**Appeal No. 24-1800**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

STAND WITH US CENTER FOR LEGAL JUSTICE; KATERINA BOUKIN; MARILYN MEYERS,
*Plaintiffs-Appellants,*

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Case No. 1:24-cv-10577; HON. RICHARD G. STEARNS

# PROPOSED AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND/OR REHEARING EN BANC

Jordan A. Sekulow
Olivia F. Summers
Nathan J. Moelker
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

*Counsel for Amicus Curiae*

## CORPORATE DISCLOSURE STATEMENT

The ACLJ is a non-profit legal corporation dedicated to the defense of constitutional liberties secured by law. The ACLJ has no parent corporation and issues no stock.

## TABLE OF CONENTS

# TABLE OF AUTHORITIES

**Cases** **Page(s)**



**Statutes**



**Other Authorities**

## INTEREST OF AMICUS[1]

The American Center for Law & Justice is an organization dedicated to the defense of constitutional liberties secured by law, including combating antisemitism across our nation's college and university campuses. ACLJ attorneys have argued before the Supreme Court of the United States in several significant cases involving the freedoms of speech and religion. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause). The ACLJ has dedicated time and effort to eradicating antisemitism and defending Jewish students' constitutionally and federally protected rights at numerous schools and universities around the country. We write this brief to address the significant and severe consequences that this Court's recent decision

[1] No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

creates for not only Jewish students, but any minority group. This Court's decision (1) provides colleges and universities with a roadmap to evade their Title VI obligations and (2) enables perpetrators to disguise conduct that would otherwise constitute actionable harassment or discrimination as political speech, a result made possible only by the Court's erroneous First Amendment analysis.

## ARGUMENT

### I. Universities can now avoid liability under Title VI through minimal, inadequate responses.

Title VI of the Civil Rights Act of 1964 ("Title VI") embodies the fundamental promise that federal funds will not support racial discrimination in any form. In calling for Title VI's enactment, President John F. Kennedy accentuated this promise, stating, "[s]imple justice requires that public funds . . . not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963). This Court's decision frustrates Title VI's core guarantee by reducing a right secured by law to a discretionary preference, allowing universities to evade their obligations through minimal, ineffective responses while discrimination and hostile environments persist.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

Federal financial assistance." 42 U.S.C § 2000d. This duty most certainly encompasses a duty to protect students from a hostile educational environment. As the Department of Justice has articulated, federal law prohibits discrimination against a student's "residency in a country whose residents share a dominant religion or a distinct religious identity." Letter from Thomas E. Perez, U.S. Assistant Att'y Gen., to Russlynn H. Ali, Assistant Sec'y for C.R. (Sept. 8, 2010).

Executive Order 13899, issued on December 11, 2019, codified longstanding policies and directed all agencies to consider the International Holocaust Remembrance Alliance's (IHRA) definition of "antisemitism" when enforcing Title VI. Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 11, 2019). That definition states, "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities." This year, Executive Order 13899 was reaffirmed by the current administration in Executive Order 14188, titled "Additional Measures to Combat Anti-Semitism." Exec. Order No. 14,188, 90 Fed. Reg. 8847 (Jan. 29, 2025). Furthermore, federal courts have applied Title VI specifically to antisemitism. *See*, *e.g.*, *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 354 (S.D.N.Y. 2014). Thus, discriminating against or harassing a Jewish student because of a real or perceived connection to Israel is antisemitic. The

Supreme Court emphasized that "Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694-95 (1979)). Title VI protection covers students who are or are perceived to be Jewish, Christian, Muslim, Sikh, Hindu, Buddhist, or other groups that are or are perceived to: 1) "share[] ancestry or ethnic characteristics"; or 2) have "citizenship or residency in a country with a dominant religion or distinct religious identity."[2] "Title VI prohibits discrimination based on race, color, or national origin against students of any religion . . . when the discrimination, for example":

- "involves racial, ethnic, or ancestral slurs or stereotypes";
- is based on a student's "skin color, physical features, or style of dress that reflects both ethnic and religious traditions"; or
- is based on the country or region where a student is from or is perceived to have come from, including, for example, discrimination based on a student's accent or name, a student's limited English proficiency, or a student speaking a language other than English.[3]

[2] *See Protecting Students from Discrimination Based on Shared Ancestry or Ethnic Characteristics*, DEP'T OF EDUC. (Jan. 2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-shared-ancestry-202301.pdf.
[3] *Id.*

Courts have accordingly recognized that the obligations imposed on schools under Title VI include an obligation to protect students from discrimination and harassment.

Accordingly, a university violates its responsibilities under Title IX or Title VI when it acts with deliberate indifference to conduct that is "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999). Further, an educational institution can be held accountable "if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment." Dep't of Educ. Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994). In this case, this Court eviscerated the "deliberate indifference" standard and found MIT was not deliberately indifferent despite the university's inadequate response to protests targeting Jewish students. For example, MIT allowed protesters to block Jewish students from accessing campus buildings and facilities. *StandWithUs Ctr. for Legal Just. v. Mass. Inst. of Tech.*, No. 24-1800, 2025 U.S. App. LEXIS 27390, *14-15 (1st. Cir. Oct. 21, 2025). During these antisemitic uprisings on campus, protesters chanted "There is only one solution: Intifada revolution", "Palestine will be free, from the river to sea", "death to Zionism", and "Palestine is free, Israel out." Pls.' Am. Compl. ¶¶ 157, 317, ECF No. 40. These statements are inherently

antisemitic and explicitly call for violence against Jews and the nation of Israel. *See id.* at n. 96, 97.

It is important to address the meaning of "intifada" or "intifada revolution" and other similar statements that have recently been made or chanted by students on campuses across the United States, including at MIT. "Intifada" is an Arabic word that translates to "uprising," "shaking off," or "rebellion."[4] Historically, it is tied to periods of intense violence against Israel by the terrorist organization Hamas,[5] including the intifada from 1987-1990 and again in 2000-2005. Acts of violence, or "intifada," include attacks on innocent civilians via car bombs,[6] suicide bombers,[7] and bus attacks.[8] Now, calls for "intifada" and to "globalize the intifada" are connected to anti-Israel groups that support violence against Israel and its supporters around the world. In fact, pro-Hamas groups have posted maps on social media of locations around the world, including locations in New York City, that they claim

[4] Bader Araj et al., *Intifada, Palestinian-Israeli History*, BRITANNICA (Nov. 24, 2025), https://www.britannica.com/topic/intifada.
[5] FOREIGN TERRORIST ORGANIZATIONS, BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE, https://www.state.gov/foreign-terrorist-organizations (last visited Nov. 24, 2025).
[6] David Hoffman, *8 Killed, 40 Injured in Car Bomb Blast at Israeli Bus Stop*, THE WASHINGTON POST (Apr. 6, 1994), https://www.washingtonpost.com/archive/politics/1994/04/07/8-killed-40-injured-in-car-bomb-blast-at-israeli-bus-stop/6feb4aef-1e8f-4d32-bfe5-79bf5d468760/; *Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles (Sept 1993)*, MINISTRY OF FOREIGN AFFAIRS (Apr. 6, 1994), https://www.gov.il/en/pages/suicide-and-other-bombing-attacks-since-the-declaration-of-principles.
[7] *Jerusalem Bombing*, NPR (Feb. 25, 1996, 12:00 AM), https://www.npr.org/1996/02/25/1008898/jerusalem-bombing.
[8] Marjorie Miller & Mary Curtius, *20 Killed, 10 Injured in Jerusalem Bus Explosion*, LOS ANGELES TIMES (Mar. 3, 1996, 12:00 AM), https://www.latimes.com/archives/la-xpm-1996-03-03-mn-42559-story.html.

are associated with "genocide" in Gaza. Student groups that chant or post these phrases on college campuses are actively calling for violence against anyone who supports or is perceived to support Israel, including Jewish students on those same campuses. MIT's Jewish students were specifically targeted for their Jewish identity and for their perceived connection with the State of Israel. This is antisemitism. Further, as Petitioners' complaint made crystal clear, "Zionism" is not a political viewpoint, "it is a key component of [a Jew's] ethnic and ancestral identity." *Id.* at 99.

Rather than removing the perpetrators causing the hostile environment, MIT warned the victims to avoid certain areas of campus. *Id.* at *6. In addition, university officials permitted encampments to remain for extended periods of time and even went so far as to install a "high fence[] around the encampment." *Id.* at *11-15. Notably missing from this Court's decision, MIT officials in the university's Institute Discrimination & Harassment Response Office (IDHR) knew of these antisemitic events on campus and when approached by Jewish students for help, told the students that Jews were not members of a protected class. Pls.' Am. Compl. ¶ 205. An institution's response must be reasonable, yet MIT's response accommodated perpetrators while leaving Jewish students helpless – flipping Title VI on its head and eviscerating *Davis*.

This Court's decision threatens all minorities, providing universities with a clear template for evading Title VI obligations. Consider the same pattern, but a different protected class. Imagine student groups establish protests outside a university's Islamic center, claiming concern about "radical Islam on campus" and demanding that the university monitor the Muslim Student Association for potential "security threats." Protesters position themselves to block entrances during Friday prayer times, carrying signs linking Islam to terrorism and chanting about "keeping campus safe from extremism." Muslim students attempting to attend prayers must navigate through hostile crowds questioning their presence and intentions. Some protesters photograph Muslim students entering and exiting, posting images online with commentary about "potential radicalization."

After two weeks of disrupted prayers and Muslim students being photographed and harassed, the university might act, not by enforcing its rules against the perpetrators, but by accommodating them. Perhaps the university agrees to form a task force examining "community concerns about campus security" and offers the protest organizers a meeting with campus security officials to discuss their perspectives. The university might issue written warnings to a few protest leaders but allow them to continue attending classes and participating in campus activities. Meanwhile, Muslim and Arab students have spent weeks unable to freely practice their religion, facing harassment based on stereotypes linking their ethnic and

religious identity to terrorism, and receiving the clear message that the university prioritizes accommodating their harassers over protecting their civil rights.

As MIT did here, any school in this hypothetical can avoid Title VI liability by taking minimal, delayed, and ineffective action that creates the appearance of response while allowing hostile environments, harassment, and discrimination to persist. School officials can warn victims to modify their behavior rather than discipline perpetrators. They can accommodate perpetrators rather than enforce policies. They can study problems rather than solve them. The list goes on. This Court's framework renders Title VI's protections illusory and will not only affect Jewish students, but also any minority group.

## II. Political framing becomes a shield for harassment and discriminatory conduct.

This Court's decision conflates speech with conduct in a way that enables perpetrators to shield discriminatory and harassing behavior against a protected group by recasting it as political expression. This flawed decision threatens us all and cannot stand. As the late Chief Rabbi Jonathan Sacks once explained, "Antisemitism is the world's most reliable early warning sign of a major threat to freedom. . . . It matters to all of us. Which is why we must fight it together."[9]

[9] *The Mutation of Antisemitism*, THE RABBI SACKS LEGACY, https://rabbisacks.org/videos/the-mutation-ofantisemitism/ (last visited Nov. 17, 2025).

The First Amendment does not protect unlawful such as trespassing, vandalism, harassment, assault, and the destruction of property. In addition, the First Amendment does not protect true threats, which the Supreme Court defined as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Nor does it protect intimidation, which is "a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360. Further, there is no First Amendment protection for speech that involves incitement, which the Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), explained includes speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

Political motivation does not convert discriminatory conduct into protected speech. At MIT, perpetrators targeted Jewish students because of their actual or perceived connections to the State of Israel, even as they attempted to frame their behavior as criticism of Israeli government policies. However, their actions were not discourse or aimed at Israeli government officials or representatives. Their antisemitic chants and blockades were aimed at Jewish students and created hostile and unsafe conditions on campus for those Jewish students. *See StandWithUs*, 2025

U.S. App. LEXIS 27390, at *4, 6, 11-15. However, because the perpetrators described their conduct as a "matter of public concern" this Court treated their discriminatory conduct as speech protected by the First Amendment. This flawed First Amendment interpretation prescribes a mechanism that allows perpetrators to target minority groups whenever the perpetrators can identify a political issue connected to a minority's identity.

Again, imagine the same scenario but different protected class. Perpetrators could target Latino students based on assumptions about their immigration status and perceived connections to Latin American countries. They could establish demonstrations outside buildings with Latin American cultural programs, not to engage in abstract debate about immigration policy, but to create an environment where Latino students feel threatened and unwelcome. They could photograph students they identify as Latino and post the images online, demanding an investigation of immigration status. They could organize efforts to exclude Latino students from student groups and campus organizations.

When challenged, according to this Court's reasoning, all the perpetrators would have to do is simply claim they are engaging in "immigration policy advocacy" or "border security advocacy." Politically framing racial animus and harassment as protected speech improperly shields the university from conduct,

otherwise illegal under Title VI, rendering the statute useless. This Court's decision creates a harmful slippery slope and should be reheard by the full Court.

## CONCLUSION

For the reasons set out above, the American Center for Law & Justice respectfully urges this Court to grant Plaintiffs-Appellants' petition for rehearing and/or rehearing en banc.

Respectfully Submitted,

/s/ Olivia F. Summers
Jordan A. Sekulow
Olivia F. Summers
Nathan J. Moelker
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

*Not admitted in this Court

*Counsel for Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limit of 1st Cir. R. 29 (b)(4) because it contains 2560 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft word for office 365 in 14-point Times New Roman font.

Date: December 1, 2025

/s/ Olivia F. Summers
Olivia F. Summers
*Counsel for Amicus Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2025, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system, which will send notification of that filing to all counsel of record in this litigation.

/s/ Olivia F. Summers
Olivia F. Summers
*Counsel for Amicus Curiae*