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 OF *AMICUS CURIAE* PROFESSOR DAVID E. BERNSTEIN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

David E. Bernstein holds a University Professor Chair and is the Executive Director of the Law and Liberty Center at George Mason University's Antonin Scalia Law School. He is a constitutional law scholar whose work examines the relationship between antidiscrimination law and civil liberties, particularly freedom of speech. He is the author of You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws (Cato Institute 2003); coauthor, with David L. Bernstein, of *Supporting Free Speech and Countering Antisemitism on American College Campuses*, 11 Harv. J.L. & Pub. Pol'y Per Curiam 1 (2025); and author of *Title VI Hostile-Environment Law in the Shadow of Antisemitic Violen*ce, 6 J. Free Speech L. 1007 (2026).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under Title VI of the Civil Rights Act of 1964, "[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.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* and his counsel has made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of this brief.

§ 2000d. These protections extend to educational institutions that receive federal funding. *See id.* § 2000d-4a(2).

Title VI imposes liability on universities that are deliberately indifferent to harassment that has "a systemic effect on educational programs or activities." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 653 (1999). The complaint alleged harassment with just such an effect on the educational opportunities available to Jewish students. Protesters disrupted classes, entered faculty office areas, shouted through hallways, and denied Jewish students access to common spaces. *See StandWithUs Ctr. for Legal Just. v. Mass. Inst. of Tech.*, 158 F.4th 1, 6–7, 20–21 (1st Cir. 2025) (*StandWithUs*). As a result, events were relocated off campus, at least one Jewish faculty member resigned, and some students left MIT and returned to Israel. *See id.* at 7–9. MIT Hillel was sufficiently concerned that it warned Jewish students "not to 'directly engage the protestors for [their] physical safety and wellbeing.'" *Id.* at 7.

Assessing whether those allegations plausibly describe a discriminatory, hostile environment requires consideration of the full context. When a complaint alleges protected expression alongside obstruction, intimidation, physical interference, disruption, or discriminatory exclusion, a court must distinguish between protected expression, which cannot itself furnish a basis for liability, and actionable conduct. But the court may not disregard the expression as contextual evidence bearing on the nature, target, meaning, severity, or effect of the accompanying conduct.

The First Circuit failed to maintain that distinction. It treated its First Amendment characterization of much of the protesters' expression as grounds for discounting that expression in the hostile environment analysis. That error undermines Title VI's contextual inquiry and conflicts with other judicial rulings.

Gartenberg v. Cooper Union for the Advancement of Science & Art illustrates the contrary approach. 765 F. Supp. 3d 245, 267 (S.D.N.Y. 2025), *reconsideration denied*, No. 24 Civ. 2669 (JPC), 2025 WL 602945 (S.D.N.Y. Feb. 25, 2025). There, the court held that when a claim combines protected expression with unprotected conduct, the court "must still consider the entire record," and it sustained a Title VI complaint based on allegations materially similar to those dismissed here. *Id.* at 267–69.

The significance of that contrasting framework was recognized within the First Circuit itself. Concurring in the denial of rehearing en banc, Judge Dunlap acknowledged that the panel left unresolved the "important subsidiary question" whether protected speech may support a Title VI claim as evidence of animus. *StandWithUs Ctr. for Legal Just. v. Mass. Inst. of Tech.*, 165 F.4th 97, 99–100 (1st Cir. 2026) (Dunlap, J., concurring in the denial of rehearing en banc). He further observed that *Gartenberg*'s framework "has much to recommend it." *Id.* at 100. The competing approaches leave universities, students, and lower courts without a uniform rule governing a recurring issue of national importance.

The decision below creates related uncertainty about causation. The First Circuit held that the complaint failed to adequately allege that the protesters "were driven by antisemitism." *StandWithUs*, 158 F.4th at 18. Petitioners argue—and amicus agrees—that Title VI requires that a hostile environment exist "because of" a protected characteristic, without proof of animus as a freestanding element. See Pet. i. However, for purposes of this amicus brief, even if this Court treats discriminatory animus as a distinct requirement, protected expression may be considered in determining whether that requirement is satisfied. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

That evidentiary principle is essential because, in many cases, it would be virtually impossible to plead discriminatory motive without considering speech in context. Animus is rarely revealed through an explicit admission; it ordinarily must be inferred from a person's words, conduct, targets, timing, and surrounding circumstances. Obstruction, exclusion, or physical interference may appear neutral in isolation, while accompanying expression may reveal why the conduct occurred and whom it targeted. Recognizing that evidentiary relevance, however, does not make the expression itself punishable or actionable.

Amicus therefore does not argue that MIT was required to censor political advocacy, prohibit criticism of Israel, or discipline students merely for expressing offensive or controversial viewpoints. Nor does amicus contend that protected speech becomes actionable harassment simply because listeners find it objectionable. The argument is narrower: although protected expression cannot itself furnish a basis for liability, the First Amendment does not require courts to ignore that expression when determining whether accompanying conduct constituted discriminatory harassment, whom it targeted, or what motivated it. Any liability must rest on MIT's alleged deliberate indifference to actionable harassment and the resulting denial of educational access—not on its failure to suppress constitutionally protected ideas.

The Court should grant the petition for certiorari to clarify that (1) when protected expression accompanies allegedly actionable conduct, courts must consider the entire record in determining whether a hostile environment existed; and (2) even if discriminatory animus is treated as a distinct element of a hostile-environment claim, protected expression may be considered as evidence of motive or intent.

ARGUMENT

I. When a Title VI hostile-environment claim alleges both protected expression and actionable conduct, the entire record must be considered in determining whether a hostile environment existed.

A Title VI hostile-environment claim requires a court to determine whether harassment was sufficiently severe, pervasive, and objectively offensive to deny plaintiffs equal access to educational opportunities and whether it occurred because of a protected characteristic. *See Davis*, 526 U.S. at 650–51. Both inquiries are contextual. When a complaint alleges protected expression alongside obstruction, intimidation, physical interference, discriminatory exclusion, or other actionable conduct, a court must therefore consider the entire record—including expression relevant to the nature, target, motive, severity, and effect of the accompanying conduct.

The First Amendment forbids imposing liability for protected expression, but it does not categorically prohibit the evidentiary use of expression to establish motive, intent, or meaning. *See Mitchell*, 508 U.S. at 489. Protected expression, therefore, cannot itself furnish a basis for liability, but neither can it be excised from the contextual analysis merely because it is constitutionally protected. In many cases, expression is what gives the accompanying conduct its alleged meaning.

The complaint presents precisely that kind of intertwined record. It alleges that, for more than six months, protesters harmed members of the Jewish community at MIT, both by blocking their access to and threatening their safety on campus. The alleged incidents began on October 10, 2023—three days after Hamas's attack—when protesters wrote "Free Palestine" and "Occupation on Gaza" outside a vigil organized by Jewish students. Protesters later gathered outside the offices of Jewish faculty members and rattled locked doors while chanting "you can't hide"; disrupted classes; massed in a major thoroughfare through which plaintiffs traveled to classes and campus events; erected an encampment adjacent to Hillel; shoved a Jewish student who was recording a protest; blocked another plaintiff's movement on campus; told a plaintiff, "Your ancestors didn't die to kill more people"; and denied individuals access to campus facilities "because [they were] Jewish." *StandWithUs*, 158 F.4th at 5–8, 10, 20.

The alleged consequences implicated educational access. Jewish organizations were forced to relocate events off campus; MIT Hillel warned students not to engage the protesters because of concerns for their "physical safety and wellbeing"; at least one Jewish faculty member resigned; students reported that it was "nearly impossible for [Jewish and Israeli students] to work, study, or keep up with [their] research commitments," and some students left MIT altogether. *Id.* at 6–9. Considered together, the alleged words, conduct, targets, timing, locations, and effects bear directly on whether Jewish students were denied or limited access to university life.

The First Circuit nevertheless failed to consider that record as a whole. It concluded that most of the MIT students' expression was protected political speech, *id.* at 12–20, and then treated that conclusion as a reason to discount the expression when evaluating whether the accompanying conduct plausibly created a hostile educational environment. The court held, for example, that absent additional allegations showing that the protesters' criticism of Israel was "driven by antisemitism," their speech could not constitute racial harassment under Title VI. *Id.* at 18.

That reasoning demanded an inference of discriminatory motive while discounting the very evidence from which that inference might be reasonably drawn. It conflated free-speech protections with evidentiary irrelevance and fragmented allegations that should have been evaluated together. As the following sections explain, that approach is inconsistent with the totality-of-the-circumstances framework governing hostile-environment claims, conflicts with decisions recognizing the contextual relevance of protected expression, and is unnecessary to safeguard First Amendment rights.

A. The totality-of-the-circumstances inquiry requires that expression and conduct be assessed together.

To prevail on a Title VI hostile-environment claim, plaintiffs must show that the alleged harassment was subjectively experienced as hostile and was objectively severe. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205 (3d Cir. 2001) (Alito, J.) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993)). In the educational setting, *Davis* requires harassment "so severe, pervasive, and objectively offensive" that it denies the victims equal access to educational opportunities or benefits. 526 U.S. at 650.

That inquiry is necessarily contextual. Objective severity must be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances, because the social impact of words and acts depends on the surrounding circumstances, expectations, and relationships. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998). A court therefore cannot determine whether an educational environment was objectively hostile by isolating allegedly actionable conduct from the words, timing, audience, and setting that gave it meaning.

An act that appears innocent in isolation may take on a different meaning when viewed in context. Posting a completed game of hangman in a dormitory common area may seem innocuous. But if students had publicly declared the week before that lynching was a good way to keep Black people "in their place," the same image could reasonably be understood as threatening and racially targeted. The surrounding expression thus bears directly on how a reasonable person would understand the act.

Hostile-environment decisions accordingly assess discriminatory expression and accompanying conduct as parts of a single record. In *Zeno v. Pine Plains Central School District*, the Second Circuit considered that a student was frequently called "n*****," "homey," and "gangster," told he was from the "hood," mocked for wearing "fake rapper bling bling," as well as evidence of a physical attack and the school district's repeated but ineffective responses to his harassment. 702 F.3d 655, 667–71 (2d Cir. 2012). The discriminatory language identified the target and character of the accompanying conduct and formed part of the trial record supporting the jury's findings that the harassment was severe, pervasive, and objectively offensive and that the school district acted with deliberate indifference. *Id.* at 667–71.

T.E. v. Pine Bush Central School District applied the same approach to antisemitic harassment of five Jewish students. One student was repeatedly bullied on the school bus and in the cafeteria, taunted with lyrics about "killing the Jews and washing off their blood," struck with coins, told he "was going to be burned in an oven," and called "dirty Jew," "filthy Jew," "ashes," and "dust." 58 F. Supp. 3d 332, 340 (S.D.N.Y. 2014). Other Jewish students were frequently called "Christ killer" and struck with coins. *Id.* at 347–48. Considering the conduct as a whole, the court held that a jury could find the harassment severe, pervasive, and objectively offensive. *Id.* at 356–

57, 367. The antisemitic expression helped identify the targeted victims of the harassment and illuminate the character, severity, and effect of the conduct.

Zeno and *T.E.* thus illustrate the ordinary method of hostile-environment analysis. Courts do not first remove the words that identify the alleged victims and then explain the meaning of the accompanying acts. They consider discriminatory language, physical interference, threats, exclusion, setting, frequency, and institutional response as parts of a single record. *See* Andrea J. Martin, *From Ambiguity to Accountability: The Case for a Legal Definition of Antisemitism in Academia*, 2025 Pepp. L. Rev. 19, 36–37 (2025).

That method does not change when some of the expression in the record is constitutionally protected. When a hostile-environment claim combines protected speech with unprotected conduct, a court "must still consider the entire record" to determine whether the harassment was "discriminatory in nature." *Gartenberg*, 765 F. Supp. 3d at 267. That formulation respects both bodies of law, the First Amendment and Title VI: protected speech, without more, cannot itself furnish a basis for liability, but it remains part of the evidentiary context surrounding separately actionable conduct.

Applied here, that framework required the First Circuit to consider the allegations cumulatively. Protesters chanted "from the river to the sea, Palestine will be free"—a slogan the House of Representatives has condemned as antisemitic and one that a reasonable Jewish student could perceive as directed at her.

StandWithUs, 158 F.4th at 7; H.R. Res. 883, 118th Cong. (2024). Protesters also rattled the locked office doors of Jewish faculty members while shouting "you can't hide" and excluded students from common spaces expressly because they were Jewish. *Stand-WithUs*, 158 F.4th at 6-8, 20. Whether those allegations plausibly describe a hostile environment cannot be determined by excluding the speech and focusing only on the conduct, because the accompanying expression bears on how a reasonable person would understand its target, character, and effect.

The door-rattling allegations illustrate the point. Had students rattled locked doors while attempting to escape a fire, a factfinder would understand the conduct as flight from danger. But when protesters entered the office area of Jewish faculty members, rattled their locked doors, and chanted "you can't hide" amid a broader campaign alleged to target Jewish students and faculty, a reasonable factfinder could understand the same physical acts as intimidation. Even assuming the accompanying slogans and advocacy were protected and nonactionable standing alone, they remain relevant to the character, target, and effect of the separate conduct. Refusing to consider expression and conduct together "strips the contextual analysis from the reasonable person standard used in hostile environment law." David E. Bernstein, *Title VI Hostile-Environment Law in the Shadow of Antisemitic Violence*, 6 J. Free Speech L. 1007, 1010 (2026) (internal quotation marks omitted).

That contextual inquiry is especially important at the pleading stage, when allegations must be considered collectively and reasonable inferences drawn in plaintiffs' favor. The First Circuit instead isolated individual acts and discounted expression bearing on their alleged discriminatory character. By fragmenting the allegations in that manner, the court departed from the totality-of-the-circumstances inquiry and the entire-record approach applied in *Gartenberg* and longstanding civil-rights precedent.

B. *Gartenberg* and related decisions reveal a division over the contextual use of protected expression that warrants this Court's review.

Courts confronting similar allegations of campus antisemitism have taken materially different approaches to the role of protected expression in hostile-environment claims. In *Gartenberg*, the court held that when a claim involves protected expression and unprotected conduct, the court "must still consider the entire record" in determining whether the alleged harassment was discriminatory. 765 F. Supp. 3d at 267. The First Circuit, by contrast, treated the protected character of much of the expression alleged here as a reason to discount it and, on that diminished record, rejected the inference that the protesters' conduct was driven by antisemitism. *StandWithUs*, 158 F.4th at 12–20.

A First Circuit judge identified the resulting uncertainty. Concurring in the denial of rehearing en banc, Judge Dunlap explained that the panel left unresolved an "important subsidiary question": whether speech protected by the First Amendment may nevertheless support a Title VI claim as evidence of animus. *StandWithUs*, 165 F.4th 97, 99–100 (Dunlap, J., concurring in the denial of rehearing en banc). He further observed that *Gartenberg*'s framework "has much to recommend it" as a means of resolving the constitutional issues embedded in the Title VI inquiry. *Id.* at 100. The question is therefore both recurring and unresolved, leaving universities, students, and lower courts without a uniform rule governing the relationship between protected expression and actionable discriminatory conduct.

This Court's precedents provide the governing principle. *Dawson v. Delaware* rejects any "per se" constitutional barrier to considering evidence of protected beliefs and associations. 503 U.S. 159, 165 (1992). *Wisconsin v. Mitchell* likewise holds that the First Amendment does not prohibit the evidentiary use of speech to establish motive or intent. 508 U.S. at 489. Applying that distinction in the discrimination context, the Third Circuit has stated that it sees "no constitutional problem with using an employer's offensive speech as evidence of motive or intent" in connection with an allegedly discriminatory action. *Saxe*, 240 F.3d at 208. These authorities do not permit protected expression itself to furnish a basis for liability. They establish the narrower principle that constitutional protection from punishment does not render expression irrelevant to the meaning or motive of separately actionable conduct.

Gartenberg applied that principle in circumstances closely resembling those alleged here. Protesters combined protected slogans with efforts to force entry into a library containing Jewish students, banging and rattling its doors and obstructing access to hallways and classrooms. 765 F. Supp. 3d at 252, 255. They also chanted slogans, including "from the river to the sea, Palestine will be free." *Id.* at 252. The court concluded that, in the context alleged, such expression went beyond criticism of Israeli policy and plausibly conveyed that "Jews as a class do not belong in Israel while justifying and encouraging violence against those Jews who do live there." *Id.* at 268.

The court did not treat the slogans as independently actionable merely because they were offensive, nor did it exclude the slogans from the analysis. Instead, applying its entire-record rule, it considered the expression together with the alleged obstruction, intimidation, and interference with access in determining whether the accompanying conduct was discriminatory in nature. *Id.* at 267–69. On that cumulative record, the court held that the plaintiffs had plausibly alleged a discriminatory hostile environment and denied dismissal. *Id.* at 270, 284.

Garrett v. City University of New York reinforces that approach. Although the court concluded that some alleged protest activity was protected expression and did not independently constitute actionable harassment, it emphasized that those events did not thereby disappear from the case; they could remain probative of discriminatory intent. No. 24 Civ. 9710 (VSB) (RWL), 2025 WL 3096550, at *15 & n.15, *19, *22 (S.D.N.Y. Oct. 10, 2025), *report and recommendation adopted*, 2026 WL 709987, at *1 (S.D.N.Y. Mar. 13, 2026). *Garrett* thus likewise distinguished between imposing liability for protected expression and considering expression as part of the circumstances surrounding allegedly actionable conduct. The district court later allowed the Title VII hostile-environment claim to proceed to discovery.

The contrast with this case is stark. The MIT complaint alleges the same or substantially similar chants—including "from the river to the sea, Palestine will be free" and "There is only one solution! Intifada revolution!"—accompanying conduct directed at Jewish students and faculty. Protesters allegedly rattled the locked office doors of Jewish faculty members while chanting "you can't hide," physically interfered with Jewish students, and denied individuals access to campus facilities "because [they were] Jewish." *See StandWithUs*, 158 F.4th at 5–8, 20. Indeed, the alleged exclusion expressly based on Jewish identity makes the discriminatory character of at least some of the conduct more explicit than the allegations sustained in *Gartenberg*.

Yet the complaints received opposite treatment at the pleading stage. *Gartenberg* considered the expression and conduct cumulatively and sustained the claim; the First Circuit discounted the expression and affirmed dismissal. That divergence demonstrates that the choice of framework can determine whether materially similar allegations survive long enough to be tested through discovery.

Although similar allegations may ultimately produce different results, they should be evaluated under the same analytical framework at the pleading stage. The speech may help identify the targets and meaning of the accompanying conduct. The obstruction, interference, and exclusion, in turn, may affect how a reasonable person would understand the surrounding expression.

The First Amendment protects political expression; it does not require courts to disregard that expression when it supplies relevant context for separately actionable conduct. By discounting protected expression in the contextual inquiry, the First Circuit afforded it an evidentiary immunity that the First Amendment does not provide. This Court's review is warranted to resolve whether protected expression must be excluded from the hostile-environment record or may be considered for a legitimate evidentiary purpose.

C. Considering protected expression as context does not require universities to punish protected speech.

Amicus does not contend that MIT was required to discipline students for speech protected by the First Amendment, nor does this brief ask the Court to treat political advocacy, slogans, criticism of Israel, or other protected viewpoints as actionable harassment standing alone. The argument is only that the constitutional prohibition against punishing protected expression does not require courts to exclude that expression from the evidentiary record when it bears on the nature, target, motive, or effect of accompanying conduct.

That distinction does not force universities to choose between censorship and liability. A university may address obstruction, physical interference, discriminatory exclusion, threats, violence, and other conduct that denies students equal access to educational opportunities without punishing the viewpoints expressed alongside that conduct. It may enforce content-neutral rules governing access to facilities, class disruption, obstruction, threats, and violence; protect students' ability to attend classes and use common spaces; investigate discriminatory exclusion; and apply its rules evenhandedly. *See* Andrea J. Martin, *Balancing Freedom of Expression and Equality on College Campuses in the Wake of Intensified Antisemitism*, 90 Brook. L. Rev. 67, 110-14 (2024).

United Mine Workers v. Gibbs illustrates that distinction. The Court recognized that courts may address violence and intimidation accompanying ideological advocacy while limiting liability and damages to the consequences of unprotected conduct. 383 U.S. 715, 729–32 (1966). Thus, *Gibbs* "firmly rejected the notion that the presence of ideological advocacy disables courts from responding to a coercive campaign of intimidation waged by the advocates." Bernstein, *Title VI Hostile-Environment Law*, supra, at 1041–42. Protected advocacy remains protected, but its presence does not immunize accompanying conduct.

The same distinction applies to the contextual inquiry here. "[T]he First Amendment . . . does not mandate judicial blindness to the way violent rhetoric can contribute to a threatening environment." *Id.* at 1038. That proposition does not make protected rhetoric independently punishable. It recognizes only that expression may supply essential context for separately actionable conduct. Whether MIT responded with deliberate indifference must therefore be assessed on the complaint's full allegations, not on the assumption that every effective response would have required censorship.

Concerns about chilling speech do not justify a different rule. Critics may contend that allowing courts to consider protected expression in a hostile-environment claim will encourage universities to restrict campus speech rather than enforce neutral rules against misconduct. *See id.* The First Circuit relied on a similar concern in rejecting plaintiffs' Title VI claim. *See StandWithUs*, 158 F.4th at 12. But the doctrines of vagueness and overbreadth already constrain the suppression of protected expression. They do not require courts to disregard relevant evidence that helps explain the nature, target, meaning, or effect of accompanying conduct.

Nor does considering expression as context convert the inquiry into viewpoint discrimination. The First Amendment distinguishes between imposing liability for protected ideas and considering expression for a legitimate evidentiary purpose. *See Mitchell*, 508 U.S. at 489. A court may recognize that rhetoric, considered alongside separately actionable conduct, bears on how that conduct would reasonably be understood without treating the rhetoric itself as a basis for liability.

That evidentiary distinction is especially important on a university campus, where First Amendment protections coexist with the institution's civil-rights obligations. Students live, study, work, and participate in university life throughout the day, making access to classrooms, offices, libraries, residences, and common spaces central to their education. *See* Bernstein, *Title VI Hostile-Environment Law*, supra, at 1036–37.

And this case does not concern protected expression alone. The complaint also alleges physical interference, obstruction of movement and access, discriminatory exclusion, the shoving of a Jewish student, violations of generally applicable rules governing shared university facilities, and other independently unlawful or otherwise unprotected conduct. If proven, that conduct would not become constitutionally protected merely because it occurred during a protest or was accompanied by protected advocacy.

Applying Title VI to actionable obstruction, violence, discriminatory exclusion, and comparable misconduct does not suppress public debate. It protects equal access to the campus while protecting free speech.

II. Even if proof of animus were an element of the hostile-environment analysis, protected expression should be considered as evidence of motive or intent.

Petitioners argue—and amicus agrees—that Title VI requires that a hostile environment exist "because of" a protected characteristic, not proof of animus as a freestanding element. *See* Pet. i. Animus of the offender may help establish motive for behavior, but is not required to prove a hostile environment. For example, a supervisor who repeatedly tells women employees that they are too emotional for leadership, excludes them from important assignments, "compliments" their appearance regularly, and calls them pet names may create a hostile environment even if he sincerely believes he is protecting and complimenting rather than harming them; his lack of personal ill will would not erase the discriminatory character of the conduct.

The First Circuit therefore should not have required plaintiffs separately to plead that the protesters were subjectively "driven by antisemitism." *See StandWithUs*, 158 F.4th at 18.

But if this Court nevertheless concludes that discriminatory animus or intent is a distinct element of such a claim, it should hold that protected expression may be considered in determining whether that element is satisfied. That is the "important subsidiary question" Judge Dunlap identified as unresolved in concurring in the denial of rehearing en banc. *See*

StandWithUs, 165 F.4th at 99–100 (Dunlap, J., concurring in the denial of rehearing en banc). The answer follows directly from *Wisconsin v. Mitchell*, which holds that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish . . . motive or intent." 508 U.S. at 489.

This Court has long distinguished between punishing protected expression and considering expression as evidence of why a person engaged in otherwise actionable conduct. In *Mitchell*, a criminal defendant convicted of aggravated battery received an enhanced sentence because he selected his victim on the basis of race. *Id.* at 480–81. To establish motive, the prosecution introduced the defendant's statement that he wanted to "move on"—that is, attack—"a white boy." *Id.* at 480. This Court unanimously rejected the argument that the First Amendment barred consideration of that statement. *Id.* at 489. The defendant was punished for the racially motivated assault, not for expressing a protected idea; his words were relevant because they showed why he committed the punishable act.

Although *Mitchell* arose in a criminal case, its evidentiary principle applies equally in civil litigation. The Third Circuit has seen "no constitutional problem with using an employer's offensive speech as evidence of motive or intent" in connection with an allegedly discriminatory action, *Saxe*, 240 F.3d at 208, and other courts of appeals have applied *Mitchell*'s evidentiary distinction in civil cases more broadly, *see Whitaker v. Thompson*, 353 F.3d 947, 953 (D.C. Cir. 2004); *Flytenow, Inc. v. FAA*, 808 F.3d 882, 894 (D.C. Cir.

2015). Protected expression does not lose its constitutional protection merely because it is relevant to motive. But neither does the First Amendment require a court to disregard that expression when deciding whether separate, actionable conduct was undertaken for a discriminatory reason.

Recent campus cases apply that distinction directly. In *Garrett*, a Jewish professor alleged that, following the October 7 Hamas attacks, protesters engaged in a campaign of anti-Jewish harassment directed at her and other Jews on the CUNY campus. 2025 WL 3096550, at *2. Protesters chanted “from the river to the sea, Palestine will be free," called through social-media posts to “globalize the intifada” and “escalate by any means necessary,” characterized the attacks as “an act of resistance,” and defaced posters of Jewish hostages with swastikas. *Id*. They also allegedly targeted the plaintiff personally through mass emails, social-media posts, and in-person confrontations, causing her and others to feel unsafe on campus. *Id*. The court concluded that some of the alleged protest activity constituted protected expression that did not independently qualify as actionable harassment. *Id*. at *15 & n.15. But it emphasized that incidents deemed nonactionable did not thereby disappear from the case; those events could remain probative of discriminatory intent. *Id. Garrett* thus confirms that constitutional speech protection does not make expression irrelevant to a discrimination claim.

Weinberg v. National Students for Justice in Palestine applied the same principle. Jewish students and faculty at UCLA alleged that the defendants participated in a conspiracy to deprive them of their right to be free from race-based violence and exclusion through the formation and operation of a campus encampment. 2026 WL 184302 at *7 (C.D. Cal. Jan. 20, 2026). One defendant argued that the claim should be dismissed because the complaint referenced speech protected by the First Amendment. *Id.* at *10–11. The court rejected that argument: although "the complaint does reference several of [the defendant's] speech acts," those acts could be considered as evidence of "whether [the defendant] acted with an improper intent or was motivated by a discriminatory animus." *Id.* at *11 (citing *Mitchell*, 508 U.S. at 489; *Saxe*, 240 F.3d at 208). *Weinberg* thus likewise distinguished between imposing liability for speech and considering speech as evidence of the motive for allegedly actionable conduct.

The First Circuit took the opposite course. It relied on the protesters' characterization of their own campaign as "antizionist" in rejecting an inference of antisemitic motive, while discounting much of the expression and conduct that could support the contrary inference. *See StandWithUs*, 158 F.4th at 18–20. But a group's characterization of its own objectives cannot, by itself, foreclose reasonable contrary inferences from its alleged words, conduct, targets, and surrounding circumstances. This case thus illustrates why protected expression "can be relevant evidence of motivation when the intent of a punishable action is disputed." David E. Bernstein & David L. Bernstein, *Supporting Free Speech and Countering Antisemitism* *on American College Campuses*, 11 Harv. J.L. & Pub. Pol'y Per Curiam 1, 21 (2025).

At the pleading stage, the question was only whether the complaint plausibly supported an inference of anti-Jewish motive—not whether plaintiffs had already proved it. The complaint did not rely on political slogans in isolation. It alleged that protesters invoked the Holocaust; students invited speakers who called on students to "confront MIT's Jewish students," and students entered the office area of Jewish faculty members and rattled locked doors while chanting "you can't hide," physically interfered with Jewish students, and denied individuals access to facilities because they were Jewish. *StandWithUs*, 158 F.4th at 6–8, 20.

Considered collectively, with the alleged facts accepted as true and reasonable inferences drawn in plaintiffs' favor, those allegations plausibly allege an anti-Jewish motive. A developed evidentiary record might ultimately lead a factfinder to a different conclusion, but that possibility did not justify resolving the disputed question of motive against plaintiffs at the Rule 12(b)(6) stage. The First Amendment required no departure from the ordinary pleading standard—and it did not permit the court to credit the protesters' self-description of their conduct while discounting the alleged words, conduct, targets, timing, and circumstances supporting a contrary inference.

The stakes of the rule extend well beyond this case. Motive ordinarily must be inferred from a person's words, conduct, targets, timing, and surrounding circumstances rather than established through a direct admission. Discounting the expression that supplies that context while simultaneously demanding allegations of discriminatory motive—as the First Circuit did—makes animus exceptionally difficult, and in many cases virtually impossible, to plead. Even if subjective discriminatory animus were treated as a distinct element of a hostile-environment claim, the complaint plausibly alleged it when the entire record is considered. Protected expression remains protected from liability; it is not insulated from evidentiary relevance.

CONCLUSION

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

Respectfully submitted,

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