

Fifth Circuit En-Banc Split Produces Dangerous Theories of Racialized Politics

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In November, the Fifth Circuit issued an equally divided en-banc ruling regarding whether a white student was discriminated against because of his race in violation of Title VI.¹ Title VI prevents discrimination based on race in publicly funded programs, but it says nothing about political views.² This case asked whether a white student (B.W.), who at times was harassed because of his race,³ but was largely bullied for his political opinions,⁴ could plausibly claim a violation of Title VI due to the school's deliberate indifference to prevent his bullying.⁵ The en-banc court affirmed the district court's dismissal as it was equally divided, but the opinions reveal a tense relationship between racial identity and political support.

Judge Richman's concurrence argues that because the main source of B.W.'s bullying was his political beliefs, that he could not sustain a Title VI suit for race discrimination.⁶ She does not deny that B.W. experienced race-based discrimination, but writes that by separating out the political and racial harassment incidents B.W. fails to meet the standard set out by *Davis* that the race-based harassment alone was "so severe, pervasive, and objectively offensive" as to undermine B.W.'s educational experience.⁷

¹ B.W. v. Austin Independent Sch. Dist., 2024 WL 4762729, --- F.4th ---- (5th Cir. Nov. 13, 2024).

² 42 U.S.C. § 2000d.

³ B.W., 2024 WL 4762729 at *8 (stating that after B.W. was assaulted, the assaulter "tells others that he beat B.W. because he 'was white.'").

⁴ *Id.* (stating that B.W. was ostracized for wearing a MAGA hat, and for being a Trump supporter).

⁵ B.W., 2024 WL 4762729 at *6 (separate opinion of Chief Judge Elrod, dissenting in the judgment).

⁶ *Id.* at *2 (Richman, J. concurring)

⁷ *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 631 (1999); *see also*, *Sewell v. Monroe Sch. Bd.*, 974 F.3d 577 (5th Cir. 2020) (recognizing Fifth Circuit jurisprudence on *Davis*).

On the other hand, Chief Judge Elrod, writing separately, argues that when other students compared B.W. to the KKK or a Nazi, that they engaged in race-based discrimination because these are white supremacist organizations.⁸ Chief Judge Elrod compares B.W.'s scenario to that of an Afghan child who is compared to the Taliban or Al-Qaeda. She then argues that when there is a race-based attack, and harassment of any nature continues, that it is reasonable to infer that the following harassment is race-based, even if it originates in political animus.⁹

Chief Judge Elrod's opinion is concerning for several reasons. To start, her comparison to an Afghan child does not survive scrutiny, as neither the Taliban¹⁰ nor Al-Qaeda¹¹ are supremacist organizations in the same manner that the KKK or the Nazis are.¹² Since these latter groups have tied their political ideology to race in a way that the Taliban or Al-Qaeda have not, comparing an Afghan child to non-race based groups like the Taliban or al-Qaeda should be considered race-based discrimination, whereas comparing a White child to the KKK or Nazis should not be. Additionally, Chief Judge Elrod equates the Make America Great Again (MAGA) ideology with those of the Nazis and KKK as all being race-based groups.¹³ This is relevant as even if her point regarding Nazis and KKK is taken to be race-based, rather than politically-based discrimination, it still may not rise to the *Davis* threshold for race-based discrimination. Since comparisons to Nazis and the KKK were relatively small parts of B.W.'s harassment,

⁸ B.W., 2024 WL 4762729 at *7 (separate opinion of Chief Judge Elrod, dissenting in the judgment). *See also*, Southern Poverty Law Center, *Ku Klux Klan*, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan> (identifying the KKK as a white-supremacist hate group).

⁹ B.W., 2024 WL4762729 at *5.

¹⁰ *See e.g.*, Gul Hassan Mohammadi, *The Plight of Hazaras under Taliban Government*, THE DIPLOMAT (Jan. 24, 2024), <https://thediplomat.com/2024/01/the-plight-of-hazaras-under-the-taliban-government/> (identifying that the Taliban is not a Afghan supremacist organization).

¹¹ *See e.g.*, Clayton Thomas, *Al Qaeda: Background, Current Status, and U.S. Policy*, CONG. RSCH. SERV. (May 6, 2024), <https://www.congress.gov/testimony/2024/05/06/488888> (identifying al-Qaeda as a transnational group, rather than a nationalist one).

¹² *See generally*, Caroline Mala Corbin, *Terrorists are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455 (2017) (exploring the connection between race and terrorism).

¹³ B.W., 2024 WL 4762729 at *4 (separate opinion of Chief Judge Elrod, dissenting in the judgment) (describing harassment regarding B.W.'s support for Ted Cruz and Donald Trump as race-based).

especially compared to the much larger body of bullying for B.W.'s support of MAGA, the harassment B.W. experienced was not based mostly in race.¹⁴ Only if Chief Judge Elrod's opinion inappropriately broadens the perspective of race into the world of politics, and concedes that the MAGA movement shares a central focus on race that is similar to other supremacist groups, can B.W.'s harassment be considered majority race-based.¹⁵ By refusing to focus on race discrimination, and only race discrimination, Chief Judge Elrod opens the door for future Title VI claims based on political ideology in the name of race.

Judge Ho then pushes even further, divorcing himself from the facts of the case to reach a conclusion which draws no distinction between race and politics. For instance, Judge Ho writes that "it's racist to characterize whites as racist" just because of their race, which while true, is not what happened in the case, as B.W. was called racist for his support of the MAGA ideology.¹⁶ He proceeds with a list of law professors allegedly teaching anti-white racism, which is unclear in how it connects to a Texas middle school.¹⁷ Judge Ho equates a one-to-one connection between race and political views, which goes even further than Chief Judge Elrod's view of race discrimination, opening the door for political harassment to be the sole support for a Title VI claim. Judge Ho's professed basis for this view are three earlier Fifth Circuit rulings, none of which discuss the relationship between race and politics.¹⁸

Both Chief Judge Elrod and Judge Ho's opinions seem to acknowledge that there is not enough race-only harassment to support a *Davis* claim but nonetheless establish one by equating

¹⁴ *Id.* at *8.

¹⁵ See, William H. Frey, *Research: Trump gained some minority voters, but the GOP is hardly a multiracial coalition*, BROOKINGS INST. (Nov. 12, 2024), <https://www.brookings.edu/articles/trump-gained-some-minority-voters-but-the-gop-is-hardly-a-multiracial-coalition/> (Identifying that 84% of Trump supporters are white).

¹⁶ B.W., 2024 WL 4762729 at *9 (Ho, J., dissenting).

¹⁷ *Id.* at *11 (Ho, J., dissenting).

¹⁸ See, *Wantou v. Wal-Mart Stores Texas, L.L.C.*, 23 F.4th 422 (5th Cir. 2022); *Price v. Valvoline, L.L.C.*, 88 F.4th 1062, (5th Cir. 2023); *Hamilton v. Dallas Cnty.*, 79 F.4th 494 (5th Cir. 2023).

harassment for B.W.'s politics with his race. Their theories risk linking race and politics in a manner which detracts an individual's qualities by overwriting them with skin color.¹⁹ This can have far-flung consequences, and it can neutralize free speech for fear of incidental race-based discrimination.²⁰ It has always been permissible in the United States to treat others differently for their political views and it has never been a federally protected classification.²¹ But by equating race and politics, Chief Judge Elrod and Judge Ho make such a classification possible, so long as the political views in question are neatly tied to race. This would create a one-way street, where political groups which focus on promoting the status of a single race are protected, but political groups which advocate for diversity, equity, and inclusivity are not protected.²²

Chief Judge Elrod and Judge Ho's theories legitimize the idea of highly racialized politics in the United States by equating MAGA with the Nazis and KKK.²³ This is dangerous for the court to do, as it lumps in incredibly complex ideas about race²⁴ with a multi-faceted political ideology²⁵ to produce a generalized assumption that must always be true for the court. While the equal split of the en banc Fifth Circuit in this case prevents these ideas from carrying the day, these approaches to race and politics fails to approach these issues with the nuance required and, if adopted as precedential in the future, could inappropriately bind lower courts

¹⁹ See, Martin Luther King Jr., *I Have a Dream Speech*, ("I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character").

²⁰ Liam H. McMillin, *Proving Racism: Gibson Bros, Inc. v. Oberlin College and the Implications on Defamation Law*, 90 CIN. L. REV. 1021 (2022) (arguing that calling someone "racist" must be constitutionally protected free speech).

²¹ Anne Carey, *Political Ideology as a Limited Protected Class under Federal Title VII Antidiscrimination Law*, 26 J. L. & Pol'y 637, 639.

²² See, e.g., Democrats, *Who We Are* ("Democrats are the party of inclusion") <https://democrats.org/who-we-are/who-we-serve/> (last visited Jan. 12, 2025).

²³ Andre M. Perry et al., *In victory or defeat, reckoning with the racial politics of the 2024 election will help the country move forward*, BROOKINGS INST. (Nov. 7, 2024) <https://www.brookings.edu/articles/in-victory-or-defeat-reckoning-with-the-racial-politics-of-the-2024-election-will-help-the-country-move-forward/>.

²⁴ See, Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (discussing the meaning of "race" in the context of Title VII).

²⁵ See, Republican National Convention, 2024 Republican Platform: Make America Great Again (detailing a 20-part political plan for the MAGA movement) <https://www.donaldjtrump.com/platform> (last visited Jan. 12, 2025).

when the facts tell a different story. The court must remain flexible in addressing these nuanced issues, and while race and politics can certainly align,²⁶ it should only recognize such alignments in small strokes, and avoid all-encompassing decrees that could destabilize the court's relationship with both race and politics.

²⁶ See, e.g. Andra Gillespie, *John Lewis and the Durability of Transcendent Race Politics*, 37 J. L. and Religion 55 (2022).