas and other terror organizations. *See, e.g.,* Yossi Sheffi, *Unsafe at MIT: A Chronicle of a Campus War on the Jews* (2026).

The decision below, beset by significant legal and procedural errors, also adopts two interlocking

rules that, taken together, create a Title VI regime under which Jewish students alone are left without a remedy.

First, the First Circuit treated the harassers' subjective discriminatory intent as an element of a hostile-environment claim. That holding cannot be reconciled with this Court's governing framework. Under that framework, a funding recipient is liable when it is deliberately indifferent to harassment that is "so severe, pervasive, and objectively offensive" that it denies the victim equal access to education. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

The inquiry is objective and is "judged from the perspective of a reasonable person in the plaintiff's position." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, n.15 (1998) (citation omitted). It is the recipient's conduct, not the harasser's secret state of mind, that gives rise to liability. The courts of appeals have said as much, holding that a harasser's "purpose or intent" is "legally immaterial." *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1235 (10th Cir. 2015).

Second, the First Circuit held that speech which would be protected against direct government suppression categorically cannot form the basis of a Title VI claim. That is a fundamental category error. Title VI is Spending Clause legislation that operates "much in the nature of a contract." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216

(2022). A university that accepts federal money voluntarily agrees not to discriminate; the First Amendment does not excuse a funding recipient from that bargain, and it has never barred the use of speech as evidence of discriminatory conduct. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). Other circuits routinely adjudicate hostile-environment claims built on slurs, symbols, and other expression without any such categorical bar. E.g., *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665-66 (2d Cir. 2012).

Third, the First Circuit made two significant and prejudicial errors in its decision that, on their own, warrant this Court's intervention. The issue before the District Court was whether the acts and omissions of an institution subject to Title VI constituted deliberate indifference under Title VI. The District Court determined that there was no deliberate indifference. On appeal, the First Circuit was asked, in substance, the same question. The First Circuit affirmed but went well beyond the four corners of the District Court's decision, first deciding a key fact without adhering to the rule that required the First Circuit to treat Petitioners' well-pleaded facts to be true and then deciding the case in a way that even a First Circuit judge, concurring the denial of rehearing *en banc*, argued "... went further than it ought to have gone to resolve the present dispute." *StandWithUs Ctr. for Legal Just. v. Mass. Inst. of*

Tech., 165 F.4th 97, 98 (1st Cir. 2026) (Dunlap, J., concurring in the denial of rehearing *en banc*).

The questions in this case are exceptionally important and squarely presented. Jews are indisputably protected by Title VI as a matter of race, ancestry, and national origin. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987). The Executive Branch has said so for two decades and across administrations, including in Executive Order 13899² and in successive guidance from the Department of Education’s Office for Civil Rights. The decision below collides with that settled federal position, and it has already produced conflicting outcomes in materially identical post-October 7 litigation. The Court should grant review.

ARGUMENT

I. The First Circuit Needlessly Decided an Issue Not Properly Before It and Has Created Crippling Uncertainty for the Application of Title VI.

The First Circuit characterized what happened on MIT’s campus as “roughly seven months of peaceful protests.” That characterization cannot be

² Exec. Order No. 13899, Combating Anti-Semitism, 84 Fed. Reg. 68779 (Dec. 16, 2019)

squared with this record. For months, Jewish students were harassed, intimidated, and prevented from obtaining an education by campus mobs openly calling for the ethnic cleansing of Jews in the Jewish homeland.

The First Circuit did not merely decide that protected speech cannot be regulated under Title VI. It first contradicted the Petitioners' well-pleaded facts to conclude, without any support, that the underlying conduct constituted "peaceful protest" and was protected by the First Amendment and then opined on the issue of the interaction of Title VI and the First Amendment, something that was not at issue in the appeal or the District Court's opinion.

In unnecessarily resolving disputed factual questions, the First Circuit deprived Petitioners of their right to demonstrate that the protests were far from peaceful and, instead, as the pleadings demonstrated, were primarily in the nature of incitement, true threats, fighting words and harassment directed at a captive audience, all well-established exceptions to the First Amendment.

The District Court's opinion not only didn't find that the MIT Campus Groups' activities were peaceful, it described the situation as the campus being "...embroiled in an internecine conflict that caused Jewish and Israeli students great anguish..." and further described the activities as "...an outburst

of ugliness....” *StandWithUs Center for Legal Justice v. Mass. Inst. Tech.*, 742 F. Supp. 3d 133, 142-143 (D. Mass 2024).

Notwithstanding amicus NJAC having alerted the court below to the violent and oppressive nature of the “protests,” the First Circuit chose to ignore those facts and, contradicting the District Court’s characterization, deemed the actions of the MIT Campus Groups as “...roughly seven months of peaceful protests.” Brief of the National Jewish Advocacy Center, Inc. as Amicus Curiae in Support of Appellants, filed on Dec 23, 2024, *StandWithUs Center for Legal Justice v. Mass. Inst. Tech.*, 158 F.4th 1 (1st Cir. 2025).

The First Circuit’s description also contradicts the findings in several reports from Congress on the nature of the post-October 7 campus riots.³ It shows that the First Circuit ignored the pleadings, where even MIT did not argue that the protests were peaceful, and violated the principles of *Twombly* (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)) and *Iqbal* (*Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). Second,

³ See COMM. ON EDUC. & THE WORKFORCE, U.S. HOUSE OF REP., REPUBLICAN STAFF REPORT: ANTISEMITISM ON COLLEGE CAMPUSES EXPOSED (Oct. 31 2024) at 39 (the “Committee Report”), available at https://edworkforce.house.gov/uploadedfiles/10.30.24_committee_on_education_and_the_workforce_republican_staff_report_-_antisemitism_on_college_campuses_exposed.pdf

it demonstrates that Petitioners were deprived of their right to show that the protests were part of a coordinated campaign, in alignment with FTOs, to support the nationwide attacks on Jews in university settings.

Instead, the District Court's Title VI ruling focused on the culpability of MIT itself for the actions of the MIT Campus Groups, confirming that the environment was far from peaceful but noting that "... MIT's evolving and progressively punitive response largely tracked its increasing awareness of **the hostility that demonstrators directed at Jewish and Israeli students** shows that MIT did not react in a clearly unreasonable manner." 742 F. Supp. 3d at 142 (emphasis added).

This was in the context of the deliberate indifference claim, and whether MIT acted with deliberate indifference was the only Title VI issue that the First Circuit's ruling should have addressed.

It may well be the case that, as the District Court found, MIT's failure to respond to the MIT Campus Groups' activities did not rise to the level of deliberate indifference under Title VI. But before deciding this question, the First Circuit raised its own threshold issue as to a question that was not at issue: Were the activities of the MIT Campus Groups protected expression under the First Amendment and thus outside the reach of Title VI?

By interjecting this premature legal question and concluding that the protests were entirely within the protections afforded by the First Amendment, which precluded the application of Title VI, the First Circuit went far afield in its inquiry and, without the benefit of having the matter subject to the entire judicial process from the District Court proceedings onwards, created new law that is at odds with Supreme Court First Amendment precedent.

When the Respondents sought an *en banc* rehearing at the First Circuit, Judge Dunlap acknowledge this problem in his concurring opinion, stating, “In my view, the panel went further than it ought to have gone to resolve the present dispute the panel should have chosen the same route as the trial court and resolved the case solely on this narrower ground.” *StandWithUs*, 165 F.4th at 98-102 (Dunlap, J., concurring in the denial of rehearing) (citation omitted).

What Judge Dunlap’s concurring opinion misstated, though, is that the First Circuit did not consider whether “speech not protected by the First Amendment could give rise to liability under [Title VI].” In fact, the First Circuit’s opinion never touched on the question of whether the MIT Campus Groups’ speech was incitement, fighting words, and harassment directed at a captive audience, all exceptions to the First Amendment. At best, it

discussed whether racist speech was punishable under Title VI, but it did not examine whether the racist speech in this case could also have been considered incitement or fighting words, which are clear exceptions to the First Amendment. *See* Marc A. Greendorfer and Vanessa Hites, *When Words Wound: Pure Speech Meets Federal Antidiscrimination Law* [Publication in the *Touro Law Review* forthcoming, 2026].

As in *Virginia v. Black*, where the Court upheld a law prohibiting the burning of crosses with the intent to intimidate, the issue here is whether the expression of the MIT Campus Groups was meant to unlawfully intimidate or harass Jewish students on the MIT campus, where Hamas flags, slogans, and related expression took the place of burning crosses as a means to intimidate Jewish students and faculty at MIT. 538 U.S. 343, 363 (2003). As amicus NJAC explained in its brief at the First Circuit, Jews on the MIT campus had just witnessed the worst slaughter of Jews since the Holocaust and the MIT Campus Groups were not only celebrating, they were directing the exact symbols and words of the killers at Jewish students and faculty.

This is equivalent to the scenario in *Black*, yet it was not only dismissed by the First Circuit, factual inquiry into the intentional campaign to intimidate and terrorize Jewish students at MIT was foreclosed

by the baseless conclusion that the protests were peaceful.

All of this would have been moot had the First Circuit ruled narrowly on the deliberate indifference issue, as observed by Judge Dunlap. The First Circuit's overbroad decision, which dismissed concerns under *Black* while it wrongfully found that the MIT Campus Groups were "peaceful," effectively overrules *Black* while rendering Title VI unenforceable in many situations where it was meant to apply.

Just as one example, if a group were to start a campaign at the MIT campus next year, where the goal was to intimidate black students under the guise of advocating for a white-only nation, and they regularly confronted black students with nooses and burning crosses and chants that America must be rid of blacks from sea to shining sea, and MIT allowed this conduct to occur for months, how could the First Circuit's decision stand for anything other than what it stood for in the instance case? Title VI would become dead letter.

There was no need for the First Circuit to opine on an issue that was outside of the questions presented, thus creating new law that will have the effect of eliminating established exceptions to the First Amendment in Title VI cases. Nonetheless, it

did so, providing this Court with the foregoing, as well as the following reasons, to grant the petition.

II. The Decision Below Adopts Two Rules That, In Combination, Strip Jewish Students Of Title VI's Protection At The Moment They Most Need It.

A. Antisemitism Is History's Most Adaptive Hatred, And Its Defining Trait Is Mutation—From Religious, To Racial, To Political.

To see why the rules below fall uniquely on Jews, the Court must first understand how antisemitism works. Often called the world's oldest hatred, antisemitism has endured for two millennia because of a singular characteristic: it mutates. In every era, it adopts the dominant moral vocabulary of the day and pours into that new vessel the same ancient libel: that Jews are a malign and alien power secretly responsible for society's misfortunes. The accusation is constant; only its idiom changes.

For much of Western history, the idiom was religious. Jews were charged with deicide, accused in the blood libel of ritual murder, blamed for plagues, and subjected to forced conversions, ghettos, and expulsions. In the nineteenth and twentieth centuries, the idiom became racial and pseudo-

scientific: antisemites recast the Jew not as an adherent of a disfavored faith but as a member of a separate and dangerous race, a conception that culminated in the Holocaust. That racial framing was not foreign to American law. As this Court has recognized, nineteenth-century Americans understood Jews to be a distinct race, which is precisely why Jews remain protected against racial discrimination under the Reconstruction statutes today. *Shaare Tefila*, 481 U.S. at 617-18.

Today, the idiom is frequently political. The same conspiratorial charge (that Jews are collectively powerful, disloyal, and culpable) now reappears in the vocabulary of geopolitics, recoded as rhetoric about Israel, “Zionists,” and a supposed worldwide Jewish lobby. The International Holocaust Remembrance Alliance (“IHRA”) working definition captures both the continuity and the modern mutation. It defines antisemitism as “a certain perception of Jews, which may be expressed as hatred toward Jews.”⁴ The definition explains that the age-old trope persists: antisemitism “frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for ‘why things go wrong.’” *Id.* And its

⁴ Int’l Holocaust Remembrance Alliance, Working Definition of Antisemitism (<https://holocaustremembrance.com/resources/working-definition-antisemitism>); see also U.S. Dep’t of State, Defining Antisemitism (<https://www.state.gov/defining-antisemitism>).

contemporary examples expressly include political forms—“[h]olding Jews collectively responsible for actions of the state of Israel” and “[d]rawing comparisons of contemporary Israeli policy to that of the Nazis.” *Id.*

Critically, the IHRA framework does not treat all criticism of Israel as antisemitic, and neither do amici. The definition is explicit that “criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic.” *Id.* That is the right line, and it confirms the proper inquiry: whether particular conduct, in its full context, targets Jews because they are Jews or instead voices a genuine political critique of a foreign state. The Executive Branch has embraced exactly this framework, directing federal agencies enforcing Title VI to consider the IHRA definition and its examples when evaluating antisemitic discrimination. Exec. Order No. 13899.

This mutability is the key to the questions presented. Because antisemitism so readily borrows a respectable idiom, the hardest and most consequential cases are precisely those in which bigotry is delivered through words that can be characterized as political. A legal regime that is blind to that dynamic—one that demands proof of conscious bigoted purpose and simultaneously excludes the harasser’s expression from the analysis—does not

protect Jews. It protects their harassers. The next two sections explain why.

B. Because Modern Antisemitism Disguises Itself, A Subjective-Intent Element Functions As A License To Harass Jews.

The harasser who would never concede animus against “Jews” will readily insist that he was merely “criticizing Israel,” “opposing Zionism,” or “engaging in political protest.” That is the recurring grammar of contemporary campus antisemitism. A subjective-intent element rewards exactly this evasion. If a Jewish plaintiff must plead and prove that her harassers acted with a conscious, bigoted purpose, then the more skilled the bigot is at cloaking his motive in politics, the more complete his immunity. The rule perversely protects sophisticated antisemitism while leaving actionable only the crudest and rarest admissions of hatred.

No other protected group is asked to litigate its tormentors’ inner life as the price of admission to court; a Black student subjected to a noose, or a Latina student subjected to slurs, need not prove that the perpetrators harbored a particular state of mind beyond that the conduct was directed at her because of who she is. The federal government has recognized this dynamic. Executive Order 13899 directs every

agency enforcing Title VI to consider the IHRA definition and its contemporary examples “to the extent that any examples might be useful as evidence of discriminatory intent.” Exec. Order No. 13899. The Order treats expression as evidence of how harassment should be understood—not as a categorical safe harbor for the harasser. The decision below inverts that approach.

C. A Categorical “Protected-Speech” Exemption Compounds The Error, Because Antisemitic Harassment Is Overwhelmingly Expressive.

The First Circuit’s second rule deepens the injury. Harassment of Jews is frequently delivered through words and symbols—chants, signs, slogans, social-media posts, and confrontations. If all expression that would be shielded from direct government censorship is also categorically excluded from the Title VI calculus, then the principal vehicle of antisemitic harassment is removed from the analysis before it begins. The hostile-environment inquiry is gutted in precisely the cases where Jewish students are most affected.

The two rules thus operate as a one-two punch unique to this form of bigotry. Rule one says the plaintiff must prove the harasser’s discriminatory intent. Rule two says the plaintiff may not rely on the

harasser's words to do it. The result is a Title VI that protects Jewish students in theory and almost never in practice. That is not what Congress enacted, and it is not what this Court's precedents permit.

III. The “Intent” Element Conflicts With This Court’s Hostile-Environment Framework, Which Is Objective And Recipient-Focused.

This Court's hostile-environment doctrine fixes liability on two things, neither of which is the harasser's private intent. The first is the objective character and effect of the conduct. A recipient is liable only for harassment that is “so severe, pervasive, and objectively offensive” that it deprives the victim “of access to the educational opportunities or benefits provided by the school.” *Davis*, 526 U.S. at 650. The severity of harassment “should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.” *Oncale*, 523 U.S. at 81, n.15 (citation omitted). And the environment is actionable so long as it “would reasonably be perceived, and is perceived, as hostile or abusive,” without any further showing of the perpetrator's psychology. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22, n.6 (1993) (citation omitted).

The second locus of liability is the funding recipient's own response. A recipient is answerable in

damages where “an official who at a minimum has authority to institute corrective measures on the recipient’s behalf has actual notice of, and is deliberately indifferent to,” the misconduct. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998). Nothing in *Davis* or *Gebser* makes the harasser’s subjective animus a freestanding element; the statutory wrong is the institution’s deliberate indifference to objectively offensive, access-denying harassment. The First Circuit’s contrary rule grafts onto Title VI an element this Court has never recognized.

The intent element also misreads Title VI’s operative language. The statute reaches discrimination “on the ground of race, color, or national origin.” That is causal language. As this Court has explained in the cognate Title VII context, the statute “is directed only at discriminat[ion] ... because of ... sex,” *Oncale*, 523 U.S. at 80, n.7—a connection between the protected trait and the harm, not proof of a malevolent heart.

The first question presented turns on a real and acknowledged conflict among the courts of appeals, which the petition documents in detail. See Pet. 15-20. The decision below deepens that conflict and lands the First Circuit on the minority side.

The majority anchors liability in objective effect, not subjective intent. The Ninth Circuit has held expressly that harassment plaintiffs “do not need to prove that [the harasser] had a specific intent to discriminate,” because antidiscrimination law “is aimed at the consequences or effects of an employment practice and not at the ... motivation of co-workers or employers.” *EEOC v. Nat’l Educ. Ass’n*, 422 F.3d 840, 844 (9th Cir. 2005). Its foundational decision in *Ellison v. Brady* adopted a reasonable-victim standard that “classifies conduct as unlawful ... harassment even when harassers do not realize that their conduct creates a hostile working environment,” so that even “[w]ell-intentioned” conduct can be actionable if objectively severe or pervasive. 924 F.2d 872, 880 (9th Cir. 1991). The Tenth Circuit agrees that “whether the alleged harasser’s purpose or intent was to do harm ... is legally immaterial.” *Lounds*, 812 F.3d at 1235. So does the Fourth Circuit, which held that racial slurs supported a claim even where the speaker “lacked intent to harm,” because “it matters not if the boy was too young to understand the force of his words.” *Chapman v. Oakland Living Ctr., Inc.*, 48 F.4th 222, 231 (4th Cir. 2022).

The First Circuit requires discriminatory intent and carried that requirement into the hostile-environment setting. The First Circuit treats “racial animus” as “a necessary component” of a Title VI

claim and demands proof that the defendant acted with discriminatory intent. *Goodman v. Bowdoin Coll.*, 380 F.3d 33, 43 (1st Cir. 2004); accord *Doe v. Brown Univ.*, 43 F.4th 195, 208 (1st Cir. 2022). In the decision below, the panel carried that intent requirement into the hostile-environment context, treating the protestors’ expression as non-actionable because it was not shown to be motivated by antisemitic purpose. The petition identifies additional circuits that likewise treat discriminatory intent or animus as an element of harassment liability. See Pet. 15-20.

The other decisions on the intent-required side, read carefully, demand a causal “because of” connection—not proof of malice. The petition also identifies the Eleventh and D.C. Circuits among the courts treating discriminatory intent or animus as part of the harassment inquiry. See Pet. 18. Properly understood, however, those decisions require that the challenged conduct be “based on” the protected trait (a causation requirement) rather than separate proof of the harasser’s subjective bigoted purpose. The Eleventh Circuit has held that “only conduct that is ‘based on’ a protected category, such as race, may be considered in a hostile work environment analysis,” so that “[i]nnocuous statements or conduct, or boorish ones that do not relate to the [race] of the actor or of the offended party (the plaintiff), are not counted.” *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1297

(11th Cir. 2012). And the D.C. Circuit, adopting and appending the district court’s opinion, rejected a hostile-environment claim where a profane tirade could not “reasonably be construed as having any sexual connotation or having been motivated by a discriminatory animus.” *Stewart v. Evans*, 275 F.3d 1126, 1133 (D.C. Cir. 2002). Read on their own terms, these cases illustrate the very distinction petitioner presses: the operative question is whether the conduct occurred because of the protected characteristic, not whether the harasser harbored conscious malice. To the extent any court, like the First Circuit below, has converted that modest causation requirement into a freestanding subjective-intent element, it has compounded rather than cured the confusion that warrants this Court’s review.

The conflict is squarely presented and outcome-determinative. In a case like this one, the presence or absence of a subjective-intent element decides the outcome at the pleading stage. And the stakes are gravest for Jewish plaintiffs: as Part I explains, antisemitic harassment is uniquely apt to be cloaked in political motive, so an intent element does not merely raise the bar, it removes the floor. This Court should grant review to resolve the split and to restore the objective, effects-based standard *Davis* and *Harris* require.

IV. The “Protected-Speech” Exemption Misapplies The First Amendment To A Spending-Clause Statute And Conflicts With This Court’s Precedents.

A. Title VI Is A Contract, And MIT Voluntarily Accepted The Nondiscrimination Condition.

The First Circuit treated Title VI as though it were a direct government prohibition on speech, to be measured against the doctrines that govern sovereign censorship. But Title VI does not command anyone to do anything. It is Spending Clause legislation that operates “much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.” *Cummings*, 596 U.S. at 216 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Title VI works “by conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.” *Gebser*, 524 U.S. at 286; accord *Barnes v. Gorman*, 536 U.S. 181, 186 (2002).

MIT was free to decline federal money. It did not. Having accepted the funds, it accepted the condition: that it not allow its programs to become an instrument of discrimination against its students on the basis of race, ancestry, or national origin. Enforcing that voluntarily assumed obligation no

more violates MIT's First Amendment rights than enforcing any other condition a recipient agrees to in exchange for federal support. The decision below would let a university pocket federal funds while disclaiming the nondiscrimination promise that is the price of those funds—precisely the result the contract framework forecloses.

B. The First Amendment Does Not Immunize A Recipient's Discriminatory Conduct, And Speech May Be Evidence Of Discrimination.

Even on its own terms, the First Amendment supplies no categorical exemption. This Court has squarely held that “the First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” *Mitchell*, 508 U.S. at 489. Indeed, “motive plays the same role” under antidiscrimination laws “which we have previously upheld against constitutional challenge.” *Id.* at 487. And in *R.A.V.*, the Court confirmed that general antidiscrimination law may reach expressive harassment: “sexually derogatory ‘fighting words’ ... may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices,” because “[w]here the government does not target conduct on

the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

C. The Circuits Are Divided Over The Role Of Protected Speech In Harassment Claims, And The First Circuit Has Adopted The Most Extreme Position On That Spectrum.

The second question presented does not arise in a vacuum. The courts of appeals have wrestled for two decades with the relationship between the First Amendment and harassment liability, and they have arrived at materially different answers. The decision below sits at the far end of that spectrum, and its outlier status is itself a reason for review.

The authority on which the panel relied does not support its rule. To hold that protected speech categorically cannot support a Title VI claim, the First Circuit drew on this Court’s decisions in *Snyder v. Phelps*, *Texas v. Johnson*, and *Cox v. Louisiana*. See Pet. 22-23. But each of those cases concerned the government acting as sovereign to punish expression—not a federal funding recipient enforcing a condition it voluntarily accepted. *Snyder* asked “whether the First Amendment shields the church

members from tort liability for their speech,” and held only that state tort damages could not be imposed for picketing on public issues. 562 U.S. 443, 448, 451 (2011). *Johnson* reviewed a criminal “conviction” for flag burning and held that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” 491 U.S. 397, 399, 414 (1989). And *Cox* reversed a criminal conviction for “disturbing the peace,” reaffirming that “constitutional rights may not be denied simply because of hostility to their assertion or exercise.” 379 U.S. 536, 545, 551 (1965). None involved a Spending Clause statute, a funding condition, or a recipient’s contractual promise not to discriminate. The panel transplanted sovereign-suppression doctrine into a contractual setting where it does not belong.

The circuits most protective of campus speech still refuse to adopt a categorical bar. The decisions that come closest to the First Circuit’s position stop well short of it. The Ninth Circuit “doubt[ed] that a college professor’s expression on a matter of public concern, directed to the college community, could ever constitute unlawful harassment,” reasoning that “the government may not silence speech because the ideas it promotes are thought to be offensive.” *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708, 710 (9th Cir. 2010) (citations omitted). The Third Circuit has twice invalidated overbroad university

harassment policies on First Amendment grounds, warning that without “a showing of severity or pervasiveness,” such a policy “provides no shelter for core protected speech.” *DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001). Yet even these speech-protective courts have expressly disavowed the categorical rule the First Circuit adopted. *Saxe* holds in terms that “[t]here is no categorical ‘harassment exception’ to the First Amendment’s free speech clause,” 240 F.3d at 204, and *Rodriguez* itself quotes that proposition, 605 F.3d at 708. *Rodriguez* further confined its protection to “pure speech” on public issues addressed to the community at large, distinguishing “targeted” insults and conduct with “non-expressive qualities.” 605 F.3d at 710. These courts engage in a fact-sensitive, as-applied inquiry; they do not bar harassment claims as a class at the pleading stage.

The circuits adjudicating Title VI harassment claims weigh expression as evidence, without any categorical bar. On the other side of the divide, the courts that have actually applied Title VI and Title IX to expressive harassment treat words and symbols as part of the *Davis* inquiry, not as a pleading-stage shield. The Tenth Circuit allowed a Title VI claim to proceed on allegations of “racial slurs, graffiti,” and student displays of “swastikas, KKK symbols, and hangman nooses,” holding that “deliberate

indifference to known instances of student-on-student racial harassment is a viable theory in a Title VI intentional discrimination suit.” *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 932-34 (10th Cir. 2003). The Second Circuit sustained Title VI liability for deliberate indifference to racial slurs and a noose threat, explaining that “[e]ducational benefits include an academic environment free from racial hostility.” *Zeno*, 702 F.3d at 665-66. The Fifth Circuit adopted the *Davis* framework and observed that “the use of a noose accompanied by a vitriolic and epithet-laden note only underscores the severe, pervasive, and objectively offensive nature of the harassment.” *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 409 (5th Cir. 2015). And just last year, the Fourth Circuit reversed a Rule 12 dismissal, treating mocking, racialized expression as hostile-environment evidence under *Davis Ricketts v. Wake Cty. Pub. Sch. Sys.*, 125 F.4th 527 (4th Cir. 2025)

The First Circuit stands alone. The upshot is a genuine and consequential split. Some circuits zealously protect campus speech; others treat expression as ordinary evidence in the *Davis* analysis. But no circuit before the decision below had converted First Amendment solicitude into a categorical, pleading-stage immunity that defeats a Title VI claim at the threshold whenever the harassing conduct takes expressive form.

**V. This Is A Clean Vehicle In A Wave Of
Recurring, Materially Identical
Litigation.**

The questions arise constantly, and they are dividing the lower courts even within a single district on near-identical facts. Because the First Circuit resolved both questions as a matter of law at the pleading stage, the issues are presented cleanly, on the face of the complaint, without any need for factual development. The recurring national importance of the questions, the developing conflict, and the clean posture all counsel in favor of review.

CONCLUSION

For the above reasons, the petition for certiorari should be granted.

Respectfully submitted,

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