

No. 24-871

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IN THE  
**Supreme Court of the United States**

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

*Petitioner,*

*v.*

AUSTIN INDEPENDENT SCHOOL DISTRICT,

*Respondent.*

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

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**REPLY BRIEF**

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## ARGUMENT

### I. AISD FAILS TO MEANINGFULLY ADDRESS THE QUESTION PRESENTED

The Question Presented bears repeating: whether a plaintiff can state a claim for racial harassment under Title VI even if the “primary impetus” for the harassment was the plaintiff’s political views. AISD largely ignores this question, nor does it explain why this Court should allow the Fifth Circuit concurrence’s erroneous “primary impetus” causation standard to stand.

Indeed, AISD side-steps the concurrence’s “primary impetus” standard altogether, arguing instead that the concurrence did not apply that standard. AISD Resp. at 11. But the concurrence’s *opening sentence* announces the “primary impetus” standard. App.3a (“Accepting B.W.’s allegations as true, AISD students unquestionably bullied him, although the *primary impetus* of the bullying was, according to B.W., his political beliefs.” (emphasis added)). That the concurrence elsewhere says in passing that Brooks’s political beliefs were “the impetus” for the actionable harassment, App.6a, does not mitigate the confusion the decision below will create if left undisturbed.

Because AISD fails even to acknowledge that the concurrence applied the “primary impetus” standard, it also does not dispute that this standard conflicts with other circuits’ holdings that Title VI’s causation standard is “but-for.” *Murguia v. Childers*, 81 F.4th 770, 775 (8th Cir. 2023) (holding that “[o]n the ground of” means but-for causation” under Title VI); *Ricketts v. Wake Cnty. Pub. Sch. Sys.*, 125 F.4th 507, 524 (4th Cir. 2025) (holding

students’ labelling plaintiff as an “angry Black girl” was sufficient to raise inference of race-based treatment under Title VI); *L. L. v. Evesham Twp. Bd. of Educ.*, 710 F. App’x 545, 548 (3d Cir. 2017) (reversing grant of summary judgment to defendant on Title VI claim where, despite several incidents that were “bereft of any suggestion of discrimination,” there were also “a few incidents that have clear or at least arguable racial overtones”); *see also Doe v. Sch. Dist. No. 1*, 970 F.3d 1300, 1310 (10th Cir. 2020) (concluding that harassment that was “*exclusively* motivated” by factor other than sex was not actionable under Title IX (emphasis added)).

Nor does AISD dispute that the “but for” standard aligns with this Court’s interpretation of other anti-discrimination statutes. *See Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 656 (2020) (Title VII); *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 589 U.S. 327, 333 (2020) (42 U.S.C. § 1981); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 289 (2023) (*SFFA*) (Gorsuch, J., concurring) (concluding the “but-for” causation standard applies to Title VI discrimination claims).

Finally, AISD also does not dispute that the concurrence’s “primary impetus” test has no basis in Title VI’s text. As the Petition points out, Title VI contains no language that would suggest race must be the “primary” basis for discrimination. Congress knows how to create such a causation standard in anti-discrimination statutes, *see, e.g.*, 29 U.S.C. § 794 (providing that “no qualified individual with a disability . . . shall [be subject to discrimination] solely by reason of [the] disability”), yet Title VI does not contain this type of limiting language.



Because of the confusion the concurrence’s adoption of the “primary impetus” causation standard creates in Title VI adjudication, the Court should grant the Petition.

## **II. RATHER THAN ADDRESS THE QUESTION PRESENTED, AISD FOCUSES ON IRRELEVANT ISSUES**

In lieu of addressing the concurrence’s “primary impetus” standard, AISD instead makes two ancillary arguments, neither of which have any bearing on the Question Presented, and both of which are wrong on their own terms in any event.

### **A. AISD’s Lack of Knowledge is Irrelevant and Waived.**

AISD spends much of its Response arguing that it lacked knowledge that Brooks was experiencing race-based harassment. This argument suffers from three fatal flaws.

First, and most obvious, it is not responsive to the Question Presented. This Court “ordinarily do[es] not consider questions outside those presented in the petition for certiorari.” *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992); *see also* Rule 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”). The Court disregards this rule “only in the most exceptional cases.” *Stone v. Powell*, 428 U.S. 465, 481, n.15 (1976). Whether AISD had actual knowledge that Brooks was experiencing race-based harassment is a separate question that the Petition does not present.

Second, AISD expressly waived any argument below that it lacked knowledge that Brooks’s harassments was race based. As Judge Elrod pointed out in her dissent, AISD “does not contest [*Davis*] prongs two, three, or four, which require, on the part of the school district, actual knowledge, control over the harasser, and deliberate indifference.” App.15a. AISD should not be permitted to revive an argument it expressly waived. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) (“Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.”).

Third, AISD is wrong. Brooks’s factual allegations easily raise the inference that AISD knew he was suffering race-based harassment. *See* App.21a–30a (detailing race-based incidents); App.9a (noting that the Complaint alleged “Plaintiff’s parents made a number of explicit complaints, believing B.W. to be a victim of bullying and harassment because of his political beliefs, *and racial stereotypes*” (emphasis in the original)). That AISD buried its head in the sand to Brooks’s numerous reports of race-based harassment is no basis to conclude those reports were not made.<sup>1</sup>

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1. This includes knowledge that Brooks was brutally beaten because he “was white.” App.29a. AISD claims it only knew this to be a politically motivated assault. AISD Resp. at 6, 15, n.16. But Brooks plausibly alleged that AISD was aware of *all* the race-based harassment he suffered, including the beating. *See* App.9a (noting that Complaint alleged AISD was informed of Brooks was the “victim of bullying and harassment because of his political beliefs, *and racial stereotypes*”); App.29a (noting that Complaint alleged AISD investigated circumstances of beating). Indeed, the clarity of Brooks’s allegations on this point is precisely why AISD waived the issue below.

**B. AISD’s claim that Brooks’s harassment was not “race-based” is both premature and wrong.**

AISD further seeks to distract from the Question Presented by arguing that Brooks’s harassment was not race based. AISD Resp. 16. But this puts the cart before the horse. Without knowing the *causation standard* for determining whether Brooks’s harassment was based on his race, it is meaningless to argue that the harassment was not, *in fact*, race based.

Moreover, applying the correct causation standard, Brooks plainly sufficiently alleged that he suffered severe and pervasive race-based harassment. AISD contends: (1) Brooks was subjected to nothing more than “benign and sporadic comments”; (2) it is improper to “conflate” the harassment Brooks suffered based on his political views with the admittedly race-based harassment he endured; (3) there are “no facts suggesting that any of the race-related comments deprived [Brooks] of any educational opportunities or benefits”; and (4) being called a racist is not discrimination based on race. AISD Resp. at 18, 21, 23–24. These arguments are meritless.

First, Brooks was indisputably subjected to more than mere “benign and sporadic” comments. Instead, he endured daily harassment at the hands of AISD administrators, teachers, and peers for over two years. App.21a–30a. As the Petition points out, the explicitly race-based harassment Brooks endured *alone* was severe and pervasive. Pet. at 20–22. Accordingly, the Complaint easily alleges severe and pervasive race-based harassment.

AISD asks the Court to view each incident in a vacuum, disaggregating each event from its context. But this Court has held that “whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); *see also Andrews v. City of Phila.*, 895 F.2d 1469, 1484 (3d Cir. 1990) (noting that just as “[a] play cannot be understood [based on] some of its scenes but only on its entire performance, . . . similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario”). Isolating interactions and classifying each as solely political- or solely race-based is categorically impermissible. Under the totality of the circumstances, Brooks has plainly set forth sufficient facts to raise the plausible inference of severe and pervasive race-based harassment.

Second, and related, the fact that Brooks was indisputably subjected to some explicitly race-based harassment gives color to his allegations that race was the cause of the other harassment to which he was subjected. AISD contends it is not “reasonable” to infer that all the harassment Brooks suffered was race-based simply because some was admittedly race-based. AISD Resp. at 21. But this ignores that much of the explicitly race-based harassment Brooks suffered came at the hands of AISD administrators and teachers. In other words, AISD administrators and teachers created an environment in which other students felt emboldened to harass Brooks on the same basis. Given this top-down harassment, it is reasonable to infer that the harassment Brooks suffered from his fellow students was simply a variation on that same theme. *See, e.g., Fennell v. Marion Indep. Sch. Dist.*, 963 F. Supp. 2d 623, 646 (W.D. Tex. 2013) (“By virtue of

their positions of authority, teachers who deliberately discriminate against students can have a particularly harmful effect on the school environment.”).

The primary case AISD cites—*D.S. v. Rochester City School District*—does not support a different conclusion. There, the court rejected the plaintiff’s argument that he had been harassed based on race, but it took care to point out that “[n]one of the allegations in the complaint allege[d] that [the plaintiff] was called names or assaulted *with any reference to her race*.” No. 6:19-CV-6528 EAW, 2020 WL 7028523, at \*10 (W.D.N.Y. Nov. 30, 2020) (emphasis added). Here, by contrast, Brooks experienced explicit race-based harassment for over two years, including a physical beating “because [he] was white.” Pet. at 20–22.

Third, it is undisputed that Brooks ultimately left AISD because of the persistent torment from AISD administrators, AISD teachers, and his peers. To claim the “race-related” comments can be parsed out and determined to have no role in Brooks’s departure both misstates Brooks’s allegations and fundamentally misunderstands Title VI. *See, e.g., Ricketts*, 125 F.4th at 522 (finding student was deprived of equal access to educational opportunities and benefits based on race-based *and* non-race-based harassment).

Fourth, AISD’s argument commits the same strawman fallacy as the concurrence. Brooks does not claim that being called a racist is based on race. Instead, Brooks claims that being called a *certain type* of racist—*i.e.*, a member of racist groups historically associated with a particular race—is based on race. “When an individual is accused of membership in a politically odious organization

associated with that individual’s protected characteristic, such an accusation amounts to stereotyping based on that protected characteristic.” App.18a. Accusing Brooks of being a member of the KKK, a Nazi, and the Southern Confederacy, is indisputably based on race, particularly when considered alongside the other overt race-based harassment he suffered.<sup>2</sup>

In sum, this case presents the question of whether to adopt the concurrence’s “primary impetus” test or other circuits’ “but for” test. Whether AISD had knowledge of the harassment (an argument AISD waived) and whether Brooks satisfies the “but for” test (he does) are immaterial to that question.

### **III. ALTERNATIVELY, THIS COURT SHOULD GRANT, VACATE AND REMAND IN LIGHT OF *AMES***

Contrary to AISD’s contention, this Court’s recent decision in *Ames v. Ohio Department of Youth Services* is not a “red herring.” In *Ames*, this Court reversed the Sixth Circuit’s conclusion that Title VII plaintiffs from so-called “majority” classes were held to a higher legal standard than plaintiffs from so-called “minority” classes. 605 U.S. — (2025), Slip. Op. at 6. It is clear that the same spirit that animated the Sixth Circuit’s incorrect interpretation of Title VII was at work in the Fifth Circuit’s ruling here. Specifically, the Fifth Circuit *sub*

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2. AISD also argues that Brooks’s classmates have a First Amendment right to harass him. AISD Resp. at 18. In addition to being ancillary to the Question Presented, that argument is not susceptible to resolution on a Rule 12(b)(6) motion.

*silentio* applied a heightened standard to Brooks’s claims because he is white.

The easiest way to confirm that the Fifth Circuit applied a heightened standard is to reimagine this case as if Brooks were Black. Imagine, for example, that for two and half years after the Black Lives Matter protests in the summer of 2020, Brooks suffered: (1) students reciting the “evils of the [black] race” (App.23a); (2) students proclaiming (with Brooks present) “here are all the [black] boys!” (App.30a); (3) being beaten “because [he] was [black];” (App.29a); (4) the principal yanking his earbud off and asking, “Are you listening to [Gangsta rap]?” (App.23a); (5) a teaching aide calling him “[Blackey]” and saying, “You need help [Blackey]?” or “Can’t figure this one out [Blackey]?” (App.24a); (6) a teacher stating to him “I will not have a [black] man talk to me about gender issues!” (App.28a) (7) being ostracized by other students for being, among other things, black (App.22a); (8) a teacher telling him he is “getting concerned about how many [black] people there are” (App.23a); (9) a student saying, “America is only for [black] people.” (App.28a); (10) a teacher asking if he “enjoyed his [Black] Gospel Music” (App.30a); and (11) a fellow student accusing him of being a member of the Black Panther Party. (App.24a).

With the facts thus reimaged, every court in the country—and likely even AISD—would agree that this case involves severe and pervasive race-based harassment. As Judge Ho recognized below, courts have concluded as much in cases involving Black plaintiffs on facts that are far less egregious than the facts here. App.31a (citing *Wantou v. Wal-Mart Stores Texas, L.L.C.*, 23 F.4th 422, 434 (5th Cir. 2022) (black employee called “chimp,”

“monkey,” “African fart” and “you little African”)); *see also Ricketts*, 125 F.4th at 522 (student labeled an “angry Black girl” while running for school elections and excluded from polls and posts); *DiStiso v. Cook*, 691 F.3d 226, 236 (2d Cir. 2012) (school child called “blackie” and “the N word” several times over two years and, without reference to race, physically dragged by his teacher once).

Without this Court’s intervention, this type of differential treatment will continue to fester in appellate courts’ decisions involving anti-discrimination statutes—including but not limited to Title VI—and, paradoxically, allow the continued unequal treatment of litigants based on their race. Thus, the Court should grant, vacate, and remand in light of *Ames* to make clear that any differential legal standard governing claims by so-called “majority” and “minority” groups is contrary to Title VI as well.

AISD’s argument that “courts have expressed concern,” over importing Title VII concepts into Title VI, AISD Resp. at 29, misreads the case law. The cases AISD cites do not hold that it is permissible to subject majority group plaintiffs to a higher standard than minority group plaintiffs under other anti-discrimination statutes. Rather, these cases simply hold that, unlike under Title VII, sexual orientation/gender identity discrimination is not “based on” sex for purposes of Title IX. *Texas v. United States*, 740 F. Supp. 3d 537, 547 (N.D. Tex. 2024) (“[N]either sexual orientation nor gender identity are logical predicates to discrimination ‘on the basis’ of biological sex[.]”); *Texas v. Cardona*, 743 F. Supp. 3d 824, 881 (N.D. Tex. 2024) (rejecting “argument that discrimination based on gender identity always demands consideration of sex.”); *Tennessee v. Becerra*, 739 F. Supp. 3d 467, 479 (S.D. Miss. 2024)



(“*Bostock’s* ruling concerning Title VII does not apply to Title IX because Congress used different causation language[.]”). These holdings have no bearing on whether and how *Ames* applies to Title VI. The Court should thus grant, vacate, and remand for reconsideration in light of *Ames*.

#### IV. AISD’S RESPONSE IGNORES THE GROWING TREND NORMALIZING DISCRIMINATION AGAINST WHITE PEOPLE

Sadly, AISD’s Response demeans Brooks, re-characterizes the verbal harassment Brooks suffered as him being unable “to listen to other students’ political viewpoints,” and refers to Brooks being called a KKK member as a harmless “jok[e].” AISD Resp. at 18, 24. This type of disdain for a former student would ordinarily be beyond the pale. But Brooks is white. These days, it is perfectly acceptable—not only to AISD but to many in our society—to treat white people as “deserving” of differential treatment based on their skin color.

Examples abound. *See* App.36a (citing instances of anti-white rhetoric). Microsoft brags about paying white employees less than other races. *Microsoft’s 2023 Diversity and Inclusion Report* (Nov. 1, 2023), available at <http://bit.ly/3ZC56ab>. The Biden Administration weaponized farm programs to discriminate and provide taxpayer dollars to non-white farmers. Entin, Brian, *Biden’s race-based loans hurt white farmers*, NewsNation (May 28, 2025), available at <https://bit.ly/3FEOtUB>. A black teenager recently received almost \$500,000 in donations after allegedly murdering a white teenager, with donors declaring his actions “a sort of racial vindication, as though [the victim]

is a slain symbol of white America.” Schlott, Rikki, *The huge outpouring of support for Karmelo Anthony—who allegedly stabbed another teen in the heart—should scare all of us*, NY Post (Apr. 19, 2025), available at <https://bit.ly/43RSka9>.

Racism against whites is racism. The difference is the “cultural permission [that exists] to tolerate (if not encourage) racism against whites.” App.37a. Judicial permission should not follow. This case provides this Court the opportunity to stamp out this disturbing trend. The Court should grant the Petition to decide Title VI’s causation standard and make clear that no form of race-based discrimination will be tolerated in our nation’s schools.

**CONCLUSION**

For the foregoing reasons and those stated in the Petition, the Court should grant the Petition.

Respectfully submitted,

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