No. 10-1636

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASSANDRA WILLIAMS, *et al.*,

Plaintiffs-Appellees

v.

PORT HURON AREA SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN

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STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the district court properly denied the defendant school board's motion for summary judgment on plaintiffs' student-on-student racial harassment claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*.

2. Whether deliberate indifference to student-on-student racial harassment constitutes intentional discrimination under the Equal Protection Clause of the Fourteenth Amendment.

IDENTITY AND INTEREST OF THE *AMICUS CURIAE* AND THE SOURCE OF ITS AUTHORITY TO FILE THIS BRIEF

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

This case raises important questions about the proper standard for assessing student-on-student racial harassment claims under Title VI and the Equal Protection Clause.

Title VI prohibits discrimination on the basis of race, color, or national origin by recipients of federal funding. The Department of Justice has authority to enforce Title VI in federal court, see 42 U.S.C. 2000d-1, and coordinates the implementation and enforcement of Title VI by federal agencies. Exec. Order No. 12250; 28 C.F.R. 0.51. The Department of Education extends financial assistance to educational programs and activities and is authorized by Congress to ensure compliance with Title VI in the operation of those programs and activities. See 42 U.S.C. 2000d-1. The Department of Education has promulgated regulations interpreting Title VI, 34 C.F.R. Pt. 100, and has issued interpretive guidance on the obligations of school districts to respond to student-on-student racial harassment.

See *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance*, 59 Fed. Reg. 11,448 (Mar. 10, 1994); "Dear Colleague" Letter from Russlynn Ali, Assistant Secretary for Civil Rights, Department of Education, at 1-5 (Oct. 26, 2010).

The United States also has an interest in the constitutional standard for assessing claims of student-on-student racial harassment. Under certain circumstances, the Attorney General has authority to bring civil actions when students "are being deprived by a school board of the equal protection of the laws," 42 U.S.C. 2000c-6(a), and may intervene in lawsuits alleging "the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race," 42 U.S.C. 2000h-2.

More generally, the United States has an interest in ensuring that federal civil rights laws are properly interpreted to combat various forms of harassment, including student-on-student harassment in schools. Consistent with this interest, the United States recently filed an *amicus* brief in this Court in *Doe* v. *Merrill Community School District*, No. 10-1028, addressing a student-on-student sexual harassment claim under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*.

STATEMENT OF THE CASE

1. Plaintiffs are eight African Americans who previously attended Port Huron Northern High School (PHNH) in Port Huron, Michigan. They filed suit in 2006 against the following defendants: the Port Huron Area School District Board of Education (Board or Board of Education); Michael Jones, former superintendent of the school district; Craig Dahlke, PHNH's principal; and six Board of Education members. *Williams* v. *Port Huron Area Sch. Dist. Bd. of Educ.*, No. 06-14556, 2010 WL 1286306, at *1 (E.D. Mich. Mar. 30, 2010). The complaint alleged that the Board violated Title VI by being deliberately indifferent to a widespread pattern of racial harassment of African-American students by other students at PHNH. R. 1, Complaint, pp. 23-24.[1] While plaintiffs claim that racial harassment at PHNH dates to the 1990s, their allegations focus on the years 2003-2006. *Williams*, 2010 WL 1286306, at *1. The complaint also included claims under 42 U.S.C. 1983 against Jones, Dahlke, and the six Board members in their personal capacities. The Section 1983 claims alleged that these individual defendants violated the Equal Protection Clause by being deliberately indifferent to the racial harassment plaintiffs suffered at PHNH. R. 1, Complaint, p. 25.

2. PHNH has about 1600 students of whom only 3% are African American. *Williams*, 2010 WL 1286306, at *1. The school has three assistant principals.

[1] "R. __" refers to the document number on the district court docket.

Ibid. From 2003-2006, one of these assistants was Marla Philpot, the only African-American professional employee at the school. *Ibid*.

Upon arriving at PHNH, Philpot was regularly subjected to racial harassment. A week after her arrival, she found Ku Klux Klan materials and literature in her office. *Williams*, 2010 WL 1286306, at *1. She was called the "n" word on several occasions. *Ibid*. These incidents were reported to the then-Principal, Cheryl Wojtas. *Ibid*. The record does not indicate that Wojtas responded to these incidents.

Plaintiff Darcy Hayes testified that, in his first semester at PHNH in spring 2003, after a female student repeatedly made fun of his weight in class, he told her to "shut the fuck up." *Williams*, 2010 WL 1286306, at *2. The female student replied "fuck you, fat nigger." *Ibid*. The teacher overheard the exchange and told them to stop. *Ibid*. During the same semester, Hayes overheard a student in the locker room call students from the rival high school "niggers." *Ibid*.

During the 2003-2004 school year, "after repeatedly hearing the 'n' word, [Hayes] complained to Wojtas and began giving her the names of students who used racial slurs." *Williams*, 2010 WL 1286306, at *2. Hayes complained to Principal Wojtas between 15 and 20 occasions over the course of the school year. *Ibid*. Wojtas responded that there was "nothing" that the administration could do because she had not heard the students using the slurs. *Ibid*. When Hayes reported

to Wojtas that he had heard someone at school refer to Tiara Long, an African-American student, as "you nigger," Wojtas told Hayes it was "none of [his] business." *Ibid*. In October or November 2003, Hayes also began complaining to Assistant Principal Philpot, who responded that "school officials could not do anything unless they heard it." *Ibid*.

Hayes' mother, Belinda Rivera, also complained numerous times to Wojtas and Philpot about the pervasive use of the "n" word at the school. *Williams*, 2010 WL 1286306, at *2. Wojtas told Rivera that she was unaware of the problem, and Philpot said there was not much Philpot could do. *Ibid*.

Student Tiara Long suffered several incidents of racial harassment during the 2003-2004 school year. Someone wrote "die nigger" on Long's desk, and she found racist writing in one of her books. *Williams*, 2010 WL 1286306, at *2. A teacher reported these incidents to either the principal or an assistant principal. *Ibid*. The record does not indicate that the administration responded to these incidents.

According to Patsy Chapman, her sons, Josh and James Chapman, experienced racial harassment at PHNH. During the 2003-2004 school year, Josh told Ms. Chapman that "[w]hite students regularly called" him "a 'nigger,' threw food at him in the cafeteria, and ripped his shirt." *Williams*, 2010 WL 1286306, at *2. Ms. Chapman had numerous conversations with Assistant Principal Charles

Mossett about the regular harassment to which her son Josh was being subjected. Mossett responded that "it was difficult to do anything because it was Josh's word against the other student." *Ibid*. During the next school year, Ms. Chapman told Mossett that students continued to taunt Josh Chapman racially. R. 49-2, Patsy Chapman Depo., p. 21. Mossett continued to tell Ms. Chapman that the school administration could do nothing because it was Josh's word against the others. *Id.* at 23. James Chapman overheard white students using the "n" word in the school hallways. *Williams*, 2010 WL 1286306, at *3. Ms. Chapman complained about this several times to Mossett. *Ibid*. The record does not indicate what, if any, action Mossett took in response.

During the same school year, "someone painted 'nigger' on a rock in front of the school." *Williams*, 2010 WL 1286306, at *2. Ms. Chapman testified that she believed the graffiti was painted over quickly. R. 49-2, Patsy Chapman Depo., p. 36.

In June 2005, the Board of Education approved a new Student Code Handbook, which prohibited harassment based on race and allowed suspension for first offenses and expulsion in repeat cases. *Williams*, 2010 WL 1286306, at *3. It is unclear from the record whether a racial harassment policy was in place prior to that time. *Id*. at *10. In September 2005, Ms. Chapman brought her grievances to then-Superintendent Jones, telling him that her sons were treated differently

based on their race and detailing the use of the "n" word at PHNH. *Williams*, 2010 WL 1286306, at *3. At some point, communication ceased between Chapman and Jones either because Jones was not receiving the messages or not returning Chapman's calls. *Ibid*.

Racial incidents continued throughout the 2005-2006 school year, when Dahlke became principal of PHNH. In October 2005, within days of Dahlke's arrival at PHNH, someone placed on Tiara Long's locker a poster containing the confederate flag and the words "Rebel – The south will rise – Death to all Niggers," and "If this offends you screw off, & get bent!" *Williams*, 2010 WL 1286306, at *3. The following day, Long found a racist note inside her locker. A day or two later, "nigger" was scrawled on her locker. *Ibid*. Principal Dahlke removed the slur and placed a hidden camera in a nearby classroom to attempt to catch the perpetrator. *Ibid*. Long and her mother contacted police, and Dahlke cooperated with the investigation. *Ibid*.

Not long after the locker incident, a staff member told Dahlke that several cars in the parking lot had confederate flags depicted on them. *Williams*, 2010 WL 1286306, at *4. Dahlke discovered who drove the cars and sent them to remove or cover the flags. *Ibid*.

On November 2, 2005, Philpot emailed Dahlke that she was concerned "by the number of minority students who * * * wish[ed] to leave" PHNH. R. 40-3,

Email Correspondence, p. 1. She stated she understood "their frustration and feelings" because she felt the same way. *Ibid*. She wrote that PHNH's "level * * * of intolerance, insensitivity and lack of understanding around issues of diversity" was simply not acceptable. *Ibid.* She also wrote that the "racist flyers, the children being called niggers on a daily basis, the lack of a multicultural curriculum and teachers who are trained in issues of diversity [were] too much for children to shoulder." *Ibid.* She requested that "a serious discussion" among the administrative team "begin immediately." *Ibid.*

Two days later, Dahlke recorded a video about the poster incident and broadcast it over the school's video system. *Williams*, 2010 WL 1286306, at *5. In the video, he showed the racist poster and reminded students that the behavior was inappropriate and requested that students with information come forward. *Ibid*. Two students came forward and told him that the poster had been stolen from the artist and that another person placed it on Long's locker. *Ibid*. The artist, who was already incarcerated in a juvenile detention center, was expelled. *Ibid*.

On November 8, 2005, Dahlke held a meeting with minority students. *Williams*, 2010 WL 1286306, at *5. All the plaintiffs except Gregory Harrison were present. *Ibid*. Dahlke or Philpot mentioned that some of the plaintiffs used the "n" word and that this led white students to employ the word also. *Ibid*. Dahlke or Philpot told the minority students to stop using the "n" word and to

report anyone using the word. *Ibid*. Some white students, who learned of the meeting, mocked it, calling it a "nigger meeting" and saying "only niggers allowed." *Ibid*. Although Dahlke considered the use of the "n" word to be a significant problem in the school, R. 39-4, Dahlke Depo., p. 38, he did not hold a similar meeting with white students, *Williams*, 2010 WL 1286306, at *5.

During meetings in November and December 2005, Ms. Chapman addressed the Board about the "persistent racial harassment" at PHNH. *Williams*, 2010 WL 1286306, at *5. At one of these meetings, Ms. Chapman and Liz Guertin, mother of plaintiff Gregory Harrison, displayed a copy of the racist poster that had been placed on Tiara Long's locker and asked the Board how it was going to respond. R. 44-2, Liz Guertin Depo., pp. 58-62. There is no indication in the record that any of the Board members responded. Throughout the 2005-2006 school year, Superintendent Jones sent out weekly operations notes informing the school board about the racial tensions at PHNH. R. 40-2, Operation Notes, pp. 1-9.

Numerous other racial incidents occurred in the 2005-2006 time span. See *Williams*, 2010 WL 1286306, at *4-6. During the school year, white students pointed at Natasha Thames and called her a nigger. *Id*. at *4. Zenia Hayes overheard white students loudly using the "n" word repeatedly in public with teachers present. *Ibid*. Kevina Jackson stated that she heard white students use the "n" word nearly every day. *Ibid*.

Joshua Portis, Long, Zenia Hayes, and Jackson reported to Philpot that white students were using racial slurs in PHNH's hallways. *Williams*, 2010 WL 1286306, at *4. Portis stated that Philpot told the four that she could not do anything about it. *Ibid*. Portis also stated that every time he walked by one particular student, the student would declare that he did not like "niggers." *Ibid*.

In early 2006, the incidents continued. On a hallway wall someone wrote, "Ms. Philpot is a nigger." *Williams*, 2010 WL 1286306, at *5. Darcy Hayes was walking in a PHNH hallway with his white girlfriend when another student called his girlfriend "you nigger loving bitch," in front of a teacher. *Ibid*. Hayes responded by calling the student a "bitch." *Ibid*. The teacher reprimanded Hayes, but did not say anything about the use of the "n" word. *Ibid*. Hayes also said that, on numerous occasions, he witnessed students using the "n" word in front of teachers who simply ignored the slurs. *Ibid*.

In April or May 2006, someone placed a text book with racist writings in Philpot's office. *Williams*, 2010 WL 1286306, at *5. "The first page of the book had 'KKK' and 'I will kill all of you' written on it" and the next page "had a drawing of a noose and the written words 'Hit List,' along with a list of targeted blacks." *Ibid*. Philpot and several plaintiffs appeared on the list. *Ibid*. The textbook was "filled with slurs and threats such as, 'hanging & killing the little niglets,' 'I beat niggers to death with these' (with an arrow pointing to a photo of

an oar), 'I want to hang Mrs. Philpot Nigga,' and 'kill all niggers.'" *Ibid*. At some point, Dahlke called the police to report the hit list. *Ibid.* A week before the discovery of the hit list, Natasha Thames saw one student show another a gun. *Williams*, 2010 WL 1286306, at *6. After the "Hit List" was discovered, Thames and her mother gave Dahlke the name of the student with the gun. *Ibid*. Subsequently, several plaintiffs, who were concerned for their safety, stayed home for a number of days. *Ibid*. Only a week after the discovery of the "Hit List," an unidentified African-American student filed a written complaint that a student behind him screamed "I hate niggers" when walking out of class. *Ibid*. Around that same time, on May 12, 2006, Dahlke informed Superintendent Jones "of a separate threat that someone was going to shoot everyone on the hit list." *Ibid*.

At Superintendent Jones' instigation, PHNH hired consultants to study the learning environment at the school. *Williams*, 2010 WL 1286306, at *6. The consultants "determined that the racially charged atmosphere developed at Port Huron Northern over an extended period of time, and was the result of a series of events, rather than a single episode. The consultants opined that policies regarding student conduct, including racial slurs, were not uniformly enforced by Port Huron Northern staff, and that the absence of firm, decisive action encouraged continuation of harassment." *Ibid*.

Based on a recommendation from the consultants, Principal Dahlke held three assemblies at the end of the 2005-2006 school year. *Williams*, 2010 WL 1286306, at *6. At the assemblies, Dahlke told students that "everyone should be treated with respect and dignity" and he instructed them to report "inappropriate" conduct "to an adult" while "offer[ing] anonymity and protection from retaliation for students who reported violators." *Ibid*.; R. 39-4, Dahlke Depo., p. 100.[2]

The racial harassment led to an exodus of African-American students after the 2005-2006 school year. *Williams*, 2010 WL 1286306, at *6. Approximately 15 African-American students transferred from PHNH to Port Huron High, and a number of others dropped out. *Ibid*.

3. The Board moved for summary judgment on the Title VI claim, and the eight individual defendants sought summary judgment on qualified immunity grounds on the Section 1983 claims. Defendants argued that neither the Board nor the individual defendants had been "deliberately indifferent" to the racial harassment.

The district court denied summary judgment on the Title VI and Section 1983 claims. With regard to the Title VI claim against the Board, the court

[2] While plaintiffs suggest (Appellees' Br. 26) that Dahlke told students at the June 2006 assemblies to stop using the "n" word, we found nothing in the record, including in Dahlke's deposition, indicating that he explicitly addressed the use of the "n" word at these assemblies. See R. 39-4, Dahlke Depo., pp. 99-101.

concluded that plaintiffs' evidence raised a genuine issue of material fact as to "whether the events and Defendants' responses, constitute deliberate indifference sufficient to support a claim for an intentional violation of Title VI." *Williams*, 2010 WL 1286306, at *10. The court held that the evidence would support a finding that the school district made little, if any, efforts to address the student-on-student racial harassment prior to Dahlke's hiring as principal in October 2005. *Ibid*. "Hence," the court concluded, "it can be argued from the facts in the record that school officials facilitated the harassment, or permitted it to continue with minimal response, at least from Fall 2003 to June 2005." *Ibid*. As for events that occurred during the 2005-2006 school year, the court held that "the evidence considered in the light most favorable to Plaintiffs, shows that despite Dahlke's efforts, the racial harassment continued, and arguably escalated to threats of physical harm and assault." *Ibid*. Therefore, the court concluded, a jury "could find that Defendants were aware their efforts were not working, but continued to use ineffective methods, both from the Fall, 2003, to June 2005, and thereafter." *Ibid*.

In rejecting the individual defendants' qualified immunity defenses, the district court held that "deliberate indifference to harassment violates students' right to equal protection," that this right was "clearly established," and that a jury could find that the individual defendants' actions "were deliberately indifferent to

Plaintiffs' allegations of harassment, and that they failed to act or acted ineffectively to prevent further harassment toward Plaintiffs." *Williams*, 2010 WL 1286306, at *17-18.

SUMMARY OF ARGUMENT

1. Defendants urge this Court to exercise pendent jurisdiction and to reverse the denial of their motion for summary judgment on the Title VI claim. The United States takes no position on whether the Court should exercise pendent jurisdiction to address the Title VI question. In the event the Court reaches the issue, however, it should affirm the denial of summary judgment on the Title VI claim.

The district court applied the correct legal standard in analyzing the Title VI claim. As the court recognized, a school district's deliberate indifference to known acts of serious student-on-student racial harassment is unlawful discrimination under Title VI. Both the Supreme Court and this Court have adopted the deliberate indifference standard for private damages claims involving student-on-student sexual harassment under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*. (Title IX). Because Congress intended that Title IX and Title VI be interpreted consistently with each other, the deliberate indifference standard applicable to Title IX claims should also apply to private damages actions under Title VI that involve student-on-student racial harassment.

Under a proper application of the deliberate indifference standard and taking the facts in the light most favorable to plaintiffs, the evidence was sufficient to preclude summary judgment on the Title VI claim. The record contains abundant evidence that, especially during the two-year period prior to Dahlke's hiring as principal in October 2005, the school district's response to racial harassment at PHNH was "clearly unreasonable in light of the known circumstances," *Patterson* v. *Hudson Area Schs.*, 551 F.3d 438, 446 (6th Cir. 2009). Plaintiffs presented evidence that numerous incidents of racial harassment occurred in the 2003-2004 and 2004-2005 school years. Far from taking reasonable steps to eliminate the racial harassment, school administrators allowed it to fester during this period. While Principal Dahlke took some actions to respond to the racial harassment, a reasonable jury could conclude that school officials' attempts to remedy the harassment during the 2005-2006 school year were too little, too late, given evidence of racial harassment that appears to have progressed and escalated, essentially unchecked, over the course of the previous school years. This evidence precluded summary judgment on the Title VI claim.

2. The district court correctly held that deliberate indifference to student-on-student racial harassment violates students' rights to equal protection under the

Fourteenth Amendment.[3] Where state actors are concerned, intentional discrimination that violates Title VI also constitutes intentional discrimination under the Equal Protection Clause. Therefore, the deliberate-indifference standard that applies to private damages claims under Title VI also governs private damages actions alleging equal protection violations.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DENIED THE SCHOOL BOARD'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' TITLE VI CLAIM

A. This Court Should Employ A Deliberate Indifference Standard In Evaluating Plaintiffs' Title VI Student-On-Student Racial Harassment Claim

If this Court reaches the Title VI question, it should hold that the deliberate indifference standard governs the question whether a school district is liable in a private damages action for student-on-student racial harassment.

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. Congress used Title VI as a model in enacting Title IX, which states that "[n]o person in the United States

[3] The United States takes no position on whether the district court properly denied summary judgment on the Section 1983 claims.

shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a).

Neither the Supreme Court nor this Court has directly addressed the appropriate standard for determining whether a recipient of federal funding can be liable under Title VI for student-on-student racial harassment. But the Supreme Court has held that a recipient of federal funding may be liable in a private damages action under Title IX "where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority," *Davis* v. *Monroe County Board of Education*, 526 U.S. 629, 647 (1999) – so long as the harassment is also "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," *id*. at 650.

In adopting the deliberate indifference standard, the Supreme Court made clear that "a recipient of federal funds may be liable in damages under Title IX only for its own misconduct." *Davis*, 526 U.S. at 640-641. The deliberate indifference standard satisfies that requirement in a private action for damages; the funding recipient is held liable for its own misconduct — *i.e.*, deliberate indifference in the face of known acts of serious student-on-student harassment. See *ibid*.

The Supreme Court also has held that "the scope of liability in private damages actions under Title IX is circumscribed by [the] requirement that funding recipients have notice of their potential liability." *Davis*, 526 U.S. at 641 (citing *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287-288 (1998)). The Title IX limitation on private damages, however, "is not a bar to liability where a funding recipient intentionally violates the statute." *Id*. at 642. This intent requirement can be satisfied by a showing of "deliberate indifference" to known sexual harassment. *Id*. at 642-643. In a private action under Title IX, liability for damages is limited to those circumstances in which an "appropriate person[,] * * * an official of the recipient entity with authority to take corrective action to end the discrimination[,] * * * has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Gebser*, 524 U.S. at 290; see also *Vance* v. *Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259, 262 (6th Cir. 2000) (finding school district had notice and was deliberately indifferent where student and parent informed teachers and principals of harassment, and both failed to respond adequately "in light of the known circumstances").

The Title IX "deliberate indifference" standard adopted in *Davis* and *Gebser* also applies to private damages actions under Title VI that involve student-on-

student racial harassment.[4] Four courts of appeals and a number of district courts have either held or assumed that the deliberate indifference standard governs Title VI harassment claims in private damages actions. See *Bryant* v. *Independent Sch. Dist. No. I-38*, 334 F.3d 928, 931-934 (10th Cir. 2003) (holding that school districts can be liable under Title VI for their deliberate indifference to known acts of student-on-student racial harassment and that the Title IX standard governs such harassment claims); *Monteiro* v. *Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998); *Whitfield* v. *Notre Dame Middle Sch.*, No. 09-2649, 2011 WL 94735 (3d Cir. Jan. 12, 2011); *DT* v. *Somers Cent. Sch. Dist.*, 348 F. App'x 697, 699 (2d Cir. 2009); *Maislin* v. *Tennessee State Univ.*, 665 F. Supp. 2d 922, 928-930 (M.D. Tenn. 2009); *Cleveland* v. *Blount Cnty. Sch. Dist. 00050*, No. 3:05-

[4] The Supreme Court has applied this standard in private damages actions under Title IX, but has not held that proof of deliberate indifference is required for administrative enforcement or equitable claims under the statute. See *Davis*, 526 U.S. at 639 ("Here, however, we are asked to do more than define the scope of the behavior that Title IX proscribes. We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages."); see also *Gebser*, 524 U.S. at 283. After the *Gebser* and *Davis* decisions, the Department of Education issued guidance clarifying that "the *Gebser* decision did not change a school's obligations to take reasonable steps under Title IX and the regulations to prevent and eliminate sexual harassment as a condition of its receipt of Federal funding." *Revised Sexual Harassment Guidance: Sexual Harassment of Students by School Employees, Other Students, or Third Parties*, available at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#_ednref76 (notice at 66 Fed. Reg. 5,512 (Jan. 19, 2001)); see also 59 Fed. Reg. 11,448 (Mar. 10, 1994) (Title VI Guidance).

cv-380, 2008 WL 250403, at *10-11 (E.D. Tenn. Jan. 28, 2008); *Karlen* v. *Westport Bd. of Educ.*, No. 3:07-cv-209, 2010 WL 3925961, at *11 (D. Conn. Sept. 30, 2010); *Watson* v. *Jones Cnty. Sch. Dist.*, No. 2:07-cv-100, 2008 WL 4279602, at *11 (S.D. Miss. Sept. 11, 2008); *Barnett* v. *Johnson City Sch. Dist.*, No. 3:04-cv-0763, 2006 WL 3423872, at *4-5 (N.D.N.Y. Nov. 28, 2006).

These holdings follow from Congress's intent that Title VI and Title IX be interpreted consistently with one another. As the Supreme Court has explained, "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." *Fitzgerald* v. *Barnstable Sch. Comm.*, 129 S. Ct. 788, 797 (2009) (citation omitted). "Thus, the Court's analysis of what constitutes intentional sexual discrimination under Title IX directly informs [the] analysis of what constitutes intentional racial discrimination under Title VI (and vice versa)." *Bryant*, 334 F.3d at 936 (Tacha, C.J., concurring).

Moreover, this Court has recognized in other contexts that, in general, case law interpreting Title IX may also be applied to Title VI. For example, in *Johnson* v. *City of Saline*, 151 F.3d 564 (6th Cir. 1998), this Court concluded that the reasoning of *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), which held that compensatory damages were available in a sexual harassment case under Title IX, applied to Title VI claims. "Given that Title IX parallels Title VI

very closely, the reasoning of *Franklin* extends to Title VI." *Johnson*, 151 F.3d at 573; see also *Neighborhood Action Coal*. v. *City of Canton*, 882 F.2d 1012, 1015 (6th Cir. 1989) (Supreme Court's interpretation of Title IX as not imposing an administrative exhaustion requirement also applied to Title VI).

Defendants suggest in passing that the deliberate indifference standard is inconsistent with *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), which held that "Title VI itself directly reach[es] only instances of intentional discrimination," *id*. at 281 (citation omitted). Appellants' Br. 39-40. Contrary to defendants' suggestion, however, nothing in *Sandoval* precludes applying the deliberate indifference standard to Title VI harassment claims. Deliberate indifference *is* intentional discrimination in the harassment context, as the Supreme Court has recognized in construing Title IX – both before and after *Sandoval*. See *Davis*, 526 U.S. at 643 (holding that "deliberate indifference to known acts of [student-on-student] harassment" can "amount[] to an intentional violation of Title IX, capable of supporting a private damages action"); *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (explaining that Court had authorized "private suits for damages in cases of a recipient's deliberate indifference to one student's sexual harassment of another, because *the deliberate indifference constituted intentional discrimination* on the basis of sex") (emphasis added); accord *Vance*, 231 F.3d at 260.

Defendants (Appellants' Br. 40) point out that the deliberate indifference theory was rejected in *Lee* v. *Lenape Valley Regional Board of Education*, No. 06-CV-4634, 2009 WL 900174, at *5 (D.N.J. Mar. 31, 2009). But that unpublished district court decision does not reflect the law in this Circuit—and likely even misapplied the law of its own circuit. The district court in *Lee* relied on dictum in *Pryor* v. *NCAA*, 288 F.3d 548, 567-568 (3d Cir. 2002), which suggested that, in light of *Sandoval*, the "deliberate indifference" standard that the Supreme Court adopted in *Gebser* for Title IX sexual harassment claims cannot be applied in Title VI cases. But *Pryor* itself did not involve harassment claims, and its holding does not support defendants' position. *Bryant*, 334 F.3d at 932 (explaining that *Pryor* "provide[s] limited guidance" in the racial harassment context); *Maislin*, 665 F. Supp. 2d at 930 (explaining that the concerns underlying the *Pryor* holding do not apply to claims alleging racial harassment). The plaintiffs in *Pryor* argued that a facially neutral policy adopted by the NCAA had a disparate impact on African Americans and that the NCAA was liable under Title VI because the organization was deliberately indifferent to that racial impact. Here, by contrast, the underlying conduct to which the defendants were deliberately indifferent was not disparate impact, but rather racial harassment, which is itself a type of intentional discrimination. See *Jackson*, 544 U.S. at 174 ("[W]e have held that sexual harassment is intentional discrimination.").

Indeed, in a recent unpublished decision, the Third Circuit adopted the deliberate indifference standard in a Title VI student-on-student harassment case. *Whitfield*, 2011 WL 94735. The court stated that a private plaintiff "may sue a school for money damages [under Title VI] for its failure to address a racially hostile environment," and that such a claim allows a "plaintiff [to] recover for alleged 'severe, pervasive, and objectively offensive' student-on-student harassment if the school 'acts with deliberate indifference to known acts of harassment.'" *Id*. at *3 (quoting *Davis*, 526 U.S. at 633).

Finally, defendants' argument is inconsistent with their concession "that the Equal Protection clause prohibits intentional discrimination and that the intentional discrimination element can be met by showing 'deliberate indifference.'" Appellants' Br. 38. As explained more fully below, evidence establishing intentional discrimination under the Equal Protection Clause necessarily satisfies the intentional discrimination requirement under Title VI. See pp. 30-31, *infra*.

For these reasons, if this Court reaches the Title VI question, it should hold that the Title IX "deliberate indifference" standard should also apply to private damages actions under Title VI involving student-on-student racial harassment.

B. The Evidence Precludes Summary Judgment On The Title VI Claim

Under the deliberate indifference standard, a private plaintiff must prove three elements to establish a school district's liability for damages under Title VI for student-on-student racial harassment:

> (1) the [racial] harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school,
>
> (2) the funding recipient had actual knowledge of the [racial] harassment, and
>
> (3) the funding recipient was deliberately indifferent to the harassment.

Patterson v. *Hudson Area Schs.*, 551 F.3d 438, 444-445 (6th Cir. 2009) (applying test to Title IX claim). The district court properly recognized that this was the correct standard for analyzing the Title VI claim against the Board.

In denying summary judgment on the Title VI claim, the district court addressed only the "deliberate indifference" prong of the test because the court understood defendants not to be contesting the first two elements. See *Williams* v. *Port Huron Area Sch. Dist. Bd. of Educ.*, No. 06-14556, 2010 WL 1286306, at *8 (E.D. Mich. Mar. 30, 2010). Likewise, on appeal, defendants challenge the district court's holding on the "deliberate indifference" issue, but do not address the other two elements of a Title VI claim.

To be "deliberately indifferent," school officials' "response to the harassment or lack thereof" must be "clearly unreasonable in light of the known circumstances.'" *Patterson*, 551 F.3d at 446 (citation omitted). Title VI requires a school district promptly to "investigate" and take steps "reasonably calculated to end any harassment * * * and prevent harassment from occurring again." *Vance*, 231 F.3d at 261 n.5.[5] Taking some form of action does not immunize a school district from liability under the deliberate indifference standard. See *Patterson*, 551 F.3d at 448-449. For example, once a school system knows its actions are "inadequate and ineffective," it must take further "reasonable action in light of those circumstances to eliminate the behavior." *Vance*, 231 F.3d at 261; see also *id.* at 262. Consequently, "[w]here a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." *Id.* at 261.

Under a proper application of the deliberate indifference standard, plaintiffs' evidence was sufficient to avoid summary judgment on their Title VI claim against the Board. When viewed in the light most favorable to plaintiffs, the evidence

[5] See also 59 Fed. Reg. 11,450 (Mar. 10, 1994) (in enforcing Title VI, Department of Education assesses the "reasonableness, timeliness, and effectiveness" of the recipient's response to notice of a racially hostile environment).

creates a genuine issue of material fact as to whether the Board was deliberately indifferent to the racial harassment at PHNH. The record contains abundant evidence that, especially during the two-year period prior to Dahlke's hiring, the school district's response to racial harassment at PHNH was "clearly unreasonable in light of the known circumstances." *Patterson*, 551 F.3d at 446 (citation omitted).

Plaintiffs presented evidence that numerous incidents of racial harassment occurred in the 2003-2004 and 2004-2005 school years. See pp. 5-7, *supra*. Darcy Hayes overheard numerous uses of the "n" word and reported these incidents to then-Principal Wojtas between 15 and 20 times. In response to one of Hayes' complaints, Wojtas told him the racial slur was none of his business and that she could not do anything about the slur because she was not there to hear it. Hayes also complained to Assistant Principal Philpot, who also said that school officials could do nothing unless they themselves heard the racial slurs. Hayes' mother also complained numerous times to Wojtas and Philpot about the pervasive use of the "n" word, but Wojtas told her that she was unaware of the problem, and Philpot said there was not much to be done. Ms. Chapman complained several times without result to Assistant Principal Mossett about her sons' experience hearing the "n" word in the hallways. Tiara Long also suffered several racial incidents in the 2003-2004 school year. Someone wrote "die nigger" on her desk, and she found

racist writing in her book. A teacher reported these incidents to an assistant principal, but there is no indication that anything was done in response. A defendant's "failure to do anything about the ongoing harassment supports an inference of deliberate indifference." *Flores* v. *Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136 (9th Cir. 2003).

This evidence would allow a jury to find that, far from taking reasonable steps to eliminate the racial harassment, school administrators for the most part sat idly by and allowed it to fester. Although they quickly removed the racist graffiti on the rock in front of the school, there is no evidence that they took any meaningful action during this period to stop the other harassment. In light of this failure to act during the 2003-2005 time frame, a reasonable jury could infer from plaintiffs' evidence that the Board was deliberately indifferent to racial harassment.

A factfinder could also reasonably infer that this deliberate indifference during the 2003-2004 and 2004-2005 school years contributed to the intensifying racial harassment that African-American students suffered at PHNH during the 2005-2006 school year after Dahlke took over as principal. Among the more egregious examples of racial harassment during this time are: the text book containing racist writings and a "Hit List" placed in Philpot's office; the repeated and frequent use of the "n" words in PHNH's hallways; and the racist poster placed on Tiara Long's locker. See pp. 8, 11-12, *supra*. Philpot's email to Dahlke

also demonstrates the levels to which the racial harassment had risen and the recognition by an administration official of the harassment's extent and intensity. See pp. 8-9, *supra*. Although Principal Dahlke took some action to respond to the racial harassment at PHNH, a reasonable jury could conclude that, when considered in context, school officials' attempts to remedy the harassment during the 2005-2006 school year were too little, too late, given the evidence of racial harassment that appears to have progressed and escalated, essentially unchecked, over the course of the previous school years.

II

A STATE ACTOR'S DELIBERATE INDIFFERENCE TO STUDENT-ON-STUDENT RACIAL HARASSMENT IS INTENTIONAL DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE

The district court properly held that it "has long been established that deliberate indifference to harassment violates students' right to equal protection." *Williams* v. *Port Huron Area Sch. Dist. Bd. of Educ.*, No. 06-14556, 2010 WL 1286306, at *17 (E.D. Mich. Mar. 30, 2010). And defendants concede "that the Equal Protection clause prohibits intentional discrimination and that the intentional discrimination element can be met by showing 'deliberate indifference.'" Appellants' Br. 38. This Court should thus apply the deliberate indifference standard in analyzing plaintiffs' constitutional claims.

As the Second Circuit has correctly recognized, school districts can be held liable for race discrimination under the Equal Protection Clause if they respond with "deliberate indifference" to student-on-student racial harassment. *Gant* v. *Wallingford Bd. of Educ.*, 195 F.3d 134, 140 (2d Cir. 1999).[6] *Gant's* holding flows logically from the Supreme Court's conclusion that, where state actors are concerned, intentional discrimination that violates Title VI also constitutes intentional discrimination under the Equal Protection Clause. See *Gratz* v. *Bollinger*, 539 U.S. 244, 276 n.23 (2003); *United States* v. *Fordice*, 505 U.S. 717, 732 (1992). Consequently, because deliberate indifference to known acts of serious student-on-student racial harassment constitutes intentional discrimination under Title VI (see pp. 18-26, *supra*), it necessarily suffices to prove intentional racial discrimination in an equal protection claim.

Thus, when applying the deliberate indifference standard to the equal protection claims, this Court should consider whether defendants' "response to the harassment or lack thereof [was] clearly unreasonable in light of known circumstances." *Patterson* v. *Hudson Area Schs.*, 551 F.3d 438, 446 (6th Cir.

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[6] Other circuits have properly held that deliberate indifference to other forms of student-on-student harassment also violate the Equal Protection Clause. See *Murrell* v. *School Dist. No. 1*, 186 F.3d 1238, 1249-1251 (10th Cir. 1999) (sexual harassment); *Flores* v. *Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136 (9th Cir. 2003) (sexual orientation harassment); *Nabozny* v. *Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996) (same).

2009). In assessing whether their response was "clearly unreasonable," this Court should further consider whether the defendants had "knowledge that [their] remedial action [was] inadequate and ineffective" and, if so, whether they took further "reasonable action in light of those circumstances to eliminate the behavior." *Vance* v. *Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000).

CONCLUSION

If this Court exercises pendent jurisdiction over the Title VI claim, it should affirm the district court's denial of summary judgment on that claim. And if the Court addresses the Title VI issue, it should hold that deliberate indifference to known acts of serious student-on-student racial harassment violates Title VI. Finally, the Court should hold that the deliberate indifference standard applies to plaintiffs' constitutional claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d) and Sixth Circuit Rule. The brief was prepared using Microsoft Word 2007 and contains 6,988 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Conor B. Dugan
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Dated: March 9, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2011, I filed the foregoing Brief For The United States As Amicus Curiae Supporting Appellees And Urging Affirmance On The Issues Addressed Herein with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case will be served by the appellate CM/ECF system, except for the following participant, who will be served by first class, certified mail:

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ADDENDUM

DESIGNATION OF RELEVANT RECORD DOCUMENTS

DOCKET NUMBER	DOCUMENT DESCRIPTION
1	Plaintiffs' Complaint
39-4	Deposition of Craig Dahlke
40-2	Operation Notes
40-3	Email Correspondence
44-2	Deposition of Liz Guertin
49-2	Deposition of Patsy Chapman