

IN THE
Supreme Court of the United States

STANDWITHUS CENTER FOR LEGAL JUSTICE;
KATERINA BOUKIN; MARILYN MEYERS,
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 IN OPPOSITION

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QUESTION PRESENTED

Petitioners are two individuals and an organization who allege that protests on MIT's campus following the October 7, 2023 terrorist attacks created an environment hostile to Jewish and Israeli students, and that MIT was deliberately indifferent to that hostile environment in violation of Title VI of the Civil Rights Act of 1964. The district court dismissed the complaint, finding that petitioners failed to plausibly allege MIT's deliberate indifference. The First Circuit canvassed the complaint's allegations and affirmed its dismissal on two independent grounds: First, it held that petitioners had not plausibly alleged conduct amounting to an actionable hostile environment on the ground of race, color, or national origin. Second, and in the alternative, it agreed with the district court that petitioners had not plausibly alleged that MIT acted with deliberate indifference. Petitioners do not challenge the court's holding regarding deliberate indifference.

The question presented is:

Whether the First Circuit correctly concluded, based on the particular allegations in petitioners' complaint, that petitioners failed to allege an actionable hostile environment, and whether that question warrants review when the First Circuit rejected petitioners' claim on a separate, independently sufficient ground.

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INTRODUCTION

Since the October 7, 2023 terrorist attacks in Israel, there has been a rising tide of antisemitism across the world. The Massachusetts Institute of Technology (“MIT”) is firmly committed to ensuring that antisemitism has no place in the MIT community and has taken decisive steps to combat antisemitism on campus.

MIT also embraces free expression as a core value. As an academic institution, MIT’s success depends on the open exchange of ideas. Deliberation, debate, and dissent are essential to MIT’s educational mission. Accordingly, community members are entitled to express and vigorously debate their diverse perspectives—including on contentious political issues—without being punished by MIT’s administration for their viewpoints. But they must do so in accordance with neutral rules that MIT has put in place to promote a safe and nondiscriminatory campus environment.

After the October 7, 2023 attacks, students, faculty, and staff expressed many divergent political opinions about the Israel-Palestine conflict. When students expressed political views in a manner that complied with MIT’s neutral rules governing the time, place, and manner of speech, MIT’s leadership made community statements urging students to be respectful, but did not censor their speech. But when students broke MIT’s rules, MIT publicly condemned their actions and took remedial steps that escalated as the activity persisted or intensified—including interim suspensions, formal disciplinary proceedings, and, ultimately, arrests.

Petitioners nonetheless contend that MIT's remedial actions were inadequate. As relevant here, petitioners sued MIT under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits discrimination at federally funded universities on the basis of race, color, or national origin.

To state a Title VI claim based on student-on-student harassment, petitioners must adequately allege, among other things, that (1) they experienced a hostile environment, *i.e.*, harassment that is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit,” and (2) MIT acted with “deliberate indifference” to that hostile environment. *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). The First Circuit held that petitioners did not adequately allege either of those elements. First, it held that petitioners did not adequately allege that they suffered actionable harassment. The court carefully scrutinized all of the well-pleaded factual allegations and found them insufficient to state a claim. *See* Pet. App. 14a-34a. Second, the First Circuit held that petitioners did not adequately allege that MIT had acted with deliberate indifference. As the First Circuit emphasized, as events developed, “MIT took an escalating series of actions aimed at calming the turmoil without violence.” Pet. App. 36a; *see* Pet. App. 36a-37a. Because that response “was far from ‘clearly unreasonable,’” the court held, petitioners’ Title VI claim failed. Pet. App. 36a.

In their petition for certiorari, petitioners challenge the First Circuit’s conclusion on the first of those issues. The petition should be denied. There are multiple serious vehicle problems, the decision below is fact-bound and does not implicate any split of authority, and adopting petitioners’ vision of Title VI would jeopardize free speech on university campuses.

To begin with a major vehicle problem, petitioners challenge only one of the First Circuit’s two independent holdings. The First Circuit held *both* that there was no hostile environment *and* that, even if there was, MIT was not deliberately indifferent. Pet. App. 15a. Petitioners challenge only the first holding. They omit the alternative holding from their facts section and do not mention it until page 32, where they assert that the two holdings are “intertwined.” They are not. The First Circuit explicitly held that “even if the protests are viewed as the type of harassment proscribed by Title VI”—in other words, even if petitioners prevail on both of the questions presented in their petition—“MIT was not deliberately indifferent,” given that “MIT took an escalating series of actions aimed at calming the turmoil without violence.” Pet. App. 35a-36a. The court emphasized that its deliberate-indifference holding was “independent of [its] conclusion as to the nature of the student protestors’ speech and conduct.” Pet. App. 39a. Thus, even if petitioners were to prevail here, the First Circuit’s decision would still stand, so the petition improperly seeks an advisory opinion.

Moreover, petitioners’ questions presented do not merit review. In their first question, petitioners ask this

Court to decide whether “the harassers’ subjective discriminatory intent is an element of a hostile environment claim under Title VI.” Pet. i. But the First Circuit’s analysis reached no sweeping conclusions about the elements of a Title VI claim and instead applied well-settled precedent to the specific facts of this case. The First Circuit recognized that some of the protestors’ statements could be viewed as so “inherently antisemitic” as to create a hostile environment, but concluded that certain statements alleged in the complaint did not satisfy that standard. Pet. App. 23a-28a. The First Circuit also acknowledged that there were incidents that “any thoughtful person would regard as antisemitic,” but concluded that they did not satisfy this Court’s requirement of “severe, pervasive, and objectively offensive” conduct and that petitioners failed to plead that MIT had knowledge of them. Pet. App. 32a-34a (internal quotation marks omitted). The petition does not seek review of those fact-bound conclusions. As Judge Dunlap emphasized in concurring in the denial of rehearing en banc, the case turns on “the unique facts as pled.” Pet. App. 70a.

The First Circuit’s decision as to the first question presented also does not conflict with the decision of any other circuit. Not a single case petitioners cite as part of this purported split actually addresses a claim like the one in this case—a Title VI deliberate-indifference claim premised on a hostile educational environment. Instead, all of petitioners’ cases involve the standard for a hostile *work* environment under either Title VII or related employment statutes, none of which were enacted under the Spending Clause and all of which differ significantly

from Title VI. In all events, the allegations in those out-of-circuit cases would suffice to state a claim under the reasoning of the decision below, confirming there is no conflict to resolve.

In their second question presented, petitioners ask the Court to hold that the First Amendment does not “bar[] a plaintiff from pleading a Title VI hostile environment claim based on ‘protected speech.’” Pet. i. But the First Circuit expressly declined to decide whether “racist speech” can be “punished pursuant to Title VI without violating the First Amendment”; instead, it held more narrowly that “even assuming that some racist speech can constitutionally be punished pursuant to Title VI,” petitioners’ allegations were inadequate. Pet. App. 21a-23a. That fact-bound holding does not merit review.

Further, as both the panel and Judge Dunlap’s concurrence in the denial of rehearing en banc noted, petitioners took the opposite position below, contending that “only conduct or speech not protected by the First Amendment could give rise to liability under [Title VI].” Pet. App. 66a (Dunlap, J.); *see* Pet. App. 21a (panel opinion). Petitioners argued below that “racist speech is itself actionable under Title VI because it falls outside First Amendment protections,” Pet. App. 67a (Dunlap, J.)—a position petitioners have now abandoned.

There is no circuit split here either. Petitioners identify no case holding that the failure to censor political speech, without more, can trigger Title VI liability. The purportedly conflicting cases say nothing

at all about the First Amendment and would have come out the same way in the First Circuit.

Finally, the Court should deny review because of the troubling implications of petitioners' position. Although this case involves protests over the Israel-Palestine conflict, petitioners' vision of Title VI sweeps more broadly. Under petitioners' approach, a university could be liable for failing to censor pure political speech, even when the speaker does not intend to discriminate based on race, color, or national origin. For example, if a student opines on this Court's decision in *Students for Fair Admissions* or current federal immigration policy, whether for or against, and another student experiences that statement as racially discriminatory, the university could be legally obligated to punish the speaker, even if the speech is pure political speech protected by the First Amendment and even if the speaker merely intends to share a political opinion. That position would result in a significant expansion of Title VI and augur a new era of censorship of political speech on campus—across the full range of viewpoints—by university administrators.

STATEMENT OF THE CASE

A. Factual Background

Petitioners are two MIT students—Katerina Boukin and Marilyn Meyers—and a California-based advocacy organization named StandWithUs Center for Legal Justice. D. Ct. Dkt. 40, ¶¶18-20 (“Am. Compl.”). As relevant here, petitioners allege that, after the October 7, 2023 terrorist attacks, several student groups organized a series of campus events that together created a hostile environment for MIT's Jewish and

Israeli students. Petitioners seek to hold MIT liable for that hostile environment under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, on the ground that MIT was deliberately indifferent in response.

The complaint describes the various “protests, demonstrations, and encampments” that occurred on MIT’s campus in the months following October 7, 2023—events the complaint asserts “were motivated by a specific class-based, invidiously discriminatory animus, specifically at Jewish and Israeli members of the MIT community.” Am. Compl. ¶281; *see id.* ¶¶282, 320. Specifically, petitioners allege that protestors voiced support for Palestine and denounced “the Israeli occupation, its racist apartheid system, and its military rule,” and criticized Zionism. *Id.* ¶147; *see id.* ¶¶150, 237.

Petitioners allege that, beginning on October 8, 2023, two student groups—Palestine@MIT and MIT Coalition Against Apartheid—issued statements and organized rallies, walkouts, and other demonstrations, many of them in Lobby 7, “a major thoroughfare” on MIT’s campus. *Id.* ¶159; *see id.* ¶¶125, 131, 146-147, 159-162, 169-188. Other student organizations allegedly joined or co-sponsored some of these events. *See id.* ¶¶320-321. These protests culminated in an encampment of tents on Kresge Lawn, a common space “in the middle of campus,” that began on April 21, 2024, and was cleared by MIT on May 10, 2024. *See id.* ¶¶220-245. According to the complaint, these activities “disrupt[ed] all students’ ability to participate in campus life.” *Id.* ¶16.

The complaint also recounts—even as it seeks to downplay—MIT’s multi-faceted response to the events

just described. These allegations, together with materials properly incorporated by reference into the complaint, reflect an active, sustained effort by MIT's senior leadership to address the events on campus and adapt that response as the situation evolved.

For example, on November 8, 2023, after the first wave of campus protests, MIT issued a communication outlining “the boundaries for protests on [MIT’s] campus,” and explaining that MIT had enhanced security measures and patrols, updated its guidelines for expressive activity, created a team to respond promptly to reports of harassment and discrimination arising from campus activism, and expanded supportive services for students. JA-201;¹ *see* JA-196-199; Am. Compl. ¶257 & n.153. Then, when protestors disregarded these rules at an event organized by the Coalition Against Apartheid in Lobby 7 on November 9, 2023, MIT’s President, Provost, and Chancellor warned the protestors in writing that their activity violated MIT’s rules and would result in discipline if they did not leave Lobby 7 by a stated time. Am. Compl. ¶¶170, 177, 180, 183. Protestors who remained after the deadline were “suspended from non-academic campus activities” as an interim action pending final adjudication. *Id.* ¶184. Later that same day, MIT’s President issued a statement to the MIT community condemning the protest, reiterating MIT’s time-place-and-manner policies, and describing the steps MIT was taking “to protect the safety of [its] community.” *Id.* ¶182 & n.103.

¹ “JA-__” cites refer to the Joint Appendix filed in the First Circuit, Ct. App. Dkt. 118222210 (Dec. 4, 2024).

MIT later provisionally suspended the Coalition Against Apartheid as a student organization. *Id.* ¶¶125 & n.73, 170, 302.

MIT responded in similarly decisive fashion to the April 2024 Kresge Lawn encampment. Shortly after the encampment began, MIT's President issued a video statement calling the encampment "a clear violation" of MIT's rules for which participants would be disciplined. *Id.* ¶227 & n.132. That statement also described in detail the actions MIT was taking to bring the encampment to an end safely and minimize its disruptive effects on campus: "[T]o avoid any further escalation, we're working closely and constantly with our Student Life team, the faculty members who are advising the [protestors], and our own campus police. Out of an abundance of caution, at my direction, the MIT[Police Department] is on the scene 24 hours a day." JA-210-211. Then, on May 6, 2024, MIT directed all students to leave the encampment by 2:30 p.m. or face discipline. Am. Compl. ¶238 & n.143; *see* JA-217.

MIT cleared the encampment for good on May 10, 2024. *See* Am. Compl. ¶244 & n.147. Soon thereafter, MIT released a detailed timeline of its efforts to address the encampment and noted that MIT had, as time went on, moved from "[d]isciplinary measures" like "suspensions" to more serious measures: in total, 19 students were arrested on May 9 and 10. JA-216-217.

MIT's actions were not limited to defusing individual protests. MIT maintains a policy against harassment and discrimination, *see* Am. Compl. ¶¶45-53; it issued new or updated policies and statements regarding

expressive activity on campus, *see, e.g., id.* ¶257; and it formed an initiative called Standing Together Against Hate “to spearhead efforts to combat antisemitism at MIT,” *id.* ¶¶201-202. Throughout, MIT’s President was clear: “Antisemitism is real, and it is rising in the world. We cannot let it poison our community.” JA-224.

B. Proceedings Below

Petitioners sued MIT on March 7, 2024, and amended their complaint on May 30, 2024. *See* D. Ct. Dkts. 1, 40. As relevant here, the operative pleading asserted that MIT violated its obligations under Title VI by acting with deliberate indifference to campus antisemitism that was so severe, pervasive, and objectively offensive as to constitute a hostile environment. Am. Compl. ¶¶378-392.

MIT moved to dismiss, and the district court granted that motion. Pet. App. 48a-62a. The court ruled solely on deliberate-indifference grounds, *see* Pet. App. 56a-59a, holding that MIT’s “evolving and progressively punitive response largely tracked its increasing awareness of the hostility that demonstrators directed at Jewish and Israeli students,” which meant that “MIT did not react in a clearly unreasonable manner,” Pet. App. 58a.

The First Circuit affirmed, holding that petitioners’ Title VI claim “fail[ed] for two independent reasons.” Pet. App. 15a.

Regarding deliberate indifference, the court “agree[d] with the district court that[,] even ... accept[ing] [petitioners’] view of the protests as

manifesting ... antisemitism that could be viewed as actionable harassment under Title VI, MIT's reaction was not clearly unreasonable." Pet. App. 39a. The court explained that "[t]his is not a case in which plaintiffs claim their school took no action in response to reported harassment." Pet. App. 35a. To the contrary, over the seven months of protests, "MIT took an escalating series of actions aimed at calming the turmoil without violence." Pet. App. 36a-37a. To wit: MIT—among other actions—"revised its campus expression rules and policies"; "announc[ed] procedures for accelerated action on reports of harassment and discrimination"; "met with leaders of the Jewish community"; "instructed protestors to vacate ... by a set time or face discipline"; "formed a Standing Together Against Hate initiative to combat antisemitism on campus"; suspended a student group that protested an "event about antisemitism" sponsored by that initiative; "install[ed] a 24-hour police presence" on campus; "suspended students following unruly protests" and had other protestors arrested; and, finally, "clear[ed] the encampment ... and ... had the remaining ... protestors arrested." Pet. App. 36a-37a (internal quotation marks omitted). In sum, petitioners had not "allege[d] facts plausibly indicating that MIT's course of action" was "clearly unreasonable." Pet. App. 38a-39a. That holding, the court emphasized, was "independent of [its] conclusion as to the nature of the student protestors' speech and conduct." Pet. App. 39a.

On that latter point, the court separately concluded that petitioners had failed to plausibly allege that they suffered a hostile environment based on race or national origin. It began by noting that "the First Amendment

erects safeguards that limit the ability of the government or private plaintiffs to punish MIT for not restricting more severely the student protestors' protected speech"—a point consistent with petitioners' concession that "courts should interpret Title VI to comport with First Amendment principles." Pet. App. 21a. As the court explained, petitioners never argued "that Title VI can be used to punish a school for not stifling student speech that the government itself could not punish," but instead argued that the protestors' speech "fell outside the protection of the First Amendment" entirely "because the speech was racist (i.e., antisemitic)." *Id.*

The First Circuit rejected that theory. It reserved the question whether "racist speech [can] be punished pursuant to Title VI without violating the First Amendment," instead holding that, even assuming that it could, petitioners failed to plausibly allege that the protestors' actions created an environment hostile to MIT's Jewish and Israeli students. Pet. App. 21a-23a.

To reach that conclusion, the court scrutinized the complaint's allegations. It first found that protestors' facially race-neutral criticisms of Israeli policy and opposition to Zionism did not "necessarily manifest[] antisemitism," and observed that the complaint failed to "allege facts that, if true, would otherwise permit the inference that in these specific circumstances the protestors' strident criticisms of Israel were driven by antisemitism." Pet. App. 27a-28a. But the court did credit "a handful of incidents, occurring over the course of seven months, that any thoughtful person would

regard as antisemitic”—among them the “heckl[ing]” of an individual “because he was visibly Jewish” and a single “tweet equating Jews with Nazis.” Pet. App. 31a-32a.

Taken as a whole, however, the court deemed these alleged incidents not “severe, pervasive, and objectively offensive,” as required for Title VI liability. Pet. App. 33a-34a (quoting *Davis*, 526 U.S. at 633). It further held that petitioners had not adequately alleged that MIT had knowledge of them. Pet. App. 34a. Petitioners’ claim thus failed “even assuming that Title VI compels a private university to take reasonable steps to shield its students from racist speech per se.” *Id.*

Petitioners sought panel and en banc rehearing, and the First Circuit denied both. Pet. App. 63a-64a. Judge Dunlap issued an opinion concurring in the denial of rehearing en banc. Like the district court, he would have “resolved the case solely on” the “narrower ground” that MIT was not deliberately indifferent. Pet. App. 70a. Judge Dunlap thus saw the panel’s harassment analysis—including its discussion of the First Amendment—as “ultimately unnecessary.” *Id.* While Judge Dunlap expressed uncertainty about some of the panel’s statements on the interaction between Title VI and the First Amendment—an issue he noted was “not ... well developed in briefing,” Pet. App. 66a-67a—he nonetheless found rehearing en banc unwarranted because the panel’s decision was rooted in “the unique facts as pled” and “sufficiently open-ended to allow ... case law to continue developing.” Pet. App. 67a, 70a.

REASONS FOR DENYING THE PETITION

The Court should deny the petition. Both questions presented by petitioners pertain to the First Circuit's hostile-environment holding. Petitioners do not challenge the First Circuit's independently sufficient alternative holding regarding deliberate indifference. Thus, even if petitioners prevailed on both of their questions presented, the result below would not change.

Even as to the First Circuit's hostile-environment holding, neither question presented warrants review. There is no circuit split—all of the allegedly conflicting cases address different statutes or unrelated issues. Further, the First Circuit issued no broad conclusions of law. Instead, as Judge Dunlap explained in his concurrence in the denial of rehearing en banc, the result in this case turned on its “unique facts.” Pet. App. 70a. Moreover, Judge Dunlap added, because petitioners' legal theories were “not ... well developed in briefing,” the panel issued an “open-ended” decision designed to allow the court's “case law to continue developing.” Pet. App. 66a-67a.

This case also suffers from serious vehicle problems, including that petitioners' arguments in this Court are diametrically opposed to the arguments they pursued below. This Court's review is unwarranted.

I. The Court Should Deny Review Because the First Circuit’s Deliberate-Indifference Holding Is Independently Sufficient to Support the Judgment.

The Court should deny certiorari because answering the questions presented by petitioners in their favor would not afford petitioners any relief.

Petitioners bring a Title VI hostile-environment claim based on alleged student-on-student harassment. To state such a claim, petitioners must establish, among other things, that (1) the harassment was “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” on the basis of race, color, or national origin, and (2) the school had “actual knowledge” of that harassment and was “deliberately indifferent” to it, meaning that its response was “clearly unreasonable in light of the known circumstances.” *Davis*, 526 U.S. at 649-50. The premise of the deliberate-indifference standard is that “an official who is advised of a ... violation refuses to take action to bring the [school] into compliance”—“in other words, ... an official decision by the [school] not to remedy the violation.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

Both of petitioners’ questions presented take aim at the First Circuit’s conclusion solely on the former issue: that petitioners’ “allegations do not plausibly rise to the level of actionable harassment required by Title VI.” Pet. App. 15a. But the First Circuit also held that petitioners’ claim failed for a second, “independent”

reason: “*even if* the protestors’ conduct as a whole was actionable harassment under Title VI, MIT is not liable because it was not deliberately indifferent to the effects of the protests on Jewish and Israeli students.” *Id.* (emphasis added). Because petitioners do not seek review of that separately dispositive holding, the petition seeks an advisory opinion.

Petitioners ignore the panel’s alternative holding until page 32 of the petition, where they assert that the panel’s “alternative holding[]” on deliberate indifference was “premised on” and “intertwined with” the panel’s assertedly incorrect hostile-environment analysis. Pet. 32-33. It was not. The panel repeatedly stated that it was assessing deliberate indifference on the assumption that petitioners were *correct* that “the protests ... manifest[ed] a degree and form of antisemitism that could be viewed as actionable harassment under Title VI.” Pet. App. 38a-39a; *see* Pet. App. 35a (accepting *arguendo* that the protests were “the type of harassment proscribed by Title VI”). Twice, the panel went out of its way to make clear that its two holdings were independent. *See* Pet. App. 15a (referring to the court’s “two independent reasons”); Pet. App. 39a (noting that the court’s deliberate-indifference holding was “independent of [its] conclusion as to the nature of the student protestors’ speech and conduct”).

Petitioners point to the First Circuit’s statement that, in assessing deliberate indifference, it would consider “the nature of the activity that plaintiffs say MIT should have eliminated more quickly.” Pet. 32

(quoting Pet. App. 37a). According to petitioners, this sentence implies that the First Circuit “limited its analysis” and failed to consider petitioners’ allegations of a hostile environment. *Id.* But the First Circuit said the opposite: in the very next sentence, the court made clear that it was “accept[ing] plaintiffs’ position that some conduct ... was antisemitic” and nonetheless found no deliberate indifference. Pet. App. 37a.

A comparison between this case and *Kestenbaum v. President & Fellows of Harvard College*, 743 F. Supp. 3d 297 (D. Mass. 2024), is instructive. In *Kestenbaum*, the court concluded that the plaintiffs had adequately alleged both that the plaintiff students experienced “severe, pervasive, and objectively offensive harassment” on campus and that the institution was deliberately indifferent to that harassment. 743 F. Supp. 3d at 308-10. Petitioners characterize the *Kestenbaum* court as “properly applying *Davis*.” Pet. 33. But the *Kestenbaum* district judge was the same district judge as in this case, and he concluded, on the facts alleged here, that petitioners had not adequately alleged MIT’s deliberate indifference. This reinforces that the First Circuit’s deliberate-indifference conclusion did not follow from a cramped understanding of what constitutes a hostile environment: even a court that adopted a hostile-environment standard that petitioners endorse nonetheless concluded that MIT was not deliberately indifferent.

While petitioners quote at length from Judge Dunlap’s opinion concurring in the denial of rehearing en banc, *see* Pet. 14, they neglect to point out that his

central qualm with the panel’s decision was that it did not “resolve[] the case solely on th[e] narrower ground” that “MIT did not act with deliberate indifference,” Pet. App. 69a-70a. As a result, Judge Dunlap explained, the panel’s entire harassment analysis was “ultimately unnecessary” to its disposition of the appeal. Pet. App. 70a.² This Court’s review is equally unnecessary.

II. On the First Circuit’s Hostile-Environment Holding, This Case Is Fact-Bound, Does Not Implicate Any Split of Authority, and Suffers from Serious Vehicle Problems.

Even setting aside the First Circuit’s independently dispositive deliberate-indifference holding, neither

² Courts of appeals regularly resolve deliberate-indifference claims under Title VI and Title IX by finding the school’s response to be adequate without deciding whether there was actionable harassment. *E.g.*, *Adams v. Demopolis City Schs.*, 80 F.4th 1259, 1270-72 & n.13 (11th Cir. 2023) (assuming without deciding “that the harassment [plaintiff] endured was the type of harassment included within the broad sweep of Title IX” and granting summary judgment to the school because “no reasonable jury could find that the defendants acted with deliberate indifference in response to the known acts of bullying against [plaintiff]”); *Menzia v. Austin Indep. Sch. Dist.*, 47 F.4th 354, 364 (5th Cir. 2022) (affirming grant of summary judgment for the school because it was not deliberately indifferent to alleged racial harassment under Title VI, and holding that, as a result, the question whether there was, in fact, “a racially hostile environment [was] moot”); *Porto v. Town of Tewksbury*, 488 F.3d 67, 73 (1st Cir. 2007) (Title IX case in which the court “assume[d] (without deciding) that [plaintiff] was subject to severe, pervasive, and objectively offensive harassment” and concluded that, “[e]ven making th[at] assumption[], ... [no] rational jury could have concluded that [the defendant] was *deliberately indifferent* to the harassment”).

question presented by petitioners warrants review. The First Circuit issued fact-bound determinations that do not conflict with the decisions of any other circuit.

A. Petitioners' first question presented does not merit review.

Petitioners' first question presented asks whether "a plaintiff must plausibly allege and prove that her harassers had discriminatory intent or animus." Pet. 15. But the First Circuit reached no sweeping conclusions about the elements of a Title VI claim alleging deliberate indifference to a hostile environment. Instead, it conducted a fact-bound analysis of petitioners' well-pleaded allegations and found them wanting. Even to the extent the First Circuit's analysis suggests that harassers must intend to discriminate, that conclusion follows directly from this Court's Title VI precedents and aligns with other circuits' decisions.

1. The First Circuit did not require petitioners to plead specific allegations of "discriminatory intent or animus" in their complaint. Pet. 15. To the contrary, the First Circuit accepted petitioners' premise that statements and conduct could be so "inherently antisemitic," Pet. App. 23a-24a, that specific allegations as to the harassers' subjective mental state would be unnecessary. Even accepting that premise, the court concluded that petitioners' complaint was inadequately pleaded based on a careful review of the specific allegations in this case. In the court's view, certain statements by protestors, such as "criticism of Israel's conduct in Gaza," were not "inherently antisemitic." *Id.* At the same time, there were other statements and

incidents that, in the court’s view, “any thoughtful person would regard as antisemitic.” Pet. App. 32a. Importantly, the First Circuit did not demand specific allegations regarding the state of mind of the perpetrators of those incidents; their antisemitic nature could be inferred from the incidents themselves. Instead, the First Circuit examined those incidents and concluded that they did not amount to “severe, pervasive, and objectively offensive” conduct as required for Title VI liability. Pet. App. 33a (quoting *Davis*, 526 U.S. at 633). It further concluded that MIT lacked adequate knowledge. Pet. App. 34a. The petition does not challenge those fact-bound conclusions.

For these reasons, petitioners are simply wrong to assert that, under the First Circuit’s approach, “a woman subjected to repeated and uncomfortable sexual advances” and “a Black student subjected to racial slurs by students wearing white hoods and waving nooses would not be able to state a claim” without separately pleading and proving the harassers’ subjective intent. Pet. 6. Slurs and nooses are paradigmatic examples of “inherently” racist speech that “any thoughtful person would regard as” racist. Pet. App. 23a, 32a. Likewise, sexual advances are “inherently” based on the victim’s sex. *Id.* A complaint containing such allegations would withstand a motion to dismiss in the First Circuit regardless of whether the plaintiff included allegations about the harassers’ motivations.

A portion of the First Circuit’s decision does assess petitioners’ allegations that “the protestors’ strident criticisms of Israel were driven by antisemitism.” Pet.

App. 27a. But that analysis addressed statements that the court did not regard as inherently antisemitic, and was in addition to—not instead of—the court’s analysis of the statements and incidents that the First Circuit acknowledged were inherently antisemitic. Further, the First Circuit’s discussion was responsive to petitioners’ own allegation that the protests “were motivated by a specific class-based, invidiously discriminatory animus, specifically at Jewish and Israeli members of the MIT community.” Am. Compl. ¶281. The discussion should therefore not be construed as holding that, where speakers utter inherently antisemitic statements, the plaintiff must separately plead that the speakers were “driven by antisemitism.”

As Judge Dunlap noted, “different facts may well justify a different conclusion,” but the decision below addresses “the unique facts as pled” here. Pet. App. 70a. Judge Dunlap also observed that the panel’s opinion was consistent with the principle that “the severity of the harassment ... must be judged from the perspective of a reasonable person in the plaintiff’s position.” Pet. App. 71a.

2. If the First Circuit’s decision is construed as requiring petitioners to allege that the protestors had the intent to discriminate, that holding was correct. Title VI provides: “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.” 42 U.S.C. § 2000d. In *Davis*, this Court considered

Title IX, which includes a similarly worded prohibition of sex discrimination at federally funded universities. 20 U.S.C. § 1681(a).³ The question in *Davis* was whether that prohibition covers only discrimination by school officials, or also encompasses discrimination by one student against another student. The Court held that “student-on-student sexual harassment, if sufficiently severe, can ... rise to the level of discrimination actionable under the statute,” and that funding recipients can be held liable if they are “deliberately indifferent” to that form of discrimination. *Davis*, 526 U.S. at 650. Subsequently, in *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court held that Title VI “directly reach[es] only instances of intentional discrimination” and thus has no privately enforceable disparate-impact cause of action. *Id.* at 280-81, 293 (citation omitted). Thus, *Davis* holds that student-on-student discrimination is a type of actionable discrimination, while *Alexander* clarifies that discrimination for Title VI purposes refers only to intentional discrimination. Putting those two holdings together, *Davis* and *Alexander* hold that student-on-student *intentional* discrimination is a type of actionable discrimination—that is, Title VI imposes liability only when funding recipients are deliberately indifferent to cases of intentional student-on-student discrimination on the basis of race, color, or national origin.

Petitioners claim that “liability turns not on the perpetrator’s mental state, but on the school’s own

³ In this case, the parties agreed that the standards for liability under Title IX and Title VI align. *See* Pet. App. 14a-15a.

conduct when confronted with knowledge of a hostile environment.” Pet. 20. But *Davis*’s recognition that Title VI requires schools to respond to race-based hostile environments cannot be detached from the text of Title VI itself. As *Davis* holds, a school’s tolerance of a hostile environment is actionable *because* the creation of a hostile environment is a type of discrimination. And under *Alexander*, only *intentional* discrimination is actionable under Title VI. Thus, liability turns on whether the university is deliberately indifferent to intentional student-on-student discrimination. *See, e.g., Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011) (holding, in the context of a deliberate-indifference claim under Title IX, that a plaintiff must “show the harasser intended to discriminate against him ‘on the basis of sex,’ meaning the harassment was motivated by either [the plaintiff]’s gender or failure to conform with gender stereotypes”).

At a minimum, Title VI does not *clearly* impose liability—which means MIT cannot be liable. Title VI is a Spending Clause statute, and hence requires that recipients have “clear notice of the consequences of their acceptance of federal funds.” *Davis*, 526 U.S. at 656 (Kennedy, J., dissenting). That principle applies regardless of whether the recipient is a state actor or a private entity. *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219 (2022) (holding, in a case involving a private defendant, that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously” (quotation marks omitted)). This clear-statement requirement is dispositive here: Title VI does not clearly and unambiguously impose

obligations on universities with respect to peer harassment that is subjectively perceived as offensive but is not motivated by discriminatory intent.

3. The First Circuit’s decision does not conflict with the decision of any other circuit. To begin, none of the purportedly conflicting cases identified by petitioners are Title VI cases addressing deliberate-indifference claims premised on an allegedly hostile educational environment. Instead, all of petitioners’ cases are *employment* discrimination cases arising under Title VII or parallel statutes applying Title VII’s substantive standard.⁴ That distinction forecloses any claimed split.

Unlike Title IX (another Spending Clause statute), Title VII differs from Title VI in myriad respects. Among other differences, Title VI requires intentional discrimination, whereas Title VII does not. *Compare Alexander*, 532 U.S. at 280-81, 293, *with* 42 U.S.C. § 2000e-2(k). Title VI and Title IX are Spending Clause statutes with clear-notice requirements, whereas Title VII is not. *See Gebser*, 524 U.S. at 286. And Title VI and Title IX, unlike Title VII, lack an express private right of action—and this Court has therefore been appropriately cautious about the scope of liability. *Id.* at 289-90.

Additionally, the legal standards for hostile-environment liability are different. Under Title VII, harassment must be “sufficiently severe or pervasive”

⁴ *See, e.g., Walston v. Foley & Lardner, LLP*, 516 F. App’x 1, 1-2 (D.C. Cir. 2013) (applying Title VII substantive law to claims under Title VII, 42 U.S.C. § 1981, and the D.C. Human Rights Act).

to “alter” the conditions of employment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citation omitted). Under Title VI, harassment must be “so severe, pervasive, and objectively offensive” that it “effectively den[ies]” the victim “equal access to an institution’s resources and opportunities,” and must be serious enough to have a “systemic effect” on an educational program. *Davis*, 526 U.S. at 651-53. Petitioners thus cannot establish a circuit split on the elements of a Title VI claim by comparing the decision below to Title VII cases.

Even setting aside the material differences between Title VI and Title VII, there is no circuit split. In each of the decisions that petitioners say reject an intent requirement, *see* Pet. 15-17, the court emphasized that the discrimination must be *based on* a protected characteristic. *See Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1222 (10th Cir. 2015) (plaintiff must show “the harassment was based on [race]”); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 271 (4th Cir. 2015) (en banc) (plaintiff must show “unwelcome conduct” “based on the plaintiff’s ... race” (citation omitted)); *Chapman v. Oakland Living Ctr., Inc.*, 48 F.4th 222, 231 (4th Cir. 2022) (referring to “harassment based on a protected characteristic”); *EEOC v. Nat’l Educ. Ass’n, Alaska*, 422 F.3d 840, 844-45 (9th Cir. 2005) (analyzing “the ‘because of ... sex’ element of the action”). These cases then hold that, where it is sufficiently clear from the conduct itself that it was based on a protected characteristic, no separate showing of the harasser’s intent is required. That unremarkable proposition follows from the facts of those cases. Where the conduct

at issue is a racial epithet, *see Lounds*, 812 F.3d at 1230; *Chapman*, 48 F.4th at 231, or an unwanted romantic overture, *see Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991), the connection to race or sex is evident from the conduct itself.

The First Circuit adopted the same view of hostile-environment liability under Title VI. As discussed, it credited several incidents as antisemitic without inquiring into the alleged harassers' subjective intent. *See* Pet. App. 31a-32a; *supra* pp. 19-20. Those incidents, the court found, self-evidently “confront[ed] Jewish students ‘on the ground’ ... that they were Jewish,” Pet. App. 32a, and that was enough to establish they were discriminatory under Title VI (albeit insufficiently “severe, pervasive, and objectively offensive” to state a claim, Pet. App. 32a-33a). As such, even if Title VI and Title VII imposed identical hostile-environment standards, there still would be no circuit split.

The decisions petitioners place on the other side of the supposed split involved speech that was not inherently discriminatory. *See* Pet. 17-18. When discrimination could not be inferred from the speech itself, and there was no separate showing of discriminatory intent, those courts declined to impose liability. *See Trask v. Sec’y, Dep’t of Veterans Affs.*, 822 F.3d 1179, 1196 (11th Cir. 2016) (no liability when manager made rude and belittling comments that were not “related to the plaintiffs’ [gender and age]” and employee could not show “discriminatory animus”), *abrogated on other grounds by Babb v. Wilkie*, 589 U.S. 399 (2020); *Stewart v. Evans*, 275 F.3d 1126, 1131, 1133

(D.C. Cir. 2002) (same, when the alleged harassment was a profane but “gender-neutral” tirade); *Walston v. Foley & Lardner, LLP*, 516 F. App’x 1, 1 (D.C. Cir. 2013) (same, when the alleged harassment involved generic “criticism and condescending comments” facially unconnected to race, so without evidence showing these actions were “motivated by racial discrimination,” the plaintiff failed to plausibly allege harassment “*because of*” membership in a protected class (citation omitted; emphasis added)); *but see Jones v. UPS Ground Freight*, 683 F.3d 1283, 1289, 1297-99 (11th Cir. 2012) (when the plaintiff found banana peels on his truck and there was circumstantial evidence indicating that “the person who placed the bananas was evoking a racial slur,” the plaintiff’s claim survived summary judgment). Those fact-bound cases are not part of any circuit split. They apply the same legal standard as petitioners’ other employment-discrimination cases and merely reach different conclusions driven by different facts.

Petitioners’ claim that four circuits are internally divided, Pet. 18-20, likewise fails. All these cases follow the same pattern just discussed: courts look to allegations or evidence of the harasser’s subjective intent when it is needed to assess whether facially neutral conduct was in fact based on a protected characteristic.⁵ Indeed, one of the Seventh Circuit

⁵ Compare, e.g., *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1109, 1111 (8th Cir. 1997) (where harasser sexually assaulted plaintiffs, no inquiry into intent needed to find “that the harassment was based on sex”), with *Bell v. Baptist Health*, 60 F.4th 1198, 1204-05 (8th Cir. 2023) (intent considered where conduct involved “no sexual remarks”).

opinions petitioners cite makes the point expressly. In *Doe v. City of Belleville*, the court explained that when harassment involves the use of “names, threats, and physical contact that are unmistakably gender-based,” it is easy to conclude that “the work environment becomes hostile to [women] as ... wom[en],” “[r]egardless of why the harasser” acted. 119 F.3d 563, 578 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998). By contrast, when the alleged harassment involves the use of words that are “on [their] face ... gender neutral, ... a hostile environment claim founded upon that type of generic harassment typically would require proof that women were belittled while men were not.” *Id.*; *see also Alfano v. Costello*, 294 F.3d 365, 378 (2d Cir. 2002) (“Facially neutral incidents may be included ... among the ‘totality of the circumstances’ that courts consider in any hostile work environment claim, so long as a reasonable fact-finder could conclude that they were, in fact, based on sex. But this requires some circumstantial or other basis for inferring that incidents sex-neutral on their face were in fact discriminatory.”).

The First Circuit’s decision in this case followed this precise dichotomy. The protestors’ facially antisemitic comments were easily labeled as such; but the court looked to other evidence to determine whether other actions could likewise be deemed discriminatory. That was not a novel approach, but rather the approach adopted by the very cases petitioners themselves cite: courts uphold hostile-environment claims in some cases and reject them in others, depending on the specific facts alleged and evidence adduced. Indeed, not one of petitioners’ over 20 cases acknowledges the purportedly

“entrenched” circuit split they assert. Pet. 20. No conflict of authority, either within or among circuits, exists.

B. Petitioners’ second question presented does not merit review.

Petitioners next ask the Court to decide “[w]hether the First Amendment bars a plaintiff from pleading a Title VI hostile environment claim based on ‘protected speech.’” Pet. i. The Court should deny review on that question because the First Circuit did not resolve the question petitioners now raise; petitioners affirmatively waived their argument below; the First Circuit’s limited First Amendment holding was correct; and there is no conflict of authority.

1. As framed by the court below, petitioners’ theory presented two distinct issues: (1) “under what circumstances, if any, can racist speech be punished pursuant to Title VI without violating the First Amendment?” and (2) “*even assuming* that some racist speech can constitutionally be punished pursuant to Title VI, have plaintiffs adequately alleged that the protestors’ expression was racist (i.e., antisemitic)?” Pet. App. 21a-22a (emphasis added).

The first of those two questions resembles the question petitioners now ask this Court to decide. But the First Circuit went out of its way not to decide it. Instead, the court explained that, “[b]ecause we can decide this appeal without addressing the first issue, we proceed directly to the second.” Pet. App. 22a-23a. Petitioners themselves recognize as much: after quoting the panel’s framing of the First Amendment issue—the

same question they now present to this Court—they concede that “the First Circuit avoided that question.” Pet. 26; *see* Pet. 14 (citing Pet. App. 65a-66a). If that is so, there is no reason for this Court to decide it.

Contrary to petitioners’ claim, the panel did not hold that protected political speech “cannot, as a matter of law, ‘constitute[] antisemitic harassment actionable under Title VI.’” Pet. 26-27 (quoting Pet. App. 30a-31a). The sentence petitioners quote does not end where their quotation does. Quoted in full, the sentence reads: “[W]e decline [petitioners’] invitation to hold that the protestors’ speech constituted antisemitic harassment actionable under Title VI *merely because it was stridently pro-Palestinian and anti-Zionist.*” Pet. App. 29a-30a (emphasis added). The panel was making a different point—if Title VI requires universities to restrict political speech (an issue the First Circuit did not decide), that speech must implicate Title VI’s prohibition on race and national-origin discrimination. That latter conclusion rests not on the First Amendment but on the text of Title VI, which proscribes only discrimination “on the ground of race, color, or national origin[.]” 42 U.S.C. § 2000d. It also accords with the view of the Department of Education that “Title VI [is] not ... implicated by conduct based solely on political views” and that “political protest on its own does not typically implicate Title VI.” Office for Civil Rights, U.S. Dep’t of Educ., *Dear Colleague Letter*, at 10, 16-17 n.32 (May 7, 2024), <https://bit.ly/3z1ySeg>; *see also id.* at 16 (“Speech expressing views regarding a particular country’s policies or practices is protected by the First

Amendment and does not necessarily implicate federal civil rights laws” like Title VI.).

2. Petitioners’ second question presented suffers from a fatal vehicle problem: petitioners waived their argument below.

Petitioners now contend that universities should be held liable under Title VI even when “the harassment takes the form of otherwise protected speech.” Pet. 22. But in their briefing to the panel, petitioners acknowledged that “courts should interpret Title VI to comport with First Amendment principles.” Pet. App. 21a; *see* Ct. App. Dkt. 118264796, at 20 (Mar. 26, 2025) (“Ct. App. Reply Br.”). As petitioners went on to explain, “[r]easonable people can understand the difference between speech on matters of public concern, directed to the community at large through generally accepted methods of communication,” on the one hand, “and targeted harassment,” on the other. Ct. App. Reply Br. 21. So, when asked at oral argument whether petitioners argued “that the government, through its laws, can compel MIT to suppress speech that ... would be constitutionally protected otherwise,” petitioners’ counsel responded: “No, that’s not our position[.]” Recording of Oral Arg. at 1:45-2:05, No. 24-1800 (1st Cir. Apr. 7, 2025), https://www.ca1.uscourts.gov/sites/ca1/files/oralargs/24-1800_20250407.mp3.

Given these unequivocal statements, the panel expressly decided this case on the premise that “courts should interpret Title VI to comport with First Amendment principles.” Pet. App. 21a. Judge Dunlap, too, concluded that petitioners had “conceded” that

“only conduct or speech not protected by the First Amendment could give rise to liability under [Title VI].” Pet. App. 66a; *see* Pet. App. 67a.⁶

Instead, the panel explained, petitioners’ theory was that “the protestors’ speech fell *outside* the protection of the First Amendment – and thus within the reach of a government censor – because the speech was racist (i.e., antisemitic).” Pet. App. 21a (emphasis added). Judge Dunlap understood petitioners’ argument the same way. Pet. App. 67a (“Plaintiffs’ arguments focused on the contention that racist speech is itself actionable under Title VI because it falls outside First Amendment protections.”). Petitioners now abandon that argument. Pet. 23 (“Generally, individuals are free under the First Amendment to use racial slurs, make ethnic taunts, and display hateful symbols while being protected from government censorship.”). Instead, they advance the polar opposite theory: racist speech falling *within* First Amendment protections gives rise to Title VI liability. Pet. 22-24. The Court should not grant certiorari to entertain this new and waived argument.

In addition to their express waiver of their current theory, petitioners also forfeited another important argument. Judge Dunlap postulated an intermediate

⁶ The vague statement petitioners point to from their reply brief below—“There is ample room between the First Amendment and Title VI for institutions to curtail harassing speech”—does not preview the elaborate arguments in the petition for certiorari that the First Amendment has no application to Spending Clause statutes. Pet. 31 n.3 (quoting Ct. App. Reply Br. 21). And petitioners cannot avoid waiver by pointing to a statement in their rehearing petition, submitted after the panel ruled. *See id.*

position: “speech that is otherwise protected by the First Amendment” can “nevertheless support a claim under Title VI as evidence of animus (as opposed to evidence of an objectively hostile education environment).” Pet. App. 66a. But, he noted, the “panel opinion does not squarely address this question,” and the “best method of harmonizing the tension between the First Amendment and Title VI has not been well developed in briefing here.” Pet. App. 66a-67a. Because petitioners “did not squarely advance” this alternative approach, Judge Dunlap explained that the panel issued an “open-ended” decision designed to allow the court’s “case law to continue developing.” Pet. App. 67a. Those observations led Judge Dunlap to vote to deny rehearing en banc, and they should lead the Court to deny certiorari as well.

3. Given how petitioners framed this case below, the court’s First Amendment analysis was appropriately modest. Although the First Circuit did not decide whether, or to what extent, universities must punish racist speech, it did hold at a high level of generality that the “First Amendment erects safeguards that limit the ability of the government or private plaintiffs to punish MIT for not restricting more severely the student protestors’ protected speech.” Pet. App. 21a. That limited holding is correct. Petitioners’ novel suggestion that First Amendment principles vanish when a university receives federal funding, Pet. 27-28, is flatly inconsistent with bedrock First Amendment precedents. Pet. App. 21a (explaining that MIT has not “forfeited its right to make or allow speech disfavored by the government by receiving federal funds for programs

or activities unrelated to the speech at issue here” (citing *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 218 (2013))).

4. There is no circuit split. The three decisions on which petitioners rely—*Fennell v. Marion Independent School District*, 804 F.3d 398 (5th Cir. 2015); *Zeno v. Pine Plains Central School District*, 702 F.3d 655 (2d Cir. 2012); and *Bryant v. Independent School District No. 1-38 of Garvin County*, 334 F.3d 928 (10th Cir. 2003)—do not even mention the First Amendment, much less offer a “reasoned decision[]” about the interplay between that Amendment and Title VI. Pet. 28-30; *see* Pet. 24. They simply held that the plaintiffs in those cases made out deliberate-indifference claims based on blatant and actionable racial harassment.

Each of those cases, moreover, would almost certainly come out the same way in the First Circuit. The First Circuit recognized in this case that the English language contains “a litany of epithets and tropes widely understood as expressions of religious or racial animus” that would be actionable under Title VI. Pet. App. 23a. The speech in *Bryant*, *Fennell*, and *Zeno* was explicitly and unapologetically racist, and hence would be actionable under the First Circuit’s standard. In *Bryant*, “racial slurs, epithets, swastikas, and the letters ‘KKK’ [were] inscribed ... in notes placed in African American students’ lockers and notebooks.” 334 F.3d at 931-32. In *Fennell*, the plaintiffs were repeatedly “the target of racial epithets and slurs,” and a noose was left near one plaintiff’s car. 804 F.3d at 402-04. And the

plaintiff in *Zeno* likewise endured racial slurs and taunts, including “references to lynching.” 702 F.3d at 659-61. Each case involved plainly harassing conduct targeted at specific individuals; none involved anything arguably resembling “political opinion[s] on a matter of public concern.” Pet. App. 27a. Petitioners’ claim that the decision below would “immunize” the harassment alleged in *Bryant*, *Fennell*, and *Zeno*, Pet. 29, is flat wrong.

Petitioners also assert a “fundamental inconsistency between the Executive Branch and the First Circuit.” Pet. 35. But petitioners’ cited authority—the Department of Education’s May 7, 2024 Dear Colleague Letter—says otherwise: “Nothing in Title VI or regulations implementing it requires or authorizes a school to restrict any rights otherwise protected by the First Amendment to the U.S. Constitution.” *Dear Colleague Letter*, *supra* p. 30, at 2.⁷

III. Adopting Petitioners’ Arguments Would Result in Suppression of Political Speech on University Campuses.

Although this case concerns speech about Israel and Palestine, petitioners’ arguments are not limited to that issue but extend to all types of campus speech across the political spectrum. The implications are troubling. If

⁷ The Department articulated the same principle in 2003. See Office for Civil Rights, U.S. Dep’t of Educ., *Dear Colleague Letter on the First Amendment* (July 28, 2003), <https://bit.ly/4bY9Zid> (“OCR’s regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution.... [or] regulate the content of speech.”).

petitioners' first argument succeeds, a university may be liable even if the speech at issue is facially neutral as to any protected characteristic, and even if no speaker harbored a discriminatory purpose. If the second succeeds, then the federal government could, consistent with the First Amendment, force universities to forfeit all federal funds unless they censor pure political advocacy on a matter of public concern. Combine the two and the rule is this: a university must discipline its students for engaging in core political speech whenever other students experience those opinions as discriminatory, even if the speech is not racist on its face and even if the student has no intent to discriminate.

That rule would create a serious chill on campus free speech. "The classroom," this Court has said, "is peculiarly the 'marketplace of ideas,'" where future leaders are "trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation omitted). But under petitioners' proposed rule, university administrators would have no choice but to stamp out all speech, even well-intentioned political speech, that other students perceive as creating a hostile environment based on race, color, or national origin (or, in light of Title IX's similar wording, based on sex). Speech advocating or opposing racial preferences in college admissions, removal of illegal immigrants, transgender rights, or many other policies on issues of public concern would be punished and censored. After all, even if such speech is well-intentioned political speech, other students might

experience it as creating a hostile environment based on race or sex—which, under petitioners’ proposed rule, would be enough to expose the university to liability. The Court should not adopt such a speech-suppressive rule in the name of Title VI.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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