No. _____

In the

Supreme Court of the United States

STATE OF ARIZONA AND ARIZONA BOARD OF REGENTS,
Petitioners,

v.

MACKENZIE BROWN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States 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). In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), this Court recognized an implied private right of action under Title IX against educational institutions who show "deliberate indifference" to student-on-student harassment in their programs or activities. To succeed on such a claim, a plaintiff must show that the educational institution "exercises substantial control over *both* the harasser *and* the context in which the known harassment occurs." *Id.* at 645 (emphasis added). Under *Davis,* does a university's authority to discipline students for misconduct taking place off of the university campus constitute "substantial control" over the "context" in which the off-campus harassment occurs?

2. Under the party presentation principle, courts rely on the parties to frame the issues for decision and act as neutral arbiters of the issues the parties present. Did the Ninth Circuit abuse its discretion in deciding this case based on an argument expressly disclaimed by the appellant?

PARTIES TO THE PROCEEDING

The parties to the proceedings before the Ninth Circuit Court of Appeals were Mackenzie Brown, the State of Arizona, and the Arizona Board of Regents (dba the University of Arizona). The State of Arizona and the Arizona Board of Regents were defendants and appellees below and are the petitioners in this appeal. Ms. Brown was the plaintiff and appellant below and is the respondent to this petition.

There are no publicly held corporations involved in this proceeding.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Brown v. Arizona et al.*, No. 20-15568 (9th Cir.) (en banc opinion entered September 25, 2023; vacated three-judge panel decision entered January 25, 2022); and
- *Brown v. Arizona et al.*, No. CV-17-03536-PHX-GMS (order granting summary judgment filed March 11, 2020).

There are no other proceedings in state or federal trial or appellate courts directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

This case presents an opportunity for the Court to clarify the extent of Title IX liability for student-on-student harassment under its decision in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), specifically where student misconduct occurs off of school campus in settings over which the school has no control. The Ninth Circuit's decision in this case represents a significant departure from decisions of this Court and decisions in the Fourth, Sixth, Eighth, and Tenth Circuits. As Judge Nelson recognized in his dissent from the ruling under consideration, "[n]o other court has gone as far" as the Ninth Circuit did in this case in holding schools liable for student conduct that takes place off of school campus and outside of school-sponsored programs and activities. App. 70.

This case presents an exceptionally important issue for schools across the nation who must navigate and assess their duties and liability exposure under Title IX on a daily basis. The Court should intervene to provide needed clarity on this important issue.

OPINIONS BELOW

The published en banc opinion of the United States Court of Appeals for the Ninth Circuit, reproduced at App. 1–102, is available at 82 F.4th 863 (9th Cir. 2023) (en banc). The vacated three-judge panel opinion of the United States Court of Appeals for the Ninth Circuit, reproduced at App. 103–51, is available at 23 F.4th 1173 (9th Cir. 2022). The order of the United States District Court for the District of Arizona granting Petitioners' motion for summary

judgment, reproduced at App. 152–61, is available at 2020 WL 1170838.

JURISDICTION

The Ninth Circuit issued its en banc opinion on September 25, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Brown brought the underlying action pursuant to Title IX of the Education Amendments of 1972, which states in relevant part:

> No person in the United States 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).

STATEMENT OF THE CASE

A. Legal Background

In *Davis*, this Court considered whether Title IX provides a private right of action for students to sue an educational institution when they are subjected to harassment by other students. *See* 526 U.S. 629. *Davis* recognized a private right of action for student-on-student harassment under Title IX in "limited circumstances." *Id.* at 643. The contours of those limited circumstances stem from the text of Title IX itself, which prohibits discrimination "*under any education program or activity* receiving Federal

financial assistance." 20 U.S.C. § 1681(a) (emphasis added). Consistent with the text of Title IX, the private right of action recognized in *Davis* is limited to instances "where the funding recipient acts with deliberate indifference to known acts of harassment *in its programs or activities*." *Davis*, 526 U.S. at 633 (emphasis added).

To ensure that recipients of federal funding are subject to Title IX liability only for known acts of harassment in their "programs or activities," *Davis* limited Title IX liability to "circumstances wherein the recipient exercises substantial control over *both* the harasser *and* the context in which the known harassment occurs." *Id.* at 645 (emphasis added). This two-prong test has become a staple part of Title IX litigation involving student-on-student harassment.

The plaintiff in *Davis* was the parent of a fifth-grade student who was subjected to repeated sexual harassment by a classmate. *Id.* at 633–34, 653. The harassment occurred during school hours and on school grounds. *Id.* at 633–34, 646. The Court concluded that, under those circumstances, the school retained control over both the harasser and the context in which the harassment occurred such that it could be subject to liability under Title IX if shown to have responded to the harassment with deliberate indifference:

> Where, as here, the misconduct occurs during school hours and on school grounds—the bulk of [the harasser's] misconduct, in fact, took place in the classroom—the misconduct is taking

> place "under" an "operation" of the funding recipient. In these circumstances, the recipient retains substantial control over the context in which the harassment occurs. More importantly, however, in this setting the Board exercises significant control over the harasser.

Id. at 646 (citation omitted).

The Court in *Davis* did not have occasion to flesh out the contours of what it means for a funding recipient to have control of the "context" in which harassment occurs, nor did it address whether and under what circumstances a school may exercise "substantial control" over off-campus environments such that there is a sufficient tie to the school's programs or activities. *See* 20 U.S.C. § 1681(a). Since deciding *Davis*, this Court has not further addressed what it means for a school to exercise substantial control over the "context" in which harassment occurs.

B. Factual Background

1. Mackenzie Brown enrolled as a freshman at the University of Arizona in the fall of 2015. In approximately February 2016, Brown began dating Orlando Bradford, who was also a freshman and a member of the University's football team. App. 152.

Brown's relationship with Bradford became violent during the summer of 2016. App. 17, 152–53. In August 2016, Bradford sent Brown threatening text messages while she was out of town. Brown showed the threatening messages to her mother, who subsequently warned Bradford to stay away from

Brown. Neither Brown nor her mother reported the threats to the University or to the police. Shortly thereafter, Bradford and Brown were arguing when Bradford hit her, giving her a black eye. App. 153. That same month, Bradford became angry upon seeing another man's name in Brown's cell phone while they were together at a Goodyear Tire store. He grabbed Brown's arm and dug in his nails, leaving a wound. Brown did not report either of these assaults to the University, the police, or anyone else. App. 153

Bradford's abuse escalated in the fall of 2016. App. 153–54. On September 12, 2016, Brown went to Bradford's off-campus house after work. After an argument about whether Brown had scratched Bradford's car, Bradford refused to let Brown leave and assaulted her repeatedly. App. 153. Bradford took Brown home the next morning, and Brown returned to Bradford's house after work. Bradford became angry over Brown's refusal to drink a milkshake he bought her, and he again assaulted Brown repeatedly over the course of the evening. App. 19–20, 153–54.

The University became aware of Bradford's assaults on Brown on September 14, 2016, after Brown informed her mother, who called the University athletic director. App. 20–21, 154. Brown's mother also called the police, who arrested Bradford later that day. App. 21, 154 n.1. The University suspended Bradford on the day of his arrest and then expelled him on October 14, 2016, pursuant to the University's disciplinary process. App. 21. Bradford ultimately pleaded guilty to two counts of felony aggravated assault and domestic

violence and was sentenced to five years in prison. App. 21–22, 154.

2. Brown was not Bradford's first victim. Prior to his abuse of Brown, Bradford had physically abused two other female students with whom he had a relationship. App. 10–12, 154. One of those students, whose name has been withheld for privacy, was referred to as "Student A" in the proceedings below. Student A is not a party to this litigation. The other student was Lida DeGroote, who separately sued the University. DeGroote's case subsequently settled, and DeGroote is also not a party to this litigation. App. 22. Though Student A and DeGroote are not parties to this case, Bradford's conduct towards these women formed part of the basis for Brown's claims against the University. App. 154. Accordingly, background related to Student A and DeGroote is briefly recounted here.

In September 2015, four students observed Bradford and Student A physically fighting in a dormitory study room. App. 10, 154–55 n.3. They alerted the resident advisor ("RA"), who spoke with Bradford and Student A about the fighting. App. 10. Bradford and Student A told the RA that they were "just joking." The RA contacted the on-call University Community Director, who instructed the RA not to call the police. The Community Director later met with Bradford and Student A about the incident. Bradford and Student A again told the Community Director that they were joking and assured him they would not engage in that type of conduct again. App. 10–11.

Student A was a member of the University's softball team. App. 10, 154–55 n.3. In January 2016,

her softball coach contacted Erika Barnes, the University's Title IX liaison for the Athletics Department, after Student A's parents contacted him with concerns about her relationship with Bradford. App. 11, 154–55 n.3. The Title IX liaison arranged for Student A to meet with the school psychologist. App. 11–12. At that time, Bradford and Student A were believed to no longer be dating. App. 11–12.

In March 2016, two of Student A's teammates spoke with the head softball coach after seeing Student A with a black eye and finger marks on her neck. App. 12. An assistant coach also saw the black eye and overheard a conversation among players suggesting that Student A's boyfriend may be responsible. When he asked Student A what happened, she told him that she had been hit by a door. The assistant coach contacted Barnes, who met with two of Student A's teammates the next day. The teammates told Barnes that Bradford had previously abused and threatened Student A. They also told her that they had heard that Bradford was hitting DeGroote, whom he was also dating. App. 12–13.

Barnes met with Student A the day after she met with her teammates. App. 13. Student A again reported that her black eye was the result of hitting a door. Barnes accompanied Student A to meet with Susan Wilson, a Senior Title IX Investigator employed by the University. Together, they discussed options for filing a complaint against Bradford should Student A decide to do so. App. 13–14. Student A also indicated during the meeting that she thought Bradford might be living with a student named Lida, whom Wilson thought might be DeGroote. App. 14.

Wilson reported Student A's comment about DeGroote to Associate Dean of Students Chrissy Lieberman, who was meeting with DeGroote regarding academic matters. App. 14–15.

In April 2016, Bradford arrived at Student A's dormitory room intoxicated. App. 15. He banged on her door for nearly two hours, but Student A refused to let him in. Bradford left around 1:30 a.m. The next day, Student A's softball coach contacted Barnes about the incident. Barnes contacted Student A and, at Student A's request, also contacted the University Police Department. Barnes and Student A met with a University police officer and told him about the door-banging incident and Bradford's prior assaults. Student A told them that she wanted a protective order. The next day, the University issued a no-contact order to Bradford prohibiting him from having any contact with Student A. App. 15–16. Bradford was reassigned to another dormitory for the remainder of his freshman year. App. 16.

In May 2016, DeGroote's mother spoke on the phone with Lieberman about DeGroote's academic matters. App. 17. DeGroote's mother mentioned a concern about DeGroote's safety, but did not elaborate or mention Bradford by name. DeGroote's mother reported that Lieberman did not respond to her statement about her daughter's safety. App. 17. When Bradford was later arrested for his abuse of Brown, DeGroote's mother left an anonymous tip with the Tucson Police Department that Bradford had been abusing DeGroote. App. 21.

Bradford was criminally charged both for his assaults on Brown and his assaults on DeGroote. As

indicated, Bradford pleaded guilty and was sentenced to five years in prison. App. 21–22.

C. Procedural History

1. Brown sued the State of Arizona and the Arizona Board of Regents (dba the University of Arizona) in state court alleging a violation of Title IX, intentional infliction of emotional distress, and negligence. App. 155. For convenience, Defendants are collectively referred to herein as "the University." The case was removed to the United States District Court for the District of Arizona. Brown's claims for intentional infliction of emotional distress and negligence were dismissed pursuant to a stipulated motion, leaving only the Title IX claim. App. 155.

The premise of Brown's Title IX claim was that the University was deliberately indifferent to Bradford's prior violence towards Student A and DeGroote. App. 154. Brown did "not fault the University for its response to her own attack, which led immediately to Bradford's arrest." C.A. Doc. 8, at 3 (July 10, 2020) (Appellant's Opening Br.). Rather, Bradford's attack on Brown was "alleged to be an *effect* of the University's" failure to respond to Bradford's violence, "not an event that itself triggered the University's Title IX obligations." *Id.*

2. The University moved for summary judgment on Brown's Title IX claim, which the district court granted. App. 152. The district court held that while the University had control over Bradford because he was subject to the University's Code of Conduct and other regulations, Brown had failed to demonstrate that the University controlled the off-

campus context in which Bradford's abuse of Brown occurred. App. 157–60. The University could not, therefore, be held liable under Title IX, which, under *Davis*, imposes liability for student-on-student harassment only where the educational institution has substantial control over both the harasser and the context in which the harassment took place. *Id.* Brown appealed the district court's ruling.

3. On appeal, Brown made one—and only one—argument for reversal. Brown argued that she did not have to show that the University exercised control over the context in which *she* was assaulted (Bradford's off-campus residence), only that the University controlled the context in which it earlier failed to act (i.e., Bradford's assaults on Student A and DeGroote). App. 116. All three members of the Ninth Circuit panel that initially heard Brown's appeal rejected this argument, concluding that Brown needed to show that the University controlled the off-campus setting in which she was assaulted. App. 116–19 (opinion), 147 (Fletcher, J., dissenting). In a split decision, the panel affirmed the district court's conclusion that the University had no control over Bradford's off-campus house. App. 104–06.

Judge Fletcher dissented. App. 125. Though he disagreed with Brown's argument that she did not have to show the University had control over Bradford's off-campus house, he would have held that the University exercised control over Bradford's house because the University retained disciplinary authority over Bradford for his assaults on Brown. App. 147. According to Judge Fletcher, the "key consideration" in determining whether an educational institution

controls the context in which harassment occurs "is whether the school has disciplinary authority over the harasser in the setting in which the harassment takes place." App. 142.

4. Brown petitioned for en banc rehearing espousing the argument set forth in Judge Fletcher's dissent. While the petition was pending, the Ninth Circuit invited the U.S. Department of Education to submit an amicus curiae brief "setting forth its views on the control-over-context requirement" and whether Brown's case should be reheard en banc. C.A. Doc. 51 (June 9, 2022). In response, the United States filed an amicus brief in support of rehearing. C.A. Doc. 58 (Aug. 8, 2022). The court granted rehearing, permitted supplemental briefing, and reversed the district court's grant of summary judgment in a divided opinion. *See Brown v. Arizona*, 56 F.4th 1169 (9th Cir. 2023) (en banc); C.A. Doc. 83 (Jan. 6, 2023) (order granting supplemental briefing); C.A. Doc. 88 (Jan. 31, 2023) (Appellant's Supp. Brief).

Writing for the majority, Judge Fletcher again concluded that while *Davis* did not define context, what matters is whether the school has disciplinary authority over the harasser in the context of the alleged harassment:

> [W]hile the physical location of the harassment can be an important indicator of the school's control over the "context" of the alleged harassment, a key consideration is whether the school has *some form of disciplinary authority* over the harasser in the setting in which the harassment takes place. That setting

> could be a school playground. But, depending on the circumstances, it could equally well be an off-campus field trip, an off-campus research project in a laboratory not owned by the school, or an off-campus residence.

App. 30 (emphasis added) (internal citation and quotation omitted). Applying this standard to the facts of the case, the majority reasoned that the University exercised substantial control over Bradford's off-campus house because (1) as a football player, Bradford needed the permission of his football coaches to live off campus; (2) Bradford was subject to the University's Code of Conduct, which encompasses student conduct both on campus and off campus; (3) Bradford was subject to "heightened supervision" under the Player Rules specific to football players; and (4) the University's football coach had a zero-tolerance policy for violence against women, which would lead to immediate dismissal from the football team. App. 34–36.

Three members of the en banc panel (Judges Rawlinson, Nelson, and Lee) dissented. Judge Rawlinson noted that the majority's "disciplinary authority" standard effectively collapses *Davis*'s two-prong control test into a single prong, with control over the harasser being the only requirement. App. 59. Each of the facts that the majority relied upon to show control over Bradford's off-campus house "are all indicia of control over Bradford, the harasser, rather than indicia of control over the off-campus context in which the assault occurred." App. 57. This matters, Judge Rawlinson explained, because "the majority's

approach would sever the pivotal tether to *programs and activities* of the educational institution that is at the core of Title IX." App. 58 (emphasis added).

Writing separately, Judge Nelson agreed that the majority's "disciplinary authority" standard is irreconcilable with *Davis*'s instruction that schools are subject to Title IX liability for student-on-student harassment only when the school has control over *both* the harasser *and* the context of the harassment. App. 70–71. He further noted that "[n]o other court has gone as far as the majority does" in broadly defining the circumstances in which schools exercise control over off-campus harassment. App. 70.

All three dissenters agreed that the University lacked control over Bradford's off-campus house, a private residence unaffiliated with the University and not part of any school-sponsored program or activity. App. 57–58, 68–69, 88, 95. Accordingly, each would have affirmed the district court's grant of summary judgment in the University's favor. The dissenters also noted that Brown had disclaimed the legal theory upon which the majority decision relied. App. 55–56, 70–82, 76.

This petition followed.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's "disciplinary authority" test is irreconcilable with *Davis*'s clear instruction that Title IX liability for student-on-student harassment is limited to circumstances where a school "exercises substantial control over *both* the harasser *and* the context in which the known harassment occurs." *Davis*, 526 U.S. at 645 (emphasis added). *Davis*'s two-prong test is tied directly to the statutory language prohibiting "discrimination under any *education program or activity* receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). The Ninth Circuit's analysis makes schools liable under Title IX for harassment between students regardless of whether such harassment has any tie to an education program or activity, in direct contradiction to the statute and this Court's decision in *Davis*. It also conflicts with decisions of the Fourth, Sixth, Eighth, and Tenth Circuits.

Further, the Ninth Circuit's decision violates the party presentation rule. During proceedings before the district court and the three-judge panel of the Ninth Circuit, Brown never asserted that the University exercised substantial control over Bradford's off-campus house. The en banc panel erred in relying on an argument Brown disclaimed.

The extent of an educational institution's liability under Title IX for conduct occurring off of its campus is an important issue that requires prompt attention from this Court. This Court should intervene and reverse the Ninth Circuit's decision.

I. THE NINTH CIRCUIT'S "DISCIPLINARY AUTHORITY" STANDARD IS IRRECONCILABLE WITH *DAVIS*.

1. *Davis* limited private rights of action for student-on-student harassment under Title IX to "circumstances wherein the recipient exercises substantial control over *both* the harasser *and* the context in which the known harassment occurs." *Davis*, 526 U.S. at 645 (emphasis added). *Davis* tied this two-prong limitation to the "plain language" of Title IX, which prohibits discrimination in "any education program or activity" receiving federal financial assistance. *Id.* at 644–45; 20 U.S.C. § 1681(a). Referring to the "context" prong in particular, the Court emphasized that "because the harassment must occur 'under' 'the operations of' a funding recipient, the harassment must take place in a context subject to the school district's control." *Davis*, 526 U.S. at 645 (internal citations omitted). "Only then can the recipient be said to 'expose' its students to harassment or 'cause' them to undergo it 'under' the recipient's programs." *Id.*

The Ninth Circuit's decision upends *Davis*'s two-prong control test, holding that schools exercise substantial control over "context" when they have "some form of disciplinary authority over the harasser in the setting in which the harassment takes place." App. 28. This circular reasoning cannot be squared with *Davis*, which plainly treated control over the harasser and control over the context of the harassment as separate prerequisites to Title IX liability. *Davis*, 526 U.S. at 645–46. Treating disciplinary authority over the harasser as control

over the context of harassment effectively collapses the two prongs into one. As the dissenting opinions correctly recognized, the Ninth Circuit's decision is a "sharp and troubling departure from the two-pronged analysis articulated in *Davis*," App. 59 (Rawlinson, J., dissenting), which leaves a "single disciplinary-control requirement" that is "irreconcilable with the Supreme Court's instruction in *Davis* that a school must have control over both the harasser and the context of the harassment," App. 71 (Nelson, J., dissenting).

Not only does the Ninth Circuit's decision collapse *Davis*'s two-prong test, it disregards *Davis*'s holding that Title IX liability for student-on-student harassment is limited to circumstances where a school exercises "*substantial* control" over the harasser and the context of the harassment. *Davis*, 526 U.S. at 645 (emphasis added). The Ninth Circuit's opinion would find control over context where there is "some form" of disciplinary authority over the harasser in that context. App. 28. "Some form" of disciplinary authority is not "substantial control." The Ninth Circuit's decision thus broadens the scope of Title IX liability for student-on-student harassment, in clear contradiction of *Davis*.

The Ninth Circuit's new "disciplinary authority" test is "unmoored from Title IX's targeted directive of prohibiting discrimination in education programs and activities." App. 71 (Nelson, J., dissenting). *Davis*'s control-over-context requirement was designed to limit Title IX liability to circumstances where schools act with deliberate indifference to harassment occurring within their "programs or activities," such that the school can be

directly responsible for it. *Davis*, 526 U.S. at 633, 644–45; 20 U.S.C. § 1681(a). Under the Ninth Circuit's decision, however, schools are subject to liability for misconduct taking place in settings far removed from their programs and activities so long as they retain "some form of disciplinary authority" over students in that setting. App. 28. Schools—and universities in particular—generally retain broad discretion to discipline students for misconduct occurring on or off campus. App. 70 (Nelson, J., dissenting). As a result, the Ninth Circuit's "disciplinary authority" test subjects schools to potential liability wherever their students may be, whether on campus, out with friends at a restaurant, at home during summer break, or away on vacation. This broad exposure to liability is irreconcilable with Title IX's focus on discrimination occurring within the "programs and activities" of schools receiving federal financial aid.

2. The Ninth Circuit found that the University exercised substantial control over Bradford's off-campus house because (1) Bradford was allowed to live off of campus only with permission of his football coaches; (2) Bradford was subject to the University's Code of Conduct, which applies to students both on campus and off campus; (3) Bradford was also subject to the Player Rules specific to football players; and (4) the University's football coach had a zero-tolerance policy for violence against women, which would lead to immediate dismissal from the football team. App. 34–37. Each of these considerations relates to the University's control over Bradford, not to his off-campus house. As Judge Rawlinson correctly stated: "[T]he problem with reliance on these facts is that they are all indicia of control over Bradford, the harasser,

rather than indicia of control over the off-campus context in which the assault occurred." App. 57. Control over whether Bradford could live off campus does not equate to control over his off-campus house. App. 57. The University's authority to punish Bradford for misconduct taking place off campus or to kick him off of the football team does not vest the University with control over off-campus settings, nor does it make those off-campus settings part of the University's operations, programs, or activities.

3. The following examples described by the dissenting opinions demonstrate the overreach of the Ninth Circuit's decision:

> **Example Number One:** A fellow student and football player at the University of Arizona lives at home with his parents while attending the University and playing on the football team. That player would be subject to the same University Student Code of Conduct and Player Rules referenced by the majority. Under the majority's analysis, the University would be deemed to have control over the parent's residence, and an assault occurring in that home would be considered committed "under an[ ] education program or activity" of the University.
>
> **Example Number Two:** A fifth-grader (same age as the harasser in *Davis*) is subject to a student code of conduct that prohibits harassment of other students. At a birthday party at her home over the

> weekend, the student engages in behavior that violates the code of conduct, and subjects her to discipline by the school. Under the majority's analysis, because of its ability to discipline the student for violation of the code of conduct, the school controlled the context of the birthday party held at the student's home.

App. 58–59.

A third example arises from the record in this case. Bradford physically abused Brown while at a Goodyear Tire store after he became upset over seeing another man's name in Brown's phone. App. 153. The University's disciplinary authority over Bradford applied to conduct in the Goodyear Tire store just as it did to conduct in his off-campus house. Under the University's Code of Conduct and football Player Rules, Bradford could have been expelled or kicked off of the football team for domestic violence no matter where it occurred.

Applying the Ninth Circuit's decision to this scenario, the University would have control over the context of the abuse in the Goodyear Tire store because the University had "some form of disciplinary authority" over Bradford in this setting. As Judge Nelson correctly observed in his dissent, that outcome "bears no resemblance" to this Court's teaching that "because the harassment must occur 'under' 'the operations of' a funding recipient . . . the harassment must take place in a context subject to the school district's control,' thereby 'denying the victim equal access to an educational program or activity.'" App.

91. The same is true for the two prior examples. The "disciplinary authority" standard adopted by the Ninth Circuit is simply divorced from the plain text of Title IX and this Court's decision in *Davis*, expanding Title IX liability well beyond what Congress and *Davis* envisioned.

4. The cases the Ninth Circuit majority cited as support for its "disciplinary authority" test do not support its holding. Rather, they demonstrate that courts have found that schools exercise control over the context of off-campus harassment when the harassment takes place in a setting associated with the school's programs or activities. *See Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007) (holding that a university had control over the context of a sexual assault that occurred at a private apartment during a university-sponsored recruiting event designed to show recruits a "good time"); *Feminist Majority Found. v. Hurley*, 911 F.3d 674 (4th Cir. 2018) (holding that a university exercised control over the context of harassing social media posts when the harassment "actually transpired on campus," including use of the university's wireless network); *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154 (D. Kan. 2017) (holding that a university controlled the context of an assault at a university fraternity house subject to university oversight), *aff'd sub nom. Farmer v. Kan. State Univ.*, 918 F.3d 1094 (10th Cir. 2019); *Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008 (E.D. Cal. 2009) (holding that a school exercised control over a high school football camp sponsored by the school and subject to its supervision).

In this case, there is "no similar indicia that the University controlled the context of Bradford's abuse of Brown." App. 88 (Nelson, J., dissenting). Brown was assaulted in Bradford's off-campus house. Bradford's house was not owned by or affiliated with the University, and Bradford's attack did not occur in connection with any University function, program, or activity. "Stated differently, the facts of this case lack any tether to a program or activity of the University, as contemplated by Title IX." App. 69 (Rawlinson, J., dissenting). This Court should grant this petition and reverse the Ninth Circuit's holding to the contrary.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE FOURTH, SIXTH, EIGHTH, AND TENTH CIRCUITS.

The Ninth Circuit's en banc majority held that a university has control over the context in which harassment occurs when it "has some form of disciplinary authority over the harasser in the setting in which the harassment takes place." App. 28. Judge Nelson's dissent correctly states that "[n]o other court has gone as far as the majority does." App. 70. In fact, the Eighth and Tenth Circuits have *rejected* the argument that authority to discipline a harasser for off-campus misconduct subjects schools to Title IX liability for that misconduct. The Ninth Circuit's decision is also inconsistent with decisions of the Fourth and Sixth Circuits. The Ninth Circuit en banc decision has created a circuit split that warrants this Court's review.

A. The Eighth and Tenth Circuits Have Rejected the "Disciplinary Authority" Test Adopted by the Ninth Circuit.

1. In *Roe v. St. Louis University*, 746 F.3d 874 (8th Cir. 2014), the Eighth Circuit determined that a university could not be held liable in a Title IX damages action for a rape that occurred during a party at an off-campus apartment. The plaintiff and an amicus argued that even though the rape took place off campus, the university still had control over the context of the rape because it had "control over its students and fraternities" for certain off-campus behavior and "disciplinary control over the rapist," who was also a student. *Id.* at 884. The Eight Circuit rejected this argument:

> *The Supreme Court has made it clear, however, that to be liable for deliberate indifference under Title IX, a University must have had control over the situation in which the harassment or rape occurs.* On the facts of this case there was no evidence that the University had control over the student conduct at the off campus party.

Id. (emphasis added) (internal citations omitted); *accord Ostrander v. Duggan*, 341 F.3d 745, 750–51 (8th Cir. 2003) (finding no Title IX liability for an assault in an off-campus residence leased to members of a fraternity where the university "did not own, possess, or control" the residence).

The Eighth Circuit's rejection of the plaintiff's "disciplinary control" argument is directly at odds with the Ninth Circuit's en banc opinion, which held that a "key consideration" in determining whether a university controls the context in which harassment takes place is "whether the school has some form of disciplinary authority over the harasser in the setting in which the harassment takes place." App. 28. Moreover, the Eighth Circuit was clear that the question was not whether the university could punish the student for off-campus misconduct, but whether the university had control over the *setting in which the misconduct took place*. *Roe*, 746 F.3d at 884. That holding is directly contrary to the Ninth Circuit's ruling.

2. Similarly, in *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114 (10th Cir. 2008), the Tenth Circuit declined to impose Title IX liability on a high school for misconduct occurring off the high school's campus. It did so over a dissenting opinion noting that the high school had authority to discipline its students even for off-campus conduct. *See id.* at 1129–30 (McConnell, J., concurring in part and dissenting in part). Citing *Davis*'s requirement that harassment creating Title IX liability must occur under the "operations" of a funding recipient, the majority found the school's authority to discipline students for off-campus conduct irrelevant to whether the school had control over the context of that harassment. *Id.* at 1121 (majority opinion). It further explained:

> We do not suggest that harassment occurring off school grounds cannot as a

> matter of law create liability under Title IX. *Davis* suggests that there must be some nexus between the out-of-school conduct and the school. We do not find a sufficient nexus here, where the only link to the school was an oblique and general reference to harassment or teasing on the school bus or in the halls at school. Moreover, the fact that the boys threatened to post pictures of [plaintiff] at school does not cause the harassment to "take place in a context subject to the school district's control" either. The district's decision to refer the investigation of the harassment to law enforcement officials where the harassment occurred off school grounds and often while the students were not enrolled in school was not clearly unreasonable under the facts of this case.

Id. at 1121 n.1 (internal citations omitted).

The Tenth Circuit's decision in *Rost* conflicts with the Ninth Circuit's en banc decision in two significant ways. First, the Tenth Circuit rejected the idea that authority to discipline students for off-campus conduct amounts to control over that off-campus conduct, which the Ninth Circuit determined to be a "key consideration." *Id.* at 1121. Second, the Tenth Circuit correctly recognized that Title IX liability exists only where student-on-student harassment occurs within the "operations" of a school's programs and activities. *Id.* This requires a "nexus" or connection between the out-of-school

conduct and the school's programs or activities, not just disciplinary authority over students. *Id.* at 1121 n.1.[1]

B. The Ninth Circuit's Decision Is Also Inconsistent with Decisions from the Fourth and Sixth Circuits.

1. The Ninth Circuit cited the Fourth Circuit's decision in *Feminist Majority Foundation v. Hurley*, 911 F.3d 674 (4th Cir. 2018), as support for its "disciplinary authority" test. App. 30. That case does not support the Ninth Circuit's ruling. In fact, it contradicts it.

The issue in *Feminist Majority* was whether a university could be liable under Title IX for harassment taking place in cyberspace on a social media platform called Yik Yak. 911 F.3d at 687–89. A divided panel of the Fourth Circuit determined that it could. *Id.* at 687–89, 694. The majority first

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[1] The Ninth Circuit's en banc majority cited the Tenth Circuit's decision in *Simpson v. University of Colorado Boulder*, 500 F.3d 1170 (10th Cir. 2007). *Simpson* does not support the majority's holding that disciplinary authority over a harasser for off-campus conduct equates to control over the off-campus setting where the harassment occurred. As Judge Rawlinson and Judge Nelson correctly noted in their dissenting opinions, the harassment at issue in *Simpson*, though taking place off campus, occurred during a university-sanctioned recruiting program designed to show recruits a "good time." *See Simpson*, 500 F.3d at 1179–80; App. 59–61 (Rawlinson, J., dissenting), 85 (Nelson, J., dissenting). *Simpson* is consistent with the Tenth Circuit's holding in *Rost* that Title IX liability extends to off-campus harassment only where there is a nexus between the off-campus conduct and the school's programs and activities. *Rost*, 511 F.3d at 1121 n.1. It does not support the Ninth Circuit's "disciplinary authority" test.

addressed whether the university controlled the context of the harassment. *Id.* at 687–88. Though the harassing messages were transmitted via cyberspace, they originated on or in the immediate vicinity of the university campus, often using the university's wireless network. *Id.* The university had the ability to disable access to Yik Yak on its campus, identify students using the university's network to send harassing messages, or otherwise control activities occurring on its network. *Id.* Under these facts, the majority concluded that the university exercised substantial control over the context in which the harassment took place.

The Fourth Circuit majority then separately addressed whether the university had control over the harassers. *Id.* at 688. Only as part of this separate analysis did the court consider the university's disciplinary authority over the students carrying out the harassment. *Id.* ("The substantial control analysis also requires us to consider the educational institution's control over the harasser, especially its 'disciplinary authority.'"). The majority reasoned that the university's authority "to punish those students who posted sexually harassing and threatening messages online" demonstrated that the university exercised sufficient control over those students such that the university could be subject to liability under Title IX. *Id.*

The Fourth Circuit's opinion clearly distinguished control over harassers and control over context as two distinct prerequisites to Title IX liability, and it treated the university's authority to discipline students for misconduct as relevant to the

former, not the latter. The Fourth Circuit's decision is inconsistent with the Ninth Circuit's decision collapsing those requirements into one.[2]

2. In *Foster v. Board of Regents of University of Michigan*, 982 F.3d 960 (6th Cir. 2020), the Sixth Circuit addressed harassment that took place during an off-site graduate program. The harassment occurred both in and out of the classroom. *Id.* at 970. The Sixth Circuit distinguished settings in which the university had no control over the misconduct, including Facebook comments and emails, with settings the university "could and did control," such as classes, university-sponsored social events, and school ceremonies. *Id.* The court elaborated:

> Universities differ from grade schools when it comes to the control they have over students. That's all the more true for off-site graduate programs conducted at a hotel, over 2,000 miles from a campus, for mid-career executives with an average age of 40. Much of the

[2] *Feminist Majority* is also notable for its dissent, which concluded that the university lacked sufficient control over the harassment on Yik Yak because "the University's ability to control its own wireless network says nothing about the University's ability to control the harassment on Yik Yak, a third-party app." 911 F.3d at 719 (Agee, J., dissenting in part and concurring in part). Before finding that a university had substantial control over an off-campus environment, the dissent would require "proof that the school exercised dominion over the environment in which the alleged harassment occurred." *Id.* at 714. The Ninth Circuit's "disciplinary authority" test is thus inconsistent with the tests outlined by both the majority and the dissent in *Feminist Majority*.

> misconduct in this case did not even occur in the classroom but in inappropriate comments on Facebook, over which the University has no control. Even when the harasser sent inappropriate emails to classmates, spilling the details of a self-described affair, the University could not restrain his ability to use external email addresses he already had. It could and did control the harasser's physical presence at classes, social events, ceremonies, and the like. And it could and did punish the harasser when he deployed these means of communication in hurtful ways. All of this does not mean Title IX fails to protect forty-year-old "free adults" learning in an off-site graduate school; it just means the deliberate-indifference inquiry operates differently than it does for elementary-age "schoolchildren" over whom grade schools possess a unique degree of "supervision and control."

Id.; *accord Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 366 (6th Cir. 2012) (affirming the district court's holding that "[w]hen conduct occurs at a school in another district or off school grounds entirely, the school district has control over neither the harasser, nor the context").

The Sixth Circuit's focus on the university's control over the *setting* in which the misconduct occurs is inconsistent with the Ninth Circuit's focus on

authority to punish a student for misconduct in that setting. The Sixth Circuit's recognition that universities differ from grade schools in their ability to control students—especially the off-campus conduct of their students—is also inconsistent with the Ninth Circuit's broad holding that universities control the context of harassment so long as they can discipline the harasser for his or her actions. *Davis* itself recognized that a "university might not . . . be expected to exercise the same degree of control over its students that a grade school would enjoy." *Davis*, 526 U.S. at 649. The Ninth Circuit's holding is a clear departure from this guidance.

C. This Court's Guidance Is Necessary to Resolve the Conflict.

Davis did not define "context," and this Court has not since addressed what it means for a school to have control over the "context in which the known harassment occurs." 526 U.S. at 646. With the Ninth Circuit's decision, the circuits are now split on how expansively to read *Davis*'s control requirement. As Judge Nelson's dissenting opinion correctly noted, "the control-over-harasser requirement now swallows the control-over-context requirement, at least in our circuit." App. 70–71. Because the Ninth Circuit's decision was issued en banc, this is a real split that will not go away on its own. This Court's guidance is necessary to resolve the conflict.

III. THIS IS AN IMPORTANT ISSUE MERITING THE COURT'S REVIEW.

The extent of a school's Title IX liability for student-on-student harassment is an important issue meriting this Court's review for at least three reasons.

1. The Ninth Circuit's "disciplinary authority" test has no meaningful limitation. Universities generally have codes of conduct, including bars on harassment, that apply to all students and enable the university to discipline students for conduct occurring on or off campus. The Ninth Circuit majority opinion recognizes that the same general code of conduct it found relevant to Bradford applies to "all students" and governs their conduct "both on-campus and off-campus." App. 35. If "some form of disciplinary authority" is sufficient to establish that a university has control over the context of off-campus misconduct, "there are no discernable limits on the circumstances that could create Title IX liability." App. 90–91 (Nelson, J., dissenting). "Schools could be liable for what happens within completely private, unsupervised settings such as spring break trips abroad, online communication, and students' family homes." App. 91 (Nelson, J., dissenting). That is not at all what *Davis* envisioned when it recognized a private right of action for student-on-student harassment "in certain limited circumstances." *Davis*, 526 U.S. at 643. This Court's intervention is needed to restore meaningful limitations on Title IX liability.

2. The Ninth Circuit's decision has significant practical consequences for all schools, not just universities. Title IX applies to educational institutions "receiving Federal financial assistance."

20 U.S.C. § 1681(a). This includes not just universities, but also public and private elementary schools, middle schools, high schools, and colleges receiving federal aid. *Davis*, which addressed student harassment in an elementary school, recognized that "school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority," and sought to craft a liability standard that is "sufficiently flexible to account both for the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary action." 526 U.S. at 649. For better or worse, schools often find themselves stuck between competing liability risks, being exposed to liability for "too much" discipline on the one hand, and "not enough" on the other. *See id.* at 667 (Kennedy, J., dissenting) (noting "difficult problems raised by university speech codes designed to deal with peer sexual and racial harassment"). The Ninth Circuit's holding disrupts this already delicate balance by exposing schools in the Ninth Circuit to broad liability for the off-campus misconduct of their students even where that conduct takes place outside of school-sponsored programs and activities. The Court should intervene to correct this error.

3. The scope of Title IX liability for education institutions implicates important principles of federalism and notice to schools about their liability exposure when accepting federal financial aid. *Id.* at 684 ("In the final analysis, this case is about federalism."). Title IX was enacted pursuant to Congress's authority under the Spending Clause. *Id.* at 640 (majority opinion). There are important

limitations on state liability arising out of Spending Clause legislation:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (citations omitted); *see also Davis*, 526 U.S. at 640.

Because Title IX was enacted pursuant to the Spending Clause, private damages actions are "available only where recipients of federal funding ha[ve] adequate notice that they could be liable for the conduct at issue." *Davis*, 526 U.S. at 640. Nothing in Title IX gives schools notice that they may be liable for the off-campus conduct of their students outside of a situation where the school has control over the context such as a school-sponsored trip or event. The Court should intervene to address the important issues of federalism implicated by this case.

IV. THE NINTH CIRCUIT IMPROPERLY DECIDED THIS CASE BASED ON AN ARGUMENT BROWN DISCLAIMED.

In proceedings before the district court and the three-judge Ninth Circuit panel, Brown never argued that the University had control over Bradford's off-campus residence. Rather, Brown repeatedly argued that she did not have to show that the University exercised control over the context of her abuse, and that she only had to show that the University controlled the context of Bradford's abuse of Student A and DeGroote. App. 154. As the three-judge panel majority and the dissenting en banc panel members recognized, Brown disclaimed the en banc majority's position. App. 69–70 (Rawlinson, J., dissenting), 76 (Nelson, J., dissenting), 119 (panel majority decision).

The Ninth Circuit abused its discretion in deciding this case based on an argument first raised by the three-judge panel dissent rather than on Brown's arguments. "In our adversarial system of adjudication, [courts] follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). "[I]n both civil and criminal cases, in the first instance and on appeal, [courts] rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). Courts "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Id.* (alterations

in original) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987)).

In *Sineneng-Smith*, this Court held that the Ninth Circuit abused its discretion when it decided a case based on an argument not raised by the parties, but by the three-judge panel. *Id.* at 1578, 1581. Rather than decide the case on the arguments raised in the briefing, the panel named three amici to address an issue the appellant had not raised. *Id.* at 1578. Counsel for the parties were then permitted to file supplemental briefs addressing the arguments raised by the amici. *Id.* at 1578, 1581. "Understandably, [the appellant] rode with [the] argument suggested by the panel." *Id.* at 1581. "How could she do otherwise?" *Id.* The court then found for the appellant on that issue, with appellant's own arguments falling "by the wayside." *Id.*

The procedural history of this case is remarkably similar to *Sineneng-Smith*. Brown never argued that the University controlled Bradford's off-campus residence before the district court or the three-judge panel. Judge Fletcher's dissent from the three-judge panel decision was the first time anyone had ever argued that the University exercised control over Bradford's residence. Understandably, Brown "rode with an argument" suggested by the dissent in her petition for en banc review. *Id.* The Ninth Circuit then invited the United States Department of Education to file an amicus brief "setting forth its views on the control-over-context requirement set forth in *Davis* . . . as applied to the facts of this case" and "on whether this case should be reheard en banc." C.A. Doc. 51 (June 9, 2022). In response, the United

States filed an amicus brief in Brown's favor addressing the new argument raised by Brown's petition for rehearing. C.A. Doc. 58 (Aug. 8, 2022). After the court granted rehearing, Brown was given leave to file a supplemental brief, in which she elaborated on her new position that the University had substantial control over the context of her abuse. C.A. Doc. 88 (Jan. 31, 2023) (Appellant's Supp. Br.). The case was then decided based on that argument rather than the arguments Brown raised before the district court and the three-judge panel.

"No extraordinary circumstances justified the [Ninth Circuit's] takeover of [Brown's] appeal." *Sineneng-Smith*, 140 S. Ct. at 1581. Brown was represented by competent counsel throughout these proceedings. *Id.* at 1579 ("[O]ur system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'" (second alteration in original) (citation omitted)). As Judge Nelson's dissent correctly recognized:

> Indeed, the University suffers prejudice here, having been unable to develop facts geared toward the majority's theory. Discovery has concluded. On remand, the case will likely proceed to trial on a legal question that Brown affirmatively abandoned. The parties have not had the opportunity for proper discovery to address these claims. It is hard to

> imagine a more unfair process for the University.

App. 80.

All three members of the original three-judge panel rejected Brown's argument that she need not show that the University exercised substantial control over Bradford's off-campus residence. App. 116–19, 147. The Court should grant this petition to reverse the Ninth Circuit's subsequent takeover of this appeal with an argument Brown disclaimed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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