No. 23-812

In The
Supreme Court of the United States

STATE OF ARIZONA, ET AL.,

Petitioners,

v.

MACKENZIE BROWN,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Title IX of the Education Amendments of 1972 provides, in relevant part, 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). "[A] private damages action may lie against [a] school board in cases of student-on-student harassment . . . where the funding recipient acts with deliberate indifference to known . . . harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis ex rel. LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). The school must also have substantial control over both the "context" in which the harassment occurs and, "[m]ore importantly," over the harasser. *Id.* at 646. "[W]hether . . . a sexual harassment incident between two students that occurs in an off-campus apartment . . . is a situation over which the recipient exercises substantial control" is a "fact specific" question. Nondiscrimination on the Basis of Sex in Education, 85 Fed. Reg. 30,026, 30,093 (May 19, 2020). On the unusual facts of this case, the Ninth Circuit held that the defendants may have had substantial control over the context of near-fatal student-on-student abuse they caused in an off-campus team house.

The questions presented are:

1. When assessing a school's control over a context in which harassment occurs, may a court consider, as one factor among others, the school's disciplinary authority over conduct in that context?

QUESTIONS PRESENTED—Continued

2. Should this Court review the Ninth Circuit's decision, consistent with its procedural rules, to consider an issue reached by the panel and briefed and argued by the parties before the en banc court?

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INTRODUCTION

By the time Orlando Bradford started abusing his classmate and girlfriend Mackenzie Brown, the University of Arizona already knew he posed a threat to female students. During his freshman year, it received a series of reports that he had strangled, hit, and otherwise abused two other students he dated. Yet the University took no steps to stop Bradford's pattern of violence and protect students like Mackenzie. To the contrary, it granted him permission to move into an off-campus house with his teammates, a privilege reserved for players who have demonstrated good behavior. There, Bradford subjected Mackenzie to his most extreme abuse, including strangling and threatening to kill her. In the wake of the violence and a resultant hospitalization, Mackenzie missed classes and had trouble focusing on her studies.

This is a textbook Title IX violation: The defendants (collectively "the University") were deliberately indifferent to the known risk Bradford posed to students, causing educational injuries. Nonetheless, on summary judgment, the University argued it could not be liable for its deliberate indifference because it lacked control over the team house. But the record contained evidence the University had the power to decide who could live in the house and what they could do there. Indeed, "[t]he very existence of this off-campus players' residence was . . . subject to the [University's] control." Pet. App. 34a.

Initially, a divided panel of the Ninth Circuit agreed with the University. It held that, however much control the school exercised over that house, it was not identical to the control it might exercise over a dorm, and therefore insufficient for a Title IX claim. Recognizing the majority's error, the Ninth Circuit reheard the case en banc. Wading into the fact-specific dispute, the Ninth Circuit held a reasonable jury could find the University exercised control over the context in which Mackenzie was abused, and remanded for further proceedings.

Unhappy with the Ninth Circuit's ruling, the University now urges this Court to take up the case, pressing for splitless error correction in the absence of error. Neither of the questions presented by the University's petition warrants certiorari.

First, on the meaning of Title IX's control requirement, there is no circuit split. The University says the decision below conflicts with opinions from four circuits. But some of the appeals courts the University identifies have adopted rules closely aligned with the Ninth Circuit's, and no court has adopted a contrary interpretation. Moreover, the University overreads the opinion below. The Ninth Circuit did not hold that the off-campus reach of the University's disciplinary code, on its own, established control over the team house. Rather, the court made clear that control is a multifactor, fact-intensive inquiry. And the Ninth Circuit's assessment of the unusual record in this case does not conflict with the law of any circuit.

If this Court were interested in taking up the question despite the unanimity among the courts of appeals, this would be the wrong vehicle to do so. By the University's account, the first question presented is not part of this case because, it says, Mackenzie failed to preserve the argument. And resolution of the question would not be outcome-determinative because Mackenzie is entitled to a trial under either party's view of the law.

Plus, further percolation among the lower courts would not only give the Court a chance to see if a split develops, but would allow for needed exploration of this issue, which has, thus far, received little attention from appeals courts. Finally, the Ninth Circuit's disposition of this fact-intensive case is correct. Contrary to the University's handwringing, its narrow vision of the law is not necessary to cabin liability appropriately: Control is only one of multiple elements that create a high bar for Title IX plaintiffs.

Second, the University asks the Court to take up this case because, in its view, the Ninth Circuit should not have reached the first question presented. That is not an issue worthy of this Court's attention, as demonstrated by the long line of recent and repeatedly denied petitions asking for similar intervention. Besides, the University's view of en banc courts' limited power is both legally wrong and impractical.

This is not a court of error correction and there is no error to correct. The Court should deny the petition.

STATEMENT OF THE CASE

I. Factual Background

1. As a student at the University of Arizona, Mackenzie Brown was repeatedly assaulted and nearly killed by her classmate and then-boyfriend, Orlando Bradford, a football player. Pet. App. 7a, 10a. She was not his first victim. *Id.* 7a. Before Bradford began abusing Mackenzie, University officials had already received multiple reports about Bradford's abuse of two other classmates whom he had dated during the previous school year. *Ibid.*

Bradford and "Student A" began dating after they "met as high school students during an athletic recruiting trip to the University." *Id.* 10a. At the start of their freshman year, several students witnessed Bradford and Student A "physically fighting in a dormitory study room." *Ibid*. A Resident Adviser reported the incident to the University Community Director, and "told university administrators that 'this may have started off as a very serious physical and verbal altercation.'" *Ibid.* The Community Director told the Resident Advisor not to call the police. *Ibid.*

"In late 2015, Student A's parents learned of her abusive relationship with Bradford," and that the pair had broken up. *Id.* 11a. Concerned, Student A's mother called Student A's softball coach at the University and told him about her daughter's relationship with Bradford. *Ibid.* The coach, in turn, shared this information with Erika Barnes, the University's Senior Associate

Athletics Director and Deputy Title IX Coordinator for Athletics. *Ibid.*

A few months later, in March 2016, Student A showed up to a team study hall with a black eye and finger marks on her neck. *Id.* 12a. Two of her teammates reported her injuries to the head softball coach. *Ibid.* They also told him that during the fall semester, "Bradford had pushed Student A up against a wall, put his hands around her neck, and choked her." *Ibid*. The next day, the softball coach sent the two teammates to share this information with Deputy Title IX Coordinator Barnes. *Ibid*. The teammates also told Barnes that Bradford had threatened to send sexually explicit photos of Student A to "her mother, grandmother, and everyone" if she reported his abuse. *Id.* 13a. Finally, they informed Barnes that Bradford was abusing another student, Lida DeGroote. *Ibid.* They reported that Lida "often had bruises and marks all over her body," that Bradford had shared an explicit video of Lida with others, and that he had abused her dog. *Ibid.*

Barnes met with Student A, and then took her to meet with Susan Wilson, the University's Senior Title IX Investigator. *Id.* 13a. In that meeting, Student A admitted that Bradford had strangled her. *Id.* 14a. She explained that Bradford was now "living with a student named 'Lida.'" *Ibid.* No University employee asked Lida if Bradford was abusing her or offered protection. *Id.* 14a-15a.

Two weeks later, Bradford went to Student A's dorm room drunk and banged loudly on her door for

several hours while yelling for her to let him in. *Id.* 15a. The next day, the head softball coach reported the incident to Deputy Title IX Coordinator Barnes. *Ibid.* Barnes arranged to meet with Student A and the University Police Department. *Ibid.* At that meeting, Student A told Barnes and the police that "on at least three occasions Bradford had choked her to the point that she could not breathe" and said she "wanted to obtain a protective order." *Ibid.*

Deputy Title IX Coordinator Barnes then called Athletic Director Greg Byrne, but told him "only that Bradford had yelled and banged on Student A's dormitory room door." *Id.* 45a. Barnes "chose not to report Bradford's repeated violent assaults on Student A and [Lida]; not to report that Bradford had threatened to send compromising pictures to Student A's family members if she reported his violence; [and] not to report that Bradford had sent to unspecified persons a video of [Lida] having sex with him." *Id.* 45a-46a. Byrne then passed his limited information about "the door-banging incident" to Bradford's position coach, who punished Bradford with "three days of . . . 'physical punishment' for violating the team's underage drinking rules." *Id.* 16a. The head football coach later testified that, had the University "informed [him] of Bradford's assaults on Student A and [Lida]," he would have kicked Bradford off the team. *Id.* 36a.

After Barnes met with Student A, the University moved Bradford to a new dorm and issued an order preventing him from contacting Student A. *Id.* 16a.

The University took no other actions to prevent Bradford's abuse of Lida or other female classmates. *Ibid.*

The next month, Lida's mother called an associate dean at the University and told her that she was concerned about Lida's safety, noting bruises on Lida's arm. *Id.* 17a. The dean, whom Wilson had previously alerted to Lida's "concerning relationship" with Bradford, did not respond. *Ibid.* "[I]t was 'just crickets.'" *Ibid.*

2. Soon after, Bradford moved into an off-campus football team house and began to abuse Mackenzie. *Ibid*. Bradford and Mackenzie had first met in February 2016 through University intramural sports. Dist. Ct. Doc. 187-1, at 6-7. They started dating soon after. Pet. App. 17a. Predictably, the relationship turned violent. *Ibid*. Bradford often flew into jealous rages when Mackenzie talked to other men—including her supervisor at work—and abused her both physically and emotionally. *Id.* 18a-19a.

Much of the abuse occurred in the off-campus team house, which Bradford and some teammates had moved into with the University's permission. *Id*. 17a-18a. Freshmen on the football team were required to live in University dorms. *Id.* 16a. A team rule allowed older players to move off campus, but only with approval from both the head coach and their position coach. *Id.* 17a-18a. That meant the coaches could "require players to move back on campus if they behaved inappropriately." *Id.* 18a. Accordingly, the coaching staff had veto power over the "very existence of this off-campus

players' residence." *Id.* 34a. The University's general student code of conduct, and the football team's player rules, extended off campus to this house. *Id.* 35a-36a. And the football team had a "zero-tolerance policy" for abuse against women. *Id.* 36a.

When the new semester started, Bradford's violence escalated. *Id.* 19a. In September, over the course of two days in the team house, Bradford engaged in his most extreme violence against Mackenzie. *Id.* 19a-20a. Bradford "slapped" Mackenzie and "dragg[ed her] by [her] hair" across a room. *Id.* 19a. He strangled her and told her to "[s]ay goodbye to [her] mom" because she was "never going to talk to her again." *Ibid.* Then he locked her in a room, where he pushed her to the ground and repeatedly hit her head, arms, and legs. *Ibid.* Bradford refused to let Mackenzie go home. *Ibid.* The next day, when she tried to leave, he grabbed her hair and hit her in the face, causing her to bleed from her nose. *Id.* 20a. Bradford went through Mackenzie's phone, saw the name of another man—her brother—and "started hitting [her] again." *Ibid.*

As a result of the abuse, Mackenzie suffered serious physical injuries, including a concussion; "neck pain from direct trauma (kicking and hitting) as well as from strangulation"; "burst blood vessels in the eye"; an "intractable acute post-traumatic headache"; "rib pain with breathing and movement"; and contusions on her abdomen, upper arm, neck, and ribs. *Id.* 21a.

Mackenzie called her mother after she escaped. *Ibid.* Her mother in turn called the police and Athletic

Director Byrne. *Ibid.* Shortly thereafter, the University suspended, and then expelled, Bradford. *Ibid.* He was later criminally charged for his assaults of both Mackenzie and Lida, pleaded guilty, and was sentenced to five years in prison. *Id.* 21a-22a.

The conviction could not undo the damage Bradford's abuse caused to Mackenzie's education. As a result of Bradford's abuse, Mackenzie missed several weeks of classes. E.R. 106. When she returned, she experienced a litany of psychological symptoms that made it hard for her to learn, including trouble concentrating, anxiety, and panic attacks. *Id.* 106-08. She has since been diagnosed with post-traumatic stress disorder. *Id.* 108.

II. Proceedings Below

1. Both Mackenzie and Lida sued the University for its deliberate indifference to Bradford's known abuse, alleging it had violated Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. Pet. App. 22a. Their cases were assigned to two different judges. *Ibid.* Lida's case succeeded. After discovery, the district court granted her summary judgment on nearly every element of her claim. *DeGroote* v. *Ariz. Bd. of Regents*, No. CV-18-00310, 2020 WL 10357074, at *6-10 (D. Ariz. Feb. 7, 2020). Most relevant to this petition, the court found that she had satisfied Title IX's "substantial control" requirement: The record demonstrated the University exercised substantial control over Bradford and the off-campus context in which the abuse

occurred. *Id*. at *8-9. The case settled shortly thereafter. Pet. App. 22a.

Mackenzie's case, before a different judge, met a very different fate. *Ibid.* The University moved for summary judgment on multiple grounds. Dist. Ct. Doc. 193, at 15-27. These included that Mackenzie, not the University, was to blame for her own abuse by failing to leave the relationship earlier, and that the University lacked control over the context in which Bradford abused her. *Id.* at 20-23. As to control, the district court agreed and granted summary judgment for the University. Pet. App. 22a-23a.

2. Mackenzie appealed to the Ninth Circuit. *Id.* 23a. She argued "that because the University had substantial control over the context of Bradford's known harassment of Student A and [Lida]"—the abuse to which the University had been deliberately indifferent, thus allowing Bradford to later abuse Mackenzie—"it necessarily had control over the context of Bradford's . . . assaults on [Mackenzie]." *Ibid*. The University again argued it lacked control over the off-campus house—the relevant inquiry, in its view. C.A. Doc. 15, at 22-24.

A divided panel affirmed. Pet. App. 104a-51a. The majority held that Mackenzie could not rely on the University's control over the context of Bradford's abuse toward his earlier victims, but must instead demonstrate that the University had control over the off-campus team house. *Id.* 116a-18a. The court then decided that the University lacked control over that

context. *Id*. 119a-24a. The majority acknowledged that the University had some control over the house, including the power to determine whether Bradford could live there. *Id.* 120a-21a. But, the court held, that control was insufficient because it was not identical to the control a school exercises over an on-campus dorm. *Id.* 121a. One judge dissented. *Id.* 125a-51a (Fletcher, J., dissenting).

3. Mackenzie petitioned for rehearing en banc on the basis that the panel's holding about the University's control over the team house was wrong and conflicted with the law of other circuits. C.A. Doc. 45-1, at 7-17. The Ninth Circuit voted to hear the case en banc. *See* Pet. 11.

After supplemental briefing and oral argument, the en banc Ninth Circuit reversed the district court. Pet. App. 2a, 7a-47a; *id.* 47a-49a (Friedland, J., concurring). Eight of the eleven assigned judges joined the majority opinion holding that a school can have substantial control over the context of sexual harassment that takes place outside its geographic boundaries. *Id.* 26a-37a. In *Davis ex rel. LaShonda D.* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), the Ninth Circuit observed, this Court laid out a vision of control that turned on whether a school possessed remedial authority over the context—for example, whether the school supervised that context or could regulate conduct within the context through discipline. Pet. App. 27a-28a. In some circumstances, the appeals court recognized, schools can exercise these forms of authority off school grounds. *Id.* 28a. Accordingly, "the

location of harassment can be important" in determining whether a school has control over a given context, but it "is only one factor." *Id.* 34a.

Turning to the facts, the court reasoned that "a reasonable factfinder [could] conclude the University had 'substantial control' over the 'context' in which Bradford assaulted [Mackenzie]," the off-campus football team house. *Ibid*. As the court explained, the University controlled who lived in that house and what they did. *Ibid.* Bradford needed University employees' permission to move off campus, and those same employees could have revoked that permission based on his behavior. *Id.* 34a-35a. In addition, the court noted, both the football team rules and the University's Student Code of Conduct applied off-campus. *Id.* 35a-36a. And the head football coach testified that if he had "been informed of Bradford's assaults on Student A and [Lida]," he would have kicked Bradford off the team, which would have caused Bradford to lose his football scholarship. *Id.* 36a. The court held these facts gave rise to an inference that "had [the coach] known of Bradford's assaults on Student A and [Lida], Bradford's September . . . assaults on [Mackenzie] at his off-campus house would never have occurred." *Id.* 37a. Viewing the record in the light most favorable to Mackenzie, "a reasonable factfinder could conclude that the University had 'substantial control' over the 'context' in which Bradford violently assaulted [Mackenzie] [i]n September." *Ibid.*

The court also held that material disputes of fact remained on the other disputed elements of

Mackenzie's claim: actual notice and deliberate indifference. *Id.* 41a, 47a. The court explained that a reasonable factfinder could conclude that University officials had actual notice of Bradford's assaults, and that at least one of those officials was senior enough for that notice to be attributed to the University. *Id.* 41a. And the court held that a reasonable factfinder could conclude that the University's response to Bradford's abuse was clearly unreasonable. *Id.* 46a-47a.

REASONS FOR DENYING THE PETITION

I. THE SUBSTANTIVE TITLE IX QUESTION IS UNWORTHY OF THIS COURT'S REVIEW.

A. There is No Circuit Split.

The University tries to fabricate a circuit split on the first question presented, but none exists. The few courts to have addressed the first question presented are in agreement, and no court has adopted a legal rule contrary to the Ninth Circuit's below.

Sixth Circuit. The University says Sixth Circuit law conflicts with the opinion below. But last year, in a case absent from the University's petition, that court adopted a rule closely aligned with the Ninth Circuit's. *See S.C.* v. *Metro. Gov't of Nashville*, 86 F.4th 707, 716 (6th Cir. 2023). There, a school argued it "lacked 'substantial control' over the context in which most of the threats [at issue] occurred: social media." *Ibid*. The Sixth Circuit rejected that argument on the basis that while "the physical location of the threats is relevant"

to the control analysis, "the '[m]ore important[]' consideration is the school's disciplinary authority over the students." *Ibid.* (quoting *Davis*, 526 U.S. at 646). Although *S.C.* did not cite the en banc decision below, it closely tracks the Ninth Circuit's holding that "while 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." Pet. App. 28a.

Ignoring *S.C.*, the University points to an earlier Sixth Circuit case, *Foster* v. *Board of Regents of University of Michigan*, 982 F.3d 960 (6th Cir. 2020). But *Foster* is a case about a separate element of a Title IX claim, deliberate indifference. *Id.* at 965-71. In conducting its deliberate indifference analysis, the Sixth Circuit noted that the University of Michigan "could . . . control the harasser's physical presence at classes, social events, ceremonies, and the like," but had less control over "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." *Id*. at 970. The Sixth Circuit noted that its observation about comparative levels of control "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.'" *Ibid.* (quoting *Davis*, 526 U.S. at 646).

Attempting to draw a contrast between *Foster* and the Ninth Circuit's opinion, the University says that the Sixth Circuit "focus[ed] on the university's control over the *setting* in which the misconduct occurs" while the Ninth Circuit "focus[ed] on authority to punish a student for misconduct in that setting." Pet. 28-29. But *Foster* was not "focused" on control at all; it is a case about a different element. The Sixth Circuit's case about control is *S.C.*, which aligns closely with the Ninth Circuit's decision below. *See supra* pp. 13-14. And in briefly referencing control, *Foster* noted ways schools can control both harassers and the context of the harassment. *See* 982 F.3d at 970. That is in line with the decision below, in which the Ninth Circuit recognized that *Davis* requires both kinds of control. Pet. App. 28a-29a.

The University also suggests the Ninth Circuit's opinion somehow erases differences, noted by *Foster*, between the amount of control universities and K-12 schools can exercise over students. Pet. 29. But this case does not speak to the control-over-the-harasser element because the University's control over Bradford is undisputed. Pet. App. 28.[1]

Fourth Circuit. The decision below also aligns with a Fourth Circuit case the University cites for a putative conflict, *Feminist Majority Foundation* v.

[1] The University's opaque reasoning is also premised on an overreading of the Ninth Circuit decision as holding "that universities control the context of harassment so long as they can discipline the harasser." Pet. 29; *see infra* pp. 19-20 (explaining why that characterization of the opinion is wrong).

Hurley, 911 F.3d 674 (4th Cir. 2018). There, the Fourth Circuit held that plaintiffs' Title IX suit sufficiently alleged their university controlled the context of online harassment "on *or within the immediate vicinity of* . . . campus." *Id.* at 687-88 (emphasis added). The court was persuaded by allegations that the university had the ability to identify the harassers and limit their access to the online platform on which the harassment occurred, among other corrective measures. *Ibid.*; *see* Pet. App. 30a-31a (discussing *Hurley*).

The Fourth Circuit, like the Ninth below, understood control over a context to turn on remedial authority—including the power to exclude a harasser from that context. To the Ninth Circuit, the most significant evidence of the University's control over the context in which Bradford abused Mackenzie was its ability to exclude him (and all his roommates) from that context. Pet. App. 34a. In *Hurley*, the school's control over the context included its ability to exclude the harassing students from the online platform on which the harassment occurred. 911 F.3d at 687-88. No wonder, then, the Ninth Circuit relied on *Hurley* in its decision below. *See* Pet. App. 30a-32a.

The University insists the two courts have taken different approaches because the Fourth Circuit opinion "distinguished control over the harassers and control over context as two distinct prerequisites to Title IX liability." Pet. 26. But so did the Ninth Circuit, which repeatedly differentiated the undisputed matter of the University's "substantial disciplinary control over Bradford" from "[t]he disputed question [of]

whether it had substantial control over the context." *See* Pet. App. 28a-29a; *see also id.* 29a (explaining this "Court limited a school's liability . . . to circumstances where the school 'exercises substantial control over *both* the harasser *and* the context'" (emphasis added) (quoting *Davis*, 526 U.S. at 645)). Perhaps the University meant that a school's power to exclude a harasser from a context is only relevant to control over the harasser, not control over the context, and so the Ninth Circuit erred by considering that evidence. But on that point the University's disagreement is with the Fourth Circuit as well as the Ninth, between which there is no conflict. *See supra* p. 16.

Eighth Circuit. The University also says that the Ninth Circuit's decision below conflicts with *Roe* v. *St. Louis University*, 746 F.3d 874 (8th Cir. 2014). But, in that opinion, the Eighth Circuit expressly limited its ruling on control to the facts of the case before it. *Id.* at 884. There, a student was sexually assaulted by a classmate outside some other students' off-campus apartment. *Id.* at 878-79. She pressed a different kind of Title IX claim than Mackenzie's, contending the school failed to respond appropriately to her rape after the fact; unlike in this case, there was no argument the school could have prevented the rape. *Id.* at 880-81. On appeal, amicus alone contended "that universities may control certain off campus behavior due to the nature of the relationship between students and the institution." *Id.* at 884. But the Eighth Circuit held, in a single sentence without reference to discipline, that "*[o]n the facts of this case* there was no evidence that the

University had control over the student conduct at the off campus party." *Ibid.* (emphasis added).

In doing so, the Eighth Circuit did not adopt any rule that conflicts with the Ninth Circuit's: It did not hold a school could never be liable for causing off-campus harassment or that a school's disciplinary authority is irrelevant to its control over the context. Indeed, by framing the inquiry as one of "control over . . . student conduct" in the given context, *ibid.*, *St. Louis University* accords with the Ninth Circuit's decision and forecloses the University's reading that a school's control over students in a context is irrelevant to its control over that context.

And the facts of the two cases are different enough that their different fates are compatible. As the U.S. Department of Education noted in 2020, "whether . . . a sexual harassment incident between two students that occurs in an off-campus apartment . . . is a situation over which the recipient exercise[s] substantial control" is a "fact specific" question. 85 Fed. Reg. at 30,093. Given the multiple forms and unusual degree of control that the University exercised over the football team house in this case, and the near certainty it could have prevented Bradford from abusing Mackenzie there, the same court could decide Mackenzie is entitled to a trial and the *St. Louis University* plaintiff was not. *See* Jared P. Cole, Cong. Rsch. Serv., LSB111103, University Liability Under Title IX for Off-Campus Sexual Harassment 5 (2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11103 ("Given the fact-specific nature of the 'substantial control'

standard . . . it is unclear how far *Brown* might extend beyond the specific facts involved there (where a student repeatedly assaulted other students, remained on the football team, and assaulted yet another fellow student).").

After all, contrary to the University's characterization of the opinion below, the Ninth Circuit did not hold "that authority to discipline a harasser for off-campus misconduct" always establishes control over context. Pet. 21. The appeals court instead held that "whether the school has some form of disciplinary authority over the harasser in the setting in which the harassment takes place" is "*a* key consideration" alongside another "important indicator of the school's control": "the physical location of the harassment." Pet. App. 28a (emphasis added); *see id.* 34a (reiterating that "the location of harassment" is an "important . . . factor"). When applying that standard to the facts before it, the Ninth Circuit did not look only, or even first, to the University's student discipline code. *See id.* 34a-35a. Rather, it started with the control the University had over who could live in the football house, noting "[t]he very existence of this off-campus players' residence was . . . subject to [University] coaches' control." *Id.* 34a. Only then did the court turn to the off-campus reach of the University's conduct code, *id.* 35a, demonstrating the code, on its own, was not determinative. That analysis was consistent with the positions taken by Mackenzie and the United States, who argued "disciplinary authority" can but "will not always suffice to provide control over context." C.A. Doc. 88, at 11-12; *see*

C.A. Doc. 58, at 12-14 (same). And the Ninth Circuit's analysis was consistent, too, with the Eighth Circuit's decision in *St. Louis University*.

Tenth Circuit. The University is wrong about Tenth Circuit law as well. Rather than conflicting with the decision below, cases from that circuit provide support for the Ninth Circuit's opinion.

The first is *Ross* v. *University of Tulsa*, 859 F.3d 1280 (10th Cir. 2017), which the petition ignores. *Ross* held that a school had control over the context of a student's rape—"a private apartment on campus"—for two reasons that align with the Ninth Circuit's analysis below: The school could have prevented the harasser from accessing the apartment if it had responded appropriately to an earlier report against him, and it "exert[ed] disciplinary authority over students for misconduct that occurs in private apartments on campus." *Id.* at 1287 n.5.

Second, in *Simpson* v. *Univ. of Colo., Boulder*, the Tenth Circuit held a university exercised control over the context of rapes that occurred during a student-organized party at a victim's off-campus residence. 500 F.3d 1170, 1173, 1178, 1180 (10th Cir. 2007). *Simpson*'s control analysis, like the Ninth Circuit's, focused on the school's causal relationship to the harassment in the relevant context. *See id.* at 1178. The University preemptively insists *Simpson* is different because the rapes "occurred during a university-sanctioned [football] recruiting program," creating a "nexus." Pet. 25 n.1. But a jury could find a similar nexus between

Bradford's University-sanctioned football house and the University, *see infra* pp. 23-24.

As the University notes, the Tenth Circuit concluded that a school was not liable for its response to off-campus harassment in *Rost ex rel. K.C.* v. *Steamboat Springs RE-2 School District*, 511 F.3d 1114 (10th Cir. 2008). That result is not contrary to Ninth Circuit law. *Rost*, like *Foster*, was a case about deliberate indifference. *See id.* at 1121. Resolving a fact-specific dispute, the Tenth Circuit held that a school's response to off-campus harassment—calling the police rather than proceeding with an internal disciplinary response—"was not clearly unreasonable." *Ibid.* There, "[t]he principal thought that the school could discipline students for conduct occurring outside the school grounds." *Ibid.* But, the court explained, that "says nothing about whether [school discipline] was appropriate" under the circumstances. *Ibid.* That is, the school's possible disciplinary authority was irrelevant to whether the school, in relying on law enforcement, was deliberately indifferent. *Rost* did not hold, as the University contends (at 23), that disciplinary authority is irrelevant to the separate control-over-context element—a reading further foreclosed by the Tenth Circuit's later decision in *Ross*, *see supra* p. 20.

In a footnote, *Rost* observed that a school could exercise control over off-campus harassment where the record establishes "some nexus between the out-of-school conduct and the school." 511 F.3d at 1121 n.1. But, in that case, the court determined no such nexus existed. *Ibid.* As explained, there is no conflict between

the Ninth Circuit's decision below and another court's conclusion, on different facts, that a school might not exercise control over off-campus harassment, since the Ninth Circuit held only that disciplinary authority is one factor among others for control. *See supra* pp. 19-20.

The University asserts without explanation that *Rost*'s "nexus" formulation is inconsistent with the Ninth Circuit's decision. That is far from obvious. Below, the Ninth Circuit explained that "an element of 'school sanction, sponsorship, or connection to a school function is required' for a school to control an off-campus context," and that, "[h]ere, the University's rules and 'sanction' authority created such a connection." Pet. App. 35a. "[C]onnection" sounds a lot like a "nexus." *See* Pet. 24 (using the two terms interchangeably).

And, contrary to the University's representation, *Rost* did not hold "that Title IX liability exists only where student-on-student harassment occurs *within* the 'operations' of a school's programs or activities." *Ibid.* (emphasis added). *Rost* instead quotes *Davis*, which in turn quotes Title IX's text, for the point that harassment must "occur '*under*' 'the operations of' a funding recipient." *Rost*, 511 F.3d at 1121 (emphasis added) (quoting *Davis*, 526 U.S. at 645). The difference between "under" and "within" is meaningful given that *Davis* defined "under" to mean "subject to the [school's] authority." *See infra* pp. 25-26.

Tenth Circuit law might require the result below in Mackenzie's case. At the very least, it would not preclude it. There is no disagreement among the courts of appeals.

B. This Case is an Unsuitable Vehicle.

Even if the Court were interested in taking up this question at some point, this is not the case to do it. The University argues (at 33-36) that the first question presented was not properly before the en banc Ninth Circuit. For reasons discussed below, Mackenzie disagrees. *See infra* Part II. But if this Court grants certiorari on the control issue, it will have to address the threshold preservation question before it can proceed to the merits. And if the Court determines the University is right that the Ninth Circuit could not reach the question here, the Court would have to dispose of the case without resolving the substantive issue.

Additionally, this Court should not grant certiorari on this question because it is not case dispositive. Mackenzie is entitled to a trial under both Ninth Circuit law and the University's proposed "nexus" test, *see* Pet. 24-25 (endorsing modified version of Tenth Circuit's nexus standard). Indeed, below, Mackenzie, not the University, proposed the "nexus" test, and she explained how she could meet it. C.A. Doc. 88, at 6-8, 10-11. That argument is intuitive: Mackenzie was abused by a classmate, whom she met through a University extracurricular activity, in a team house near campus populated exclusively by football players living there

with their coaches' permission, and the abuse disrupted her education. *See supra* pp. 7-9. A reasonable jury could find that there was "a 'nexus' or connection between the out-of-school conduct [in that context] and the school's programs or activities," Pet. 24-25, rendering this case a poor vehicle.

C. Further Percolation is Warranted.

This Court should allow further percolation among the lower courts. For starters, additional time will reveal whether the courts of appeals continue to agree, or whether a circuit split eventually develops. The latter is far from certain. No disagreement has emerged in the twenty-five years since *Davis*. And Title IX litigation is on the decline, limiting opportunities for a conflict to emerge. Recently, this Court held emotional distress damages are no longer available under Spending Clause statutes. *Cummings* v. *Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 230 (2022). Emotional distress has traditionally constituted the bulk of students' damages in Title IX cases. *See id.* at 235-36 (Breyer, J., dissenting). Given the newly limited value of these suits to both plaintiffs and attorneys, new Title IX filings are sure to slow. That decreased volume may explain why only two federal courts have cited the opinion's section on control at the time of this writing. *See Ware* v. *Univ. of Vt. & State Agric. Coll.*, No. 2:22-CV-212, 2024 WL 989804, at *22 (D. Vt. Mar. 7, 2024); *Doe* v. *Williamsport Area Sch. Dist.*, No. 4:22-CV-01387, 2023 WL 6929316, at *7 n.88 (M.D. Pa. Oct. 19, 2023).

If a circuit split arises, this Court will benefit from additional consideration of the question presented by lower courts. The Ninth Circuit is the only court of appeals to have addressed the issue at any length. *Compare* Pet. App. 26a-37a, *with S.C.*, 86 F.4th at 716, *and Hurley*, 911 F.3d at 687-88, *and Ross*, 859 F.3d at 1287 n.5, *and Rost*, 511 F.3d at 1121 n.1, *and Simpson*, 500 F.3d at 1173, 1177. And the Ninth Circuit's rule and the University's are not the only positions this Court could adopt. Mackenzie alone has offered three plausible understandings of *Davis*'s control-over-context requirement (all of which she would satisfy): as a matter of regulatory authority, risk creation, or nexus. *See* C.A. Doc. 88, at 1-8. Time will allow lower courts to evaluate the range of possible readings of the control element.

D. The Ninth Circuit's Decision is Correct.

1. The Ninth Circuit was right to allow Mackenzie's case to proceed. Title IX's text and this Court's precedent demonstrate a school exercises substantial control over the context of harassment when it has the regulatory authority to reduce (or, in this case, increase) the risk of harassment in that context.

Davis rooted the control-over-context requirement in Title IX's statutory prohibition on "discrimination *under* [an] education program or activity," 20 U.S.C. § 1681(a) (emphasis added); *see Davis*, 526 U.S. at 645 (connecting "control over context" to "under"). In interpreting this portion of Title IX's text, this Court adopted a series of dictionary definitions of "under"

that all boil down to regulatory authority: "'in or into a condition of subjection, regulation, or subordination'; 'subject to the guidance and instruction of[,]' . . . 'subject to the authority, direction, or supervision of.'" *Davis*, 526 U.S. at 645 (citations omitted); *see Owens* v. *La. State Univ.*, No. CV 21-242, 2023 WL 8880380, at *10 (M.D. La. Dec. 22, 2023) (holding school could be liable for causing off-campus rape based, in part, on *Davis*'s definitions of "under"). Based on these definitions, the court concluded the statute's use of "under" meant that "the harassment must take place in a context subject to the school district's control." *Davis*, 526 U.S. at 645.[2]

This Court also explained that the control-over-context requirement reinforces *Davis*'s core holding that a school will not be vicariously liable for a student's harassment. *See Davis*, 526 U.S. at 640-41, 645-46. Rather, it will only be responsible for its own deliberate indifference that either causes a student to be harassed or makes them vulnerable to further harassment. *Id.* at 640-41. The control requirement fortifies that rule by foreclosing liability where a student is harassed in a context where a school cannot influence the risk of harassment, and thus cannot be blamed for failing to do so. *See id.* at 645-46.

In so explaining the origins and purpose of the control-over-context element, this Court made clear

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[2] The *Davis* dissent adopted its own definitions of "under" to suggest a greater degree of control, akin to authorization. *See Davis*, 526 U.S. at 659-60 (Kennedy, J., dissenting). But neither the majority nor dissent defined "under" to mean "inside," as the University would.

that that requirement turns on authority: What power did the school have to protect students from known harassment in the relevant context? *See*, *e.g.*, *Hurley*, 911 F.3d at 687-89 (explaining school had substantial control because it could have "exercised control in . . . ways that might have corrected the hostile environment").

Moreover, by choosing the term "context," not "location," 526 U.S. at 645-46, *Davis* indicated the latter is relevant to but not dispositive of control, Pet. App. 34a. The one term *Davis* used synonymously with "context" is "environment," 526 U.S. at 644—a term that evokes "conditions" or "circumstances" defined by more than simple geographic boundaries, *see Environment*, Merriam-Webster, https://www.merriam-webster.com/dictionary/environment (last visited Mar. 7, 2024) ("1: the circumstances, objects, or conditions by which one is surrounded . . . 2[b]: the aggregate of social and cultural conditions that influence the life of an individual or community").

2. Disciplinary and other regulatory authority can provide a school control over the risk of harassment in a given context. *See*, *e.g.*, *Ross*, 859 F.3d at 1287 n.5 (holding school had control over context because its disciplinary authority meant it could have prevented the rape). Even on campus, disciplinary authority is often the primary way that schools control the settings in which harassment occurs. When a student is harassed behind a dorm room's closed door, or in a teacher's private office, officials may not exercise contemporaneous physical control sufficient to intervene

in the moment. *See*, *e.g.*, *Oden* v. *N. Marianas Coll.*, 440 F.3d 1085, 1086-87 (9th Cir. 2006) (describing teacher's sexual harassment during one-on-one classes where "no one else was present" to intervene). But they can impose measures, including discipline, that make it more difficult for harassment to reoccur in that context. *See*, *e.g.*, *id.* at 1087-88; *Ross*, 859 F.3d at 1287 n.5. And schools are sometimes able to exercise similar control over student or employee misconduct that occurs away from campus. *See Mahanoy Area Sch. Dist.* v. *B.L. ex rel. Levy*, 141 S.Ct. 2038, 2045 (2021) (explaining schools can regulate students' off-campus "harassment" and "threats").

That does not mean that, whenever a school's disciplinary code extends to a context, the school will exercise substantial control over it. Sometimes, the policy on paper will not provide the school with practical power to meaningfully affect the risk of harassment in that context. Take, for example, the University's hypothetical (at 18-19) of a young student who commits sexual harassment at a birthday party in her parent's home. As the United States explained below, that disciplinary code would not provide the school control over the context of the harassment because "it is not clear that . . . disciplinary action could have prevented the harassment. . . . [E]ven if the school had suspended the harasser before the party, it is not obvious how the suspension would have prevented the student from

hosting her own private party . . . or engaging in the harassment." C.A. Doc. 58, at 14.[3]

The birthday hypothetical cuts a sharp contrast to the facts of this case, where the University had multiple forms of power to protect Mackenzie from abuse in the relevant context—whether defined narrowly as the team house or something more like the "circumstances" or "conditions" of the abuse. *See supra* p. 27. Indeed, the University not only failed to remediate the risk in that context but also, by giving Bradford special permission to move there, *created* the heightened risk of abuse in the given context. It would be nonsensical to say a school lacked control over the context of rapes that were the direct result of its own course of conduct—conduct that definitionally occurs under the education program or activity. *See Simpson*, 500 F.3d at 1178.

That Title IX is a Spending Clause statute does not change the answer here. The Spending Clause does not require that every potential violation be "specifically identified and proscribed in advance," *Bennett* v. *Ky. Dep't of Educ.*, 470 U.S. 656, 666 (1985), in a manner akin to qualified immunity. And "the text of Title IX gives recipients notice that intentional discrimination will result in liability." *Hall* v. *Millersville Univ.*, 22 F.4th 397, 404 (3d Cir. 2022). "It is for this reason

[3] For similar reasons, the University is wrong that the opinion below fails to require sufficiently "*substantial* control," Pet. 16—an argument premised on its mischaracterization of the Ninth Circuit as holding "some form of disciplinary authority" will always suffice. *See supra* pp. 19-20.

that the Supreme Court has, throughout its Title IX jurisprudence, rejected arguments that *Pennhurst* bars a particular plaintiff's cause of action after finding that a funding recipient's conduct constituted an intentional violation of Title IX." *Ibid.*; *see also Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 182-83 (2005) (similar). For example, although Title IX does not mention either retaliation or deliberate indifference to sexual harassment, this Court has held that the Spending Clause posed no obstacle to liability for such forms of intentional sex discrimination. *See Jackson*, 544 U.S. at 182-83. Here, the University had clearer notice than the schools in those earlier cases because it already knew from the statutory text that it could be liable for discrimination "under" its "education program or activity," as "under" has been defined by this Court. *See supra* pp. 25-26.

3. The Ninth Circuit's opinion accords with the federal government's longstanding interpretation of Title IX across administrations. The preamble to Title IX regulations promulgated by the U.S. Department of Education in 2020 noted that a school may exercise control over harassment that occurs off campus, including in an "off-campus apartment." 85 Fed. Reg. at 30,093. That position was consistent with the United States' previous enforcement actions and statements of interest. *See*, *e.g.*, Letter from Adele Rapport, Reg'l Dir., Off. for C.R., U.S. Dep't Educ., to Janice K. Jackson, Chief Exec. Officer, Chicago Pub. Schs. Dist. #299, at 4-10, 7 n.3, 33-34 (Sept. 12, 2019), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/

more/05151178-a.pdf (finding district violated Title IX in failing to address and prevent off-campus sexual harassment that occurred outside any school activity); Gov't Br. at 16-17, *Weckhorst* v. *Kan. State Univ.*, 241 F.Supp.3d 1154 (D. Kan. 2017) (describing school's control over harassment at off-campus fraternity and relevant Education Department positions). And, before the Ninth Circuit, the United States participated in this case as amicus, arguing that the University exercised control over the context in which Mackenzie was abused. *See generally* C.A. Doc. 58.

It is little surprise the United States' view conflicts with the University's: The latter is not only legally wrong but also terrible policy. Below, the University conceded that, under its vision of Title IX, a "school encouraging its students to abuse classmates outside of school programs" would be beyond the statute's reach. C.A. Doc. 92, at 17. Fortunately, that intolerable interpretation cannot be squared with Title IX's text or this Court's precedent.

4. Finally, despite the University's handwringing, its preferred rule is not necessary to cabin schools' liability appropriately. This Court has already done so by adopting a "high standard" for damages. *Davis*, 526 U.S. at 643. The University repeatedly asserts that, under the Ninth Circuit's rule, a school may be liable if it exercises control over off-campus student misconduct. *E.g.*, Pet. 14, 17, 21, 30, 32. But control is just one element of a Title IX claim. A plaintiff must also establish that the defendant-school had actual knowledge, its response was

deliberately indifferent, and the underlying harassment was so severe, pervasive and objectively offensive as to deny the plaintiff educational opportunities. *Davis*, 526 U.S. at 643-52. That is, in a case like Mackenzie's, the harassment must be the school's fault and it must interfere with the victim's experience at school.

Together with control, those elements ensure the harassment will be closely tied to the school, and that funding recipients will only face liability in extreme circumstances. Even though courts have adjudicated *Davis* claims absent the University's proposed limitation for decades now, plaintiffs find it exceedingly difficult to succeed. *See*, *e.g.*, Emily Suski, *Subverting Title IX*, 105 Minn. L. Rev. 2259, 2266-78 (2021). And, post-*Cummings*, schools face limited damages even where plaintiffs establish liability, since the "major . . . harm" in these cases, emotional distress, is no longer compensable. *Cummings*, 596 U.S. at 235-36 (Breyer, J., dissenting).

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For these reasons, the Court should deny certiorari on the first question presented.

II. THE NINTH CIRCUIT'S DECISION TO ADDRESS THE SUBSTANTIVE ISSUE IS UNWORTHY OF REVIEW.

1. The University also asks this Court to take up this case because it thinks the Ninth Circuit should not have reached the substantive legal issue on which it seeks certiorari. This "Court has not deemed an issue

waived when it was first raised in a petition for rehearing *en banc* before a circuit court." *United States* v. *Hernandez-Estrada*, 749 F.3d 1154, 1160 (9th Cir. 2014) (en banc) (citing *United States* v. *Jimenez Recio*, 537 U.S. 270, 273-77 (2003)). That makes sense because "the *en banc* court acts as if it were hearing the case on appeal for the first time." *Socop-Gonzalez* v. *I.N.S.*, 272 F.3d 1176, 1186 n.8 (9th Cir. 2001) (en banc), *overruled on other grounds by Smith* v. *Davis*, 953 F.3d 582, 599 (9th Cir. 2020) (en banc). Unsurprisingly, then, the University rightly does not argue there is a circuit split on this issue.

Absent more, putative procedural error is not a basis for review. This Court has recently and repeatedly denied petitions that ask the Court to determine whether an appeals court ran afoul of the party-presentation rule. *See*, *e.g.*, *Yi-Chi* v. *United States*, No. 23-693, 2024 WL 674836 (U.S. Feb. 20, 2024); *Jones* v. *United States*, 144 S.Ct. 418 (2023); *Behar* v. *Dep't of Homeland Sec.*, 143 S.Ct. 2431 (2023); *Graham* v. *United States*, 143 S.Ct. 1754 (2023); *Campbell* v. *United States*, 143 S.Ct. 95 (2022); *Daza* v. *Indiana*, 142 S.Ct. 763 (2022); *Shinn* v. *Baker*, 141 S.Ct. 2510 (2021); *Dziedziach* v. *Wilkinson*, 141 S.Ct. 1501 (2021); *Elder* v. *United States*, 141 S.Ct. 1055 (2021); *Murphy* v. *City of Tulsa*, 141 S.Ct. 250 (2020). In just the last year, this Court has denied such petitions where respondents expressly waived the relevant argument before the appeals court considered it, as the University (wrongly) claims Mackenzie did. *See*, *e.g.*, Pet. 27, *Behar* v. *Dep't of Homeland Sec.*, 143 S.Ct. 2431 (2023) (No. 22-578)

(documenting, in denied petition, that respondent "affirmatively waived the [relevant] argument"); Pet. 22-24, *Graham* v. *United States*, 143 S.Ct. 1754 (2023) (No. 22-850) (same); Pet. 21, *Yi-Chi* v. *United States*, No. 23-693, 2024 WL 674836 (U.S. Feb. 20, 2024) (similar). Here, too, this Court should decline to police case-specific application of the party-presentation principle.

Moreover, however the University thinks courts should function, longstanding Ninth Circuit law is clear both that Mackenzie did not engage in waiver and that the court can reach issues raised for the first time en banc. Pet. App. 23a-24a (collecting cases). This Court "do[es] not often review the circuit courts' procedural rules." *Joseph* v. *United States*, 574 U.S. 1038, 1040 (2014) (statement of Kagan, J., respecting the denial of certiorari).

2. *United States* v. *Sineneng-Smith*, 140 S.Ct. 1575 (2020), does not suggest otherwise. That case did not concern the validity of established Ninth Circuit procedural rules. And, there, this Court did not grant a writ of certiorari to correct the Ninth Circuit's error in addressing an issue that the parties did not raise. *See id.* at 1578. Rather, the Court granted review because the Ninth Circuit had held that a federal criminal statute was facially unconstitutional—a decision that, if left unreviewed, would have had effects far more sweeping than those of the fact-specific Ninth Circuit opinion at issue here.

Plus, contrary to the University's telling, this case is nothing like *Sineneng-Smith*. There, after the

parties briefed an appeal, a "panel . . . ordered further briefing from three non-party organizations on an issue that had never been raised by" the appellant. Pet. App. 24a. The appellant never briefed the issue herself, merely "adopt[ing] without elaboration" the arguments the organizations made at the panel's invitation. *Sineneng-Smith*, 140 S.Ct. at 1581.

By contrast, in this case, the "en banc panel . . . neither turned over the appeal to non-parties, nor 'radical[ly] transform[ed]' the case by raising a new issue." Pet. App. 24a (quoting *Sineneng-Smith*, 140 S.Ct. at 1581-82). The University initially introduced the issue of its control over the team house by moving for summary judgment on that basis and repeating its relevant arguments in its panel briefing. *See supra* p. 10. Of her own accord, Mackenzie presented the relevant counter-argument in her petition for rehearing en banc and again after seeking leave to file a supplemental brief on the topic, *see* Pet. App. 48a (Friedland, J., concurring)—a motion the University opposed, in contrast to its current position, on the ground that the issue had "already been briefed," C.A. Doc. 76, at 1. After that, the en banc court addressed this "alternative argument," which it recognized Mackenzie had "raised . . . 'to support what has been [her] consistent claim from the beginning.' " Pet. App. 24a (quoting *United States* v. *Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004)). Because "the parties themselves have 'frame[d] the issue for decision' " the "party-presentation principle is not implicated." *Lee* v. *Fisher*, 70 F.4th 1129, 1154 (9th

Cir. 2023) (en banc) (quoting *Sineneng-Smith*, 140 S.Ct. at 1579).

That rule is particularly important in a case like this one. The University's petition omits that the panel majority, not just the dissent, reached the issue in question, creating binding case law. Pet. App. 48a (Friedland, J., concurring). "Had the three-judge panel merely disposed of the control-over-off-campus-apartment theory on waiver or forfeiture grounds . . . there likely would not have been a rehearing en banc." *Ibid.* But "[w]hen an opinion by a three-judge panel resolves a legal claim and 'the case is called en banc on grounds that would correct the opinion but which were not raised before the original panel, the en banc panel [must be] . . . permitted, if not encouraged, to decide the case on the correct, unraised grounds.'" *Id.* 48a-49a (quoting *Socop-Gonzalez*, 272 F.3d at 1186 n.8).

Were the rule otherwise, courts would find themselves in a bizarre bind. If a panel reached an unraised issue and resolved it incorrectly, and the losing party then petitioned for rehearing en banc on that basis, a court would have two options. It could refuse to consider the question even then, allowing bad precedent to sit undisturbed. Or all the court's judges could expend significant time and energy to determine their views on the legal issue decided by the panel, only to find themselves powerless to write a new, better opinion en banc. For good reason, that is not the law.

And, in this case, the Ninth Circuit's procedural rule did not prejudice the University, even if it would

prefer a different result. The petition contends (at 35-36) that it was unfair for the Ninth Circuit to reach the central legal issue because the University did not have the opportunity to develop relevant facts. That is wrong. The University never moved to dismiss this case. *See* Docket, *Brown* v. *Arizona*, No. 2:17-cv-03536 (D. Ariz.). So, during discovery, it did not know what arguments Mackenzie would or would not advance. And when the University moved for summary judgment on the basis that it did not control the team house, it marshalled its evidence at hand. *See* Dist. Ct. Doc. 193, at 20-21. Besides, if necessary, the district court can reopen discovery for this limited purpose. Pet. App. 80a n.3 (Nelson, J., dissenting).

CONCLUSION

The Court should deny the petition for a writ for certiorari.

Respectfully submitted,

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