No. 23-812

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Nearly twenty-five years ago, this Court determined that Title IX liability extends to student-on-student harassment in "limited circumstances." *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999). Specifically, *Davis* limited Title IX liability for student-on-student harassment to instances where a school "exercises substantial control over both the harasser and the context in which the known harassment occurs." *Id.* at 645. The Ninth Circuit's decision collapses this two-prong test into a single prong focused on control or "disciplinary authority" over the harasser.

Review by this Court is necessary. The Ninth Circuit's decision is irreconcilable with *Davis* and decisions in other circuits. Respondent Mackenzie Brown ("Brown") offers no valid reason why the Court should not grant review, nor does she deny that the question presented in this case is exceptionally important to schools across the nation. The petition should be granted.

I. The Ninth Circuit's Decision Directly Conflicts with *Davis*.

1. Title IX provides: "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) (emphasis added). In *Davis*, this Court held 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." 526 U.S. at 645 (emphasis added) (citations omitted). "The statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser *and the environment* in which the harassment occurs." *Id.* at 644 (emphasis added). Thus, Title IX "limit[s] a recipient's damages 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 distinction matters.

The Ninth Circuit's en banc decision collapses *Davis*'s two-prong test into a single prong, holding that disciplinary authority over the harasser is "a key consideration" in analyzing whether the school has control over the context in which the harassment occurs. App. 28. As the dissenting judges correctly observed, the collapsing of *Davis*'s two-prong test is "a sharp and troubling departure" from *Davis*, and completely "unmoored" from Title IX's focus on discrimination occurring under the "programs and activities" of schools receiving federal funding. App. 58–59 (Rawlinson, J., dissenting); App. 70–71 (Nelson, J., dissenting). This departure from *Davis* is, in and of itself, reason for granting review. Sup. Ct. R. 10(c).

Brown does not seriously dispute that the Ninth Circuit's decision collapses *Davis*'s two-prong test. Rather, Brown strives to minimize this legal error by suggesting that "disciplinary authority" is only one consideration under the Ninth Circuit's decision. BIO 19. That significantly misstates the extent of the Ninth Circuit's holding. The Ninth Circuit did not hold

that disciplinary authority over the harasser was merely *a* consideration in the control-over-context analysis. It held that it was a "key" consideration. App. 28. And, in practice, it was the *only* consideration the majority relied upon to find that the University could control Bradford's off-campus residence. The factors the majority cited as indicia of control over Bradford's residence are actually "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 (Rawlinson, J., dissenting). But the University's ability to punish Bradford for off-campus conduct does not amount to control over his off-campus house, nor does it bring that residence under the purview of the University's programs or activities.

2. Contrary to Brown's implication, the University does not contend that Title IX liability for student-on-student harassment can never extend to off-campus conduct. Brown cites regulations indicating that a school's "programs or activities" may encompass off-campus conduct in some situations. BIO 30. The University does not disagree. Title IX liability may properly extend to off-campus activities in some circumstances, such as a school-sponsored football camp. But the Ninth Circuit's decision fails to provide meaningful guidance or place meaningful limitations on the scope of Title IX liability for off-campus student misconduct. App. 90–91 (Nelson, J., dissenting) ("Now that disciplinary authority is enough to establish the control-over-context requirement, there are no discernable limits on the circumstances that could create Title IX liability."). This poses a significant problem for schools, which already grapple with competing liability risks on a

daily basis. Schools need and deserve better guidance than that provided by the Ninth Circuit. This Court should intervene to provide needed clarity.

3. Brown attempts to avoid the Ninth Circuit's clear departure from *Davis* by characterizing this case as "fact-intensive." BIO 3. The relevant facts, however, are undisputed. And the University's petition seeks review of legal error (i.e., the Ninth Circuit's departure from *Davis*), which does not require review of the facts.[1]

Brown also makes factual assertions that are unsupported by the record. For example, Brown creatively rebrands Bradford's private residence as "the football house" or "team house" in an apparent attempt to tether the private residence to the University's football program. BIO 23. She contends that the University controlled "who could live" in Bradford's residence and "what they did." BIO 12, 19. These assertions lack support in the record. Bradford lived in a private, off-campus residence with other football players, as well as a non-student. App. 17, 71. There is no support for Brown's assertion that the University "controlled who lived in" Bradford's off-campus house, much less what happened in that house. Brown also suggests that Bradford received "special permission" to live off campus. BIO 29. This also misstates the record. App. 91–94 (Nelson, J.,

[1] Brown suggests that the district court issued an inconsistent decision in a case brought by another one of Bradford's victims. BIO 9–10. In that case, however, the abuse was alleged to have occurred both on and off campus. *DeGroote v. Ariz. Bd. of Regents*, No. CV-18-00310-PHX-SRB, 2020 WL 10357074, at *3 & n.12 (D. Ariz. Feb. 7, 2020).

dissenting). Regardless, Brown's insistence that the football coach could have revoked Bradford's "permission" to live off campus relates to control over Bradford—not his off-campus residence. *Id.* Brown's mischaracterization of the record does not warrant denying review.

II. The Ninth Circuit's Decision Conflicts with Decisions in Other Circuits.

Not only does the Ninth Circuit's decision conflict with *Davis*, it also conflicts with decisions of the Fourth, Sixth, Eighth, and Tenth Circuits, further illustrating that review is warranted. Sup. Ct. R. 10(a).

1. In *Roe v. St. Louis University*, the Eighth Circuit expressly rejected the argument that "disciplinary control" is relevant to whether a school has control over the context in which harassment occurs. 746 F.3d 874, 884 (8th Cir. 2014). Brown strives unsuccessfully to factually distinguish *Roe*. The Ninth and Eighth Circuits have taken conflicting positions on whether disciplinary authority can support control over the context of harassment. The Ninth Circuit held that such disciplinary authority is a "key consideration" in evaluating control over context, while the Eighth Circuit rejected that argument outright. *Id*. These diverging legal conclusions have nothing to do with the facts of either case. The Ninth Circuit's decision is in direct conflict with *Roe*, and this Court should resolve the conflict.

2. The Tenth Circuit likewise declined to hold that disciplinary authority over the harasser can establish the requisite control over the context of the

harassment. *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 & n.1 (10th Cir. 2008). Brown again tries to factually distinguish this case, but with no success. *Rost* correctly held that "harassment creating liability under Title IX must occur under the operations of a funding recipient, . . . [meaning that] the harassment must take place in a context subject to the school district's control." *Id.* at 1121 (cleaned up). It further held that there must be "some nexus between the out-of-school conduct and the school" for Title IX liability to arise for harassment occurring off school grounds. *Id.* at 1121 n.1. The mere fact that the school could have disciplined the students for off-campus harassment was not enough to establish the necessary control. *See id.* at 1121 & n.1; *id.* at 1129–31 (McConnell, J., concurring in part and dissenting in part).

Brown attempts to liken the Tenth Circuit's nexus test to the Ninth Circuit's reasoning that the "University's rules and 'sanction' authority created [] a connection" with the off-campus harassment by Bradford. BIO 35. However, the Tenth Circuit expressly declined to hold that disciplinary authority was enough to create the requisite "nexus" or connection in *Rost*, 511 F.3d at 1121 & n.1.

Brown retreats to another Tenth Circuit case: *Simpson v. University of Colorado Boulder*, 500 F.3d 1170 (10th Cir. 2007). She asserts that, in that case, the Tenth Circuit "focused on the school's causal relationship to the harassment in the relevant context." BIO 20. Not quite.

In *Simpson*, the court actually reasoned that the university had control over the context (i.e.,

environment) of the off-campus harassment because it "arose out of an official school program, the recruitment of high-school athletes" through showing them a "good time." 500 F.3d at 1174. *Simpson* supports *Rost*'s conclusion that there must be a nexus between the off-campus conduct and a school program or activity, not just "a causal relationship" between the harassment and the school, as Brown contends.

3. The Sixth Circuit has also made clear that a "school may be held liable only for what it can control" regardless of the disciplinary authority it has over its students. *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 970–71 (6th Cir. 2020) (en banc). In *Foster*, the university exhibited disciplinary control over the harasser for his conduct on social media by precluding him from attending class the day after making an offending social media post, yet the school was not liable because it lacked control over that setting itself. *Id.* at 964, 970.

The Sixth Circuit's focus on whether the university had *control over the setting* regardless of its disciplinary authority in that setting contrasts with the Ninth Circuit's focus on whether the school has "some form of disciplinary *authority over the harasser* in the setting." App. 28 (emphasis added). While Brown argues that the Sixth Circuit was analyzing deliberate indifference rather than control, the Sixth Circuit analyzed control as part of its determination as to deliberate indifference. The decisions conflict, meriting review.

4. As for the Fourth Circuit, Brown completely ignores that in *Feminist Majority Foundation v. Hurley*, the court analyzed "disciplinary

authority" as part of the "institution's control over the harasser," not control over context. 911 F.3d 674, 688–89 (4th Cir. 2018). The Fourth Circuit expressly distinguished disciplinary authority from control over the context, as *Davis* counseled, observing that a university "could exert substantial control over the context in which the harassment occurred *and* could exercise *disciplinary authority* over [its] students." *Id.* (emphasis added).

Brown nonetheless argues that *Feminist Majority* supports the Ninth Circuit's decision because the university's power to exclude students from a social media platform showed control over the context. BIO 16. But it was the university's control over the campus wireless network that could have prevented the students from engaging in the harassment through social media, not its disciplinary authority, that established control over context. *Feminist Majority*, 911 F.3d at 688. Brown is simply wrong in asserting that "[t]he Fourth Circuit, like the Ninth below, understood control over a context to turn on remedial authority." BIO 16. Instead, the Fourth Circuit, consistent with *Davis*, confined analysis of disciplinary authority to its analysis of the university's control over the harasser.

5. Brown relies on two inapposite cases in an attempt to obscure the unprecedented nature of the Ninth Circuit's decision: (1) *Ross v. University of Tulsa*, 859 F.3d 1280 (10th Cir. 2017), and (2) *S.C. v. Metropolitical Government of Nashville*, 86 F.4th 707 (6th Cir. 2023). Neither of these cases resolve the circuit split.

First, in *Ross*, the court determined that a university had control over an *on-campus* apartment. While the court mentioned "disciplinary authority," the court's analysis focused on the university's ability to bar the student *from campus*, which "would have prevented him from sexually harassing students *on campus*," including in the private on-campus apartment. 859 F.3d at 1287 n.5 (emphasis added). *Ross* is inapposite because Bradford's residence was off-campus and privately owned. Indeed, had the University expelled Bradford sooner, there is no evidence that he would have had to leave his private residence. App. 93–94 (Nelson, J., dissenting). *Ross* does not support the Ninth Circuit's holding.

Second, as for *S.C.*, Brown clips a quote from the case to suggest that the Sixth Circuit agreed with the Ninth Circuit decision. Though *S.C.* post-dates the Ninth Circuit's decision, the Sixth Circuit did not cite the Ninth Circuit's decision, as Brown acknowledges. BIO 14. And for good reason. In *S.C.*, the Sixth Circuit was addressing online harassment and threats, some of which "were made during school hours" by the plaintiff's peers. 86 F.4th at 716. The harassment was part of an "extensive sexual misconduct problem" at the high school and within the school district. *Id.* at 715. Given these facts, it is unremarkable that the Sixth Circuit found the school's disciplinary authority over students relevant to "whether the student-harassers were under the school's control." *Id.* at 716. *S.C.* did not hold that authority to discipline students for off-campus misconduct equates to control over context.

Even assuming Brown is right that *Ross* and *S.C.* support the Ninth Circuit's decision, that only reinforces that the circuit courts are in conflict. This Court's guidance is necessary.

III. The Ninth Circuit's Decision Violated the Party Presentation Rule By Relying on an Argument Brown Disclaimed.

"In our adversarial system of adjudication, [courts] follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). As described in the petition (at 33–36), the Ninth Circuit erred by reaching out to determine whether the University controlled Bradford's residence even though Brown had expressly disclaimed this argument. This extreme departure from "the accepted and usual course of judicial proceedings" merits this Court's review. Sup. Ct. R. 10(a).

Brown concedes that she never argued that the University had control over Bradford's residence until her petition for rehearing en banc, after the argument was raised in a dissent from the three-judge panel majority. BIO 35. Brown nevertheless asserts the en banc panel was duty-bound to address whether the University controlled Bradford's residence because the panel majority created binding case law by addressing the issue in response to the dissent.[2] BIO 36. But there is no precedent for an appellate court to

[2] This argument falters out the gate because "[a]nything [a prior case] has to say as to matters not presented in that case is . . . dicta and thus not binding." *United States v. Cruz*, 554 F.3d 840, 849 n.13 (9th Cir. 2009) (cleaned up).

entertain an argument that has been *affirmatively disclaimed* by a party. App. 79 (Nelson, J., dissenting). As Judge Nelson noted, if the en banc panel disagreed with the three-judge panel majority's decision, it could simply vacate the opinion without addressing Brown's disclaimed argument. App. 79 n.2.

That is not what happened here. Instead, the en banc panel solicited an amicus brief to address Brown's previously disclaimed argument, then it permitted Brown to file a supplemental brief further addressing that argument. Pet. at 34–35. The case was decided based on this new argument rather than on any argument Brown raised before the district court or the three-judge panel.

The prejudice to the University of permitting—indeed, encouraging—Brown's about-face is obvious. Brown attempts to minimize this prejudice, but cannot deny that the Ninth Circuit remanded this case to proceed under a theory that she previously disclaimed. Even if the district court reopens discovery, that itself is prejudicial, as the University already expended significant time and resources completing discovery on Brown's original theory of the case. "It is hard to imagine a more unfair process for the University." App. 80 (Nelson, J., dissenting). The Court should grant this petition to reverse the Ninth Circuit's takeover of this appeal.

IV. This Case Is a Proper Vehicle.

Brown's vehicle arguments are meritless. The Ninth Circuit's decision is a precedential opinion on an issue of significant importance to schools across the nation. Remarkably, Brown would insulate that

decision from review because if the Court agrees that the Ninth Circuit violated the party presentation rule, it may not need to reach the issue of whether the Ninth Circuit's decision conflicts with *Davis*. True, the petition presents two independent and alternative grounds for reversal. But the existence of alternative grounds for reversal is not a reason to deny review. Indeed, Brown's argument is that since the Ninth Circuit committed two errors, this Court should not accept review but could do so if the Ninth Circuit had only made one of the two mistakes. This argument has a "Through the Looking Glass" quality to it.

Tacitly acknowledging a circuit split, Brown also argues that this case is a poor vehicle because she would prevail under the "nexus" test adopted by the Tenth Circuit. BIO 23. Even if that were true, it is not a reason to deny certiorari. At most, this argument would support a remand for "further proceedings not inconsistent with this opinion" after the Court resolves the legal questions presented in this case. This is a common occurrence, not a vehicle problem.

Finally, Brown insists that this case is too "fact-intensive" and that there is need for further percolation. BIO 3, 23–24. As discussed, the relevant facts are undisputed, and the issues on review are legal, not factual. No further percolation is warranted because the Ninth Circuit's decision directly conflicts with this Court's precedent and other circuits' decisions. No vehicle issue precludes review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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