No. 20-15568

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MACKENZIE BROWN,

Plaintiff-Appellant,

vs.

STATE OF ARIZONA, *et al.*

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Case No. 2:17-cv-03536-GMS
The Honorable G. Murray Snow

APPELLANT'S PETITION FOR REHEARING OR REHEARING EN BANC

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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.

This is a textbook Title IX violation: the defendants (collectively "the University") were deliberately indifferent to the known risk Bradford posed to students. Yet, over Judge Fletcher's forceful dissent, a panel of this Court absolved the University of responsibility because Bradford's abuse of Mackenzie occurred off the University's campus—even though the University knew about Bradford's past violence, heavily regulated the players' house, and admits that it could have taken measures to prevent the abuse Mackenzie suffered.

In doing so, the majority adopted a sweeping, overly formalistic rule under which schools' responsibility to prevent and address sexual harassment turns on artificial geographic boundaries. That is wrong under Supreme Court precedent,

creates a circuit split, and conflicts with the federal government's interpretation of Title IX. The legal question here is also one of exceeding importance because the majority's rule guts crucial civil rights protections for students. Accordingly, this Court should grant rehearing or rehearing en banc to reconsider this erroneous decision.

BACKGROUND

1. Over the course of the 2015-2016 academic year, school officials received multiple reports that Bradford, a freshman, was physically abusing two classmates he was dating: "Student A" and Lida DeGroote. Slip op. at 5-8. For example, Student A's teammates reported that Student A had a black eye and finger-shaped bruising on her neck, and that Bradford had admitted to strangling her. *Id.* at 5-6. The teammates also reported that Bradford had started "hitting" and otherwise abusing Lida, who had "bruises and marks all over her body." *Id.* at 26 (Fletcher, J., dissenting). When a University Title IX Coordinator called a meeting with Student A, the student recounted that "Bradford [had] choked her three or four different times." *Id.* at 7.

The University's response was wholly inadequate: It only ordered Bradford to stay away from Student A and moved him to a different dorm room. *Id.* at 8. The University did nothing to prevent Bradford from abusing other students. Slip op. at 8. It did not even inform his football coaches of his violence. Slip op. at 23 (Fletcher,

J., dissenting). As a result, the coaches granted him special permission to live off-campus with other players—a privilege reserved for those demonstrating good behavior. Slip op. at 8; *see also* ER54 (allowing players to live "off-campus subject to moving back on campus" for rules violations). The head coach later testified that, had he known about the abuse, he would have immediately dismissed Bradford from the team, which would have meant the termination of Bradford's scholarship as well. ER57-59, 61-63.

During the summer of 2016, between their freshman and sophomore years, Bradford began abusing Mackenzie. Slip op. at 8. The most extreme violence occurred over two days in the off-campus house where Bradford lived with other football players. *Id*. at 30-33 (Fletcher, J., dissenting). During that time, Bradford pushed and hit Mackenzie, dragged her by her hair, strangled her, told her to "[s]ay goodbye to [her] mom" because she was "never going to talk to her again," locked her in a room, and slapped her face so hard that her nose bled. *Id*. at 31-32 (Fletcher, J., dissenting). Bradford's abuse caused serious physical injuries, including neck, abdominal, and rib contusions; "burst blood vessels in the eye;" a concussion; an "intractable acute post-traumatic headache," and "rib pain with breathing and movement." *Id.* at 33 (Fletcher, J., dissenting). Soon after these assaults, Mackenzie's mother reported Bradford to the police, and he was arrested. *Id.* at 9. The football coaches immediately kicked Bradford off the team, and he left the

University after it began a disciplinary investigation. ER52, 101. Bradford was later convicted of felony aggravated assault and domestic violence. Slip op. at 9 n.2.

Because of Bradford's abuse, Mackenzie missed several weeks of classes. ER106. 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.* at 106-08. She has since been diagnosed with post-traumatic stress disorder. *Id.* at 108.

2. 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*. Slip op. at 34 (Fletcher, J., dissenting). Their cases were assigned to two different judges. *Id.* Lida's suit succeeded: The 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). It found that she had demonstrated as a matter of law that the University had been deliberately indifferent to Bradford's known abuse, and that Lida had been subjected to severe, pervasive, and objectively offensive sex-based harassment. *Id.* at *6-7, *9-10. And—most relevant to this appeal—the Court found that the University exercised substantial control over Bradford and the off-campus apartment in which the abuse occurred, rejecting the University's argument

that its control ended at its geographic boundaries. *Id.* at *8-9. The case settled shortly thereafter. Slip op. at 34 (Fletcher, J., dissenting).

Yet, in Mackenzie's case, a different judge granted summary judgment to the *University*. ER8. That Court found that, as a matter of law, the University did not have substantial control over the context in which Bradford's harassment of Mackenzie occurred because it happened at the off-campus house he shared with teammates. *Id.* at 7.

Mackenzie appealed to this Court, and a divided panel affirmed. It held that the University had control over Bradford, but not over the context in which he abused Mackenzie because the players' house was located off the University's campus. Slip op. at 20-21. The majority acknowledged that, as a practical matter, the University had full control over whether Bradford could live in that house, and that its funding covered his rent. *Id.* at 17. But, the majority said, that control was insufficient. *Id.* As a general matter, the majority explained, "[t]here is an appreciable difference between the degree of control an educational institution exercises over on-campus housing and off-campus housing." *Id.* So, it decided, all the indicia of the University's control over Bradford's house meant nothing because they did not prove "that the University had regulatory control over his residence *like it does over on-campus housing*." *Id.* (emphasis added). In other words, the majority held that a school's control over off-campus housing that is different in degree or kind from its

control over on-campus dorms is, simply, no control at all. A school, then, would never have Title IX responsibilities to address abuse that occurs in the "context" of off-campus student housing because its control of those residences, however significant, will never be identical to its control over its own buildings. *See id*.[1]

Judge Fletcher disagreed. In dissent, he explained that, though location could be an "important indicator of the school's control over the 'context' of the alleged harassment, the key consideration is whether the school has disciplinary authority over the harasser in the context in which the harassment takes place." Slip op. at 37 (Fletcher, J., dissenting). Judge Fletcher noted that the University had disciplinary authority over Bradford for his actions in his off-campus residence—a residence in which he was only permitted to live with permission from his coaches, and which he paid for with his scholarship. *Id.* at 42, 44 (Fletcher, J., dissenting). Mackenzie's evidence of control, then, was at least enough to survive summary judgment. *Id.* at 45 (Fletcher, J., dissenting).

[1] The majority appeared to recognize that a school will have control over its own events that happen to occur off-campus, including at an off-campus residence. *See id*. at 19-20. But its rule still forecloses courts from recognizing schools' control over off-campus student housing insofar as it functions as student housing.

ARGUMENT

I. The Panel Majority's Decision Contravenes Supreme Court Precedent, Creates a Circuit Split, and Conflicts with the Federal Government's Interpretation of Title IX.

As Judge Fletcher recognized, under controlling Supreme Court precedent, location is relevant but not dispositive to a school's control over the environment in which harassment occurs. *Id.* at 37 (Fletcher, J., dissenting). The majority erred in adopting a rule under which, as a categorical matter, schools lack control over off-campus student residences. *See id.* at 17. That rule is incompatible with the Supreme Court's direction, heeded by other courts, to treat control as a matter of "degree" dependent on multiple factors. Rehearing or rehearing en banc is therefore necessary for this Court to follow Supreme Court precedent, as well as to avoid conflicts with other circuits and federal agencies.

1. In *Davis*, the Supreme Court held that a school may be liable for its deliberate indifference to student-on-student sexual harassment. *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646-52 (1999). In doing so, it emphasized that a school could only be responsible for its *own* failure to intervene; it would not be vicariously liable for the student-harassers' misconduct. *Id.* at 640-41. Toward that end, *Davis* explained that a school's liability depended, in part, on its "control over the context in which the harassment occurs" and, "[m]ore importantly," its "control over the harasser." *Id.* at 646. That makes sense: If the school lacked the control

necessary to address the harassment, it could not be responsible for its failure to do so.

Davis did not define "control," but in summarizing its new legal test, the Court made clear that the crux is disciplinary authority. It wrote: "We thus conclude that recipients of federal funding may be liable for 'subject[ing]' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment *and the harasser is under the school's disciplinary authority*." *Id.* at 646–47 (emphasis added). *Davis* was also clear that control is not binary, repeatedly discussing it as a matter of "degree." *Id.* at 644, 646, 649. That degree of control, it explained, would depend on factors beyond the location of the harassment, including the students' ages. *See id*. at 649.

As both a practical and legal matter, a school's control over its students' conduct often does not end at the campus boundary, even if it may diminish. *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 is especially clear where a school's disciplinary policy expressly covers off-campus conduct. *See DeGroote*, 2020 WL 10357074 at *8. It is sensible for schools to regulate off-campus behavior since that misconduct—including off-campus sexual harassment—can affect students' on-campus learning. *See Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1105 (10th Cir. 2019). And where there is a sufficient

"nexus between the out-of-school conduct and the school," *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1 (10th Cir. 2008), a school may have significant power to influence that off-campus environment, *see, e.g.*, slip op. at 43 (Fletcher, J., dissenting); *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 688 (4th Cir. 2018); *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1182 (10th Cir. 2007); *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1169 (D. Kan. 2017), *aff'd* 918 F.3d 1094 (10th Cir. 2019). That is, the school may have control over the context of the harassment. Contrary to the panel opinion, then, a school may, in certain circumstances, have control over off-campus housing "under [the] education program or activity," 20 U.S.C. § 1681(a).

2. This Court's sister circuits, as well as numerous district courts, have rejected the majority's rule that Title IX requires contemporaneous control precisely akin to a university's control over its buildings. For example, in the Tenth Circuit case *Simpson*, two students were raped at one of their off-campus apartments by members of the football team and high school recruits. *Simpson*, 500 F.3d at 1173. As in this case, the "'the likelihood of such misconduct was so obvious' that the University's failure 'was the result of deliberate indifference.'" Slip op. at 38 (Fletcher, J., dissenting) (quoting *Simpson*, 500 F.3d at 1173). The Tenth Circuit allowed the suit to proceed, recognizing that the University had sufficient control despite the off-campus location of the rapes. *See* slip op. at 38 (Fletcher, J.

dissenting). The majority attempts to distinguish *Simpson* on the basis that, there, the rapes "occurred during team … activities." Slip op. at 20. But a jury could find that athletes living together near campus at the revocable permission, and under the regulation, of their coaches is at least as much a team activity as athletes partying at another classmate's off-campus apartment with recruits—and that, as a practical matter, the two university-defendants exercised comparable degrees of control over those contexts.

Similarly, in *Weckhorst*, the district court determined that the university had substantial control over the plaintiff's off-campus rape. There, "the plaintiff got intoxicated at an off-campus fraternity event, and a fellow student who was a designated driver for a different fraternity sexually assaulted her in his vehicle and his off-campus fraternity house." *Id*. at 20 (citing *Weckhorst*, 241 F.Supp.3d at 1159). Indicia of the school's control included the school's regulation of fraternities and sororities, and its discipline of a fraternity for other, non-sexual rule violations that occurred off campus. *Weckhorst*, 241 F.Supp.3d at 1167. Attempting to distinguish Mackenzie's case, the panel says that the University of Arizona lacked "regulatory control over Bradford's off-campus apartment [akin to that] Kansas State University had over fraternities in *Weckhorst*." Slip op. at 20. The record, though, demonstrates the University of Arizona likely exercised at least as much authority over the football players' off-campus house: It determined which

teammates were allowed to live there, it reserved the right to revoke its permission even mid-semester, and the University's own policies make clear it had the disciplinary authority to regulate students' conduct in off-campus residences. *See infra* pp. 13-14.

Other courts also use a commonsense approach to determine whether a school has substantial control, rather than relying on campus boundaries alone. *Hurley*, 911 F.3d at 687-89 (explaining school's substantial control over online harassment—some of which occurred off-campus—was demonstrated by its ability to "exercise[] control in … ways that might have corrected the hostile environment"); *Rost*, 511 F.3d at 1121 n.1 (recognizing Title IX liability can arise related to off-campus conduct so long as there is "some nexus between the out-of-school conduct and the school"); *T.C. ex rel. S.C. v. Metro. Gov. of Nashville & Davidson Cnty.*, Nos. 17-01098, 17-01159, 17-01277, 2020 WL 5797978 at *19 (M.D. Tenn. Sept. 25, 2020) (finding school exercised control over off-campus harassment), *appeal docketed,* No. 20-6228 (6th Cir. Oct. 27, 2020); *Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F.Supp.2d 1008, 1011, 1025 (E.D. Cal. 2009) (holding school had control over off-campus football camp affiliated with, but not run by, the school); *Crandell v. N.Y. Coll. of Osteopathic Med.*, 87 F.Supp.2d 304, 317 (S.D.N.Y. 2000) (explaining school had control over off-campus clinical rotation because it regulated its students' participation); *see also Hall v. Millersville Univ.*, 22 F.4th 397, 409 (3d

Cir. 2022) (explaining control inquiry turns on specific facts, not categorical distinctions).

Those cases reflect the federal government's interpretation of Title IX. *See* U.S. Statement of Interest at 16-17, *S.W. v. Kan. State Univ.*, No. 16-02255 (D. Kan. Oct. 26, 2016), https://www.justice.gov/crt/case-document/file/906112/download [hereinafter "U.S. Statement of Interest"]; 85 Fed. Reg. 30,026, 30,093 (May 19, 2020) ("clarify[ing] that even if a situation arises off campus"—including in an "off-campus apartment"—"it may still be part of the recipient's education program or activity if the recipient exercised substantial control"); Letter from Adele Rapport, Reg'l Dir., Off. for Civ. Rts., U.S. Dep't Educ., to Janice K. Jackson, Chief Exec. Officer, Chicago Pub. Schs. Dist. #299 at 4-10, 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 off-campus sexual harassment that occurred outside any school activity). It is also consonant with Title VII case law, which requires employers to address employee-on-employee harassment that occurs outside of work. *See, e.g.*, *Dowd v. United Steel Workers of Am., Loc. No. 286*, 253 F.3d 1093, 1101-02 (8th Cir. 2001); *Ferris v. Delta Air Lines Inc.*, 277 F.3d 128, 136-37 (2d Cir. 2001); *see also Emeldi v. Univ. of Or.*, 698 F.3d 715, 725 (9th Cir. 2012) (noting "[t]he Supreme Court has often 'looked to its Title VII interpretations of discrimination in illuminating Title IX'").

3. The consensus among the courts, then, is that "[t]he location at which the known harassment occurs is certainly part of a court's calculus in examining context—but it is not dispositive." *DeGroote*, 2020 WL 10357074 at *8. This case perfectly illustrates that rule. Nobody disputes that the University had substantial control over Bradford, slip op. at 16, or that its disciplinary policies cover off-campus conduct, ER99. And, construing the record evidence in Mackenzie's favor, the University also had substantial control over the context of the abuse. Slip op. at 41-45 (Fletcher, J., dissenting).

The University had an unusually high degree of control over Bradford's off-campus residence because he was an athlete. *See id*. at 44 (recounting expert's testimony about university control over student-athletes); *see also Dawson v. Nat'l Collegiate Athletics Ass'n,* 932 F.3d 905, 909-10 (9th Cir. 2019) (explaining that NCAA member schools heavily regulate student-athletes' lives). Bradford could only live off-campus with his coaches' permission, which depended on his good behavior. Slip op. at 9, 18. If he misbehaved, the coaches could force him to move back to a dorm. *Id*. at 44 (Fletcher, J., dissenting); ER54. Moreover, "[i]t is undisputed that if university officials had told Bradford's coaches of his assaults on Student A and [Lida]," as they surely should have, "the coaches would not have given him permission to live off campus," slip op. at 23 (Fletcher, J., dissenting)—

meaning that the University not only controlled the context of the abuse but affirmatively *created* it through its deliberate indifference.

Crucially, there is no dispute that the University had the power to address Bradford's past violence and so prevent his abuse of Mackenzie, regardless of its location. *Id.* at 23-24 (Fletcher, J., dissenting). After learning of Bradford's violence toward other women, the University could have increased supervision of Bradford, required him to engage in rehabilitative services, or suspended or expelled him. *See, e.g.*, U.S. Dep't of Educ. Off. for Civ. Rts., *Dear Colleague Letter: Harassment and Bullying* 3 (Oct. 26, 2010) [hereinafter "2010 Guidance"] (discussing options for school action). Head football coach Rick Rodriguez also testified that, if the University had informed him of Bradford's earlier violence toward classmates, he would have kicked Bradford off the team and revoked his scholarship, effectively expelling him. ER58. Indeed, Rodriguez cut Bradford as soon as he learned of his arrest, and the University opened a disciplinary investigation into Bradford for his off-campus abuse of Mackenzie. ER52, 90. Construing those facts in favor of Mackenzie, a reasonable jury could conclude that the University exerted control over the context of the abuse.

4. Regardless, in a "pre-assault" case like this one, a high degree of control over the physical location of the abuse matters little, because the University's

liability arises from its failure to address earlier complaints of Bradford's on-campus violence.

Generally speaking, Title IX sexual harassment claims come in two forms: (1) "post-assault" claims, as in *Davis*, in which a plaintiff seeks to hold the recipient liable for its deliberate indifference to her reports that she had been sexually harassed, and (2) "pre-assault" claims in which the plaintiff contends that the recipient is liable based on its deliberate indifference that occurred prior to—and helped cause—the sexual harassment she then experienced. *Karasek v. Regents of Univ. of California*, 956 F.3d 1093, 1099 (9th Cir. 2020). "Pre-assault" claims include cases, like this one, in which a school was deliberately indifferent to the risk a specific student or teacher with a history of harassment posed to the student body, and who went on to harass the plaintiff. *E.g.*, *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1257-59 (11th Cir. 2010); *J.K. v. Ariz. Bd. of Regents*, No. CV06-916, 2008 WL 4446712, at *14 (D. Ariz. Sept. 30, 2008) (Murguia, J.).

In these cases, the "control" that matters most is the school's ability to address the substantial risk *before* the plaintiff is harassed: Absent that, the later abuse would not be the school's fault, and, as explained above, the purpose of *Davis*'s control requirement is to ensure that schools only face liability for their own failures. *See supra* pp. 7-8. Here, there is no question that the University had control over the context of Bradford's abuse of Student A, which occurred on campus. Slip op. at 28

(Fletcher, J., dissenting). Once it learned of that violence, the University unquestionably could have taken steps to protect other students from Bradford without departing from the scope of its ordinary on-campus operations. *See id.* at 42 (Fletcher, J., dissenting). Accordingly, the University's deliberate indifference—the "'discrimination' 'on the basis of sex'" for which it is liable, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005)—occurred "under [the] education program or activity," 20 U.S.C. § 1681(a). So did the resultant "exclu[sion]" and "deni[al of] benefits" Mackenzie suffered as a result, such as the classes she missed. *Id*.

Besides, under Title IX's plain text, not *all* challenged discrimination must occur "under the education program or activity." 20 U.S.C. § 1681(a). The statute identifies three types of violations: A plaintiff states a claim if she was (1) "excluded from participation in … [the] education program or activity," (2) "denied the benefits of … [the] education program or activity," or (3) "subjected to discrimination under [the] education program or activity." *Id*. Thus, if a school's discrimination excludes a plaintiff from participation in the "education program or activity" or deprives her of its benefits, she may state a claim, regardless of whether the discrimination occurred "under [the] education program or activity." *Id.*

That Bradford abused his last victim-classmate in an off-campus house, rather than in a dorm, does not make the University less blameworthy—especially since Bradford was only allowed to live in that house because of its deliberate indifference.

Cf. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 278-79 (1998) (contemplating liability for school's failure to prevent off-campus teacher-on-student abuse based on past complaints, without any mention of control). In truth, the most relevant "context" of the abuse was not its location but rather the University's tolerance for Bradford's pattern of violence against female classmates.

II. The Legal Question Here Is One of Exceeding Importance.

This case presents a fundamental question about the rights of students subjected to sexual harassment, including serious physical violence. Off-campus gender violence against students poses a grave threat to the educations of tens of thousands of students every year. Over thirty percent of female undergraduates experience sexual assault while enrolled. David Cantor et al., Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* A7-56 (2020).[2] Most of this violence takes place off campus, and, of those assaults, nearly forty percent are committed by classmates or school employees. Eryn Nicole O'Neal et al., *Distinguishing Between On-Campus and Off-Campus Sexual Victimization: A Brief Report*, 8 Violence & Gender 53, 55 (2021), https://doi.org/10.1089/vio.2020.0029; Bonnie Fisher et al., *The Sexual Victimization of College Women* 20, U.S. Dep't of Justice (2000),

[2] https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf

https://www.ojp.gov/pdffiles1/nij/182369.pdf. And K-12 students, too, are sexually abused off campus by peers or teachers, as in *Gebser*, 524 U.S. at 278-79.

Artificial geographic boundaries do not prevent that abuse from limiting victims' access to education. That, the Department of Justice has said, is a matter of "common sense." U.S. Statement of Interest at 16. Fortunately, schools have tools at their disposal to try to prevent violence, regardless of whether a student poses a threat to a classmate in a dorm or in an apartment across the street. *See* 2010 Guidance at 3; slip op. at 42 (Fletcher, J., dissenting). They can also offer supportive services to ameliorate the educational effects of such violence after the fact, irrespective of where it occurs. *See, e.g.*, 34 C.F.R. § 106.30(a) (2020) (providing examples of supportive measures). The panel majority, however, has devised an unduly formalistic rule that, in too many instances, will absolve schools of their responsibilities to address gender violence. The Court should rehear this case not only to correct the opinion's legal errors but to protect thousands of students' access to education.

CONCLUSION

For the reasons explained above, the Court should grant the petition for rehearing or rehearing en banc.

Dated: March 25, 2022

Respectfully submitted,

/s/ Alexandra Z. Brodsky

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 40-1 because this brief contains 4,199 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Times New Roman font.

Dated: March 25, 2022

/s/ Alexandra Z. Brodsky
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 25, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the appellate CM/ECF system.

Dated: March 25, 2022

/s/ Alexandra Z. Brodsky
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No. 20-15568

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RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC AND RESPONSE TO AMICUS CURIAE BRIEF

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INTRODUCTION

Brown's Petition for Rehearing and the Amicus Curiae Brief present no issues worthy of rehearing.

Title IX prohibits discrimination on the basis of sex under any education program or activity that receives federal financial assistance. 20 U.S.C. § 1681(a). To establish her Title IX claim, Brown had to prove that the University exercised substantial control over *both* the harasser *and* the context in which the harassment occurred. Because the University did not exercise control over the context of Brown's harassment—which occurred off-campus and not under any University program or activity—the panel majority correctly affirmed summary judgment for the University.

Brown's request for the Court to reconsider that ruling is based on the faulty premise that the Supreme Court's two-pronged control element can be collapsed into a single prong that requires only that the University have disciplinary authority over the harasser. The majority construed Title IX according to its plain language and Supreme Court precedent, as have other circuits. No circuit split exists and rehearing is not warranted.

In asking this Court to ignore the Supreme Court's directive, Brown and the Amicus Curiae rely on federal-agency interpretation and sheer policy considerations. But neither option is available to this Court, whose job is not to legislate or

enact policy but to apply the law as it exists and has been interpreted by the Supreme Court.

BACKGROUND

The district court granted the University summary judgment, ruling that Brown had not alleged or proved that any of her assaults occurred on campus or at a location subject to the University's control. (Op. at 9-10.) It ruled that Brown had failed to demonstrate that the University exercised sufficient control over the context of her harassment, a requirement for Title IX liability. (*Id*.)

On appeal, Brown argued that she satisfied the control-over-context element not by the University's control over the context of Bradford's off-campus assaults of *her* but rather its control over the context of Bradford's on-campus conduct toward a *different* student the year before, which, according to Brown the University had failed to correct. (Op. at 13.) The panel *unanimously* rejected Brown's theory. (*Id.* at 15; *id.* at 41 [Fletcher, J., dissenting].) The majority properly applied Supreme Court precedent interpreting the plain language of Title IX and held that the control element requires *both* substantial control over the harasser *and* control over the context of the harassment.

Judge Fletcher dissented, urging a theory Brown did not raise "and in fact expressly disclaimed." (Op. at 16.) He argued that the key consideration in determining whether the school controlled the context of the alleged harassment "is

whether the school has disciplinary authority over the harasser in the setting in which the harassment took place." (*Id.* at 15-16; *id.* at 37 [Fletcher, J., dissenting]).

Brown has now abandoned her original theory and argues for the first time in her Petition that the control element should be viewed as a matter of "degree" dependent on multiple factors—a sliding scale—so that if there is sufficient control over the harasser, a plaintiff need not show as much, or any, control over the context of the harassment. In Brown's new interpretation of Title IX, the sliding scale can obviate the need to show the University's control over the context of the harassment and she can establish Title IX liability without proving an element laid out in Supreme Court precedent.

ARGUMENT

I. The Majority Properly Ruled that Control Over the Context Is Required, an Element Separate and Distinct from Control Over the Harasser.

A. *Davis* Requires Both Control over the Harasser and Control over the Context in which the Harassment Occurred to Establish Title IX Liability.

Brown asserts that the panel majority's opinion contravenes Supreme Court precedent. (Pet. for Reh'g ["Pet."] ep 12.[1]) She is mistaken.

[1] Citations are to the Court's electronic page numbering.

Title IX prohibits sex discrimination in education programs or activities that receive federal financial assistance: "No person 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, 643 (1999), the Supreme Court determined that Title IX's proscription against sex discrimination applies, "in certain limited circumstances," to student-on-student harassment in an educational setting. But it imposes liability on an educational institution receiving federal funds "only for its own misconduct." *Id.* at 640. Thus, the recipient of federal funds—here, the University—may not be held liable under Title IX under principles of respondeat superior, vicarious liability, and strict liability. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285, 290-91 (1998). Congress did not intend "unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination *in its programs*." *Gebser*, 524 U.S. at 285 (emphasis added). Otherwise, "there would be a risk that the recipient would be liable in damages not for its own official decision but instead for [a third party's] independent actions." *Id.* at 290.

To avoid this unfair result, Title IX imposes liability only when a funding recipient "exercised substantial control over *both* the harasser *and* the context in

which the known harassment occurred." *Davis*, 526 U.S. at 645 (emphasis added). "[B]ecause the harassment must occur 'under' 'the operations of' a funding recipient, the harassment must take place in a context subject to the school['s] control. . . . 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.* (citation omitted).

Brown asserts that the crux of *Davis*'s control test is "disciplinary authority" and that control is a matter of "degree." (Pet. ep 13.) Brown misreads *Davis.* There, the Supreme Court discussed an elementary school's disciplinary authority and the concept of degree of control in relation to the control-over-harasser element. *Davis*, 526 U.S. at 644, 645, 646, 649. This makes sense because *Davis* considered student-on-student harassment of school-age children that took place in the classroom under an operation of the funding recipient (the school), and the school retained control over the harassing student's conduct through its disciplinary policy. *Id.* at 633-34, 646-47. Indeed, the Supreme Court recognized that "[a] university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy, and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Id.* at 649.

Brown's argument, like the dissent's, conflates the two prongs of *Davis*'s control test and focus only on the control-over-harasser because Bradford's con-

duct was proscribed by the University's Code of Conduct and because he was an athlete. Doing so, however, would "eviscerate[] Congress's express requirement that conduct [under Title IX] is actionable only if it occurs 'under an[] education program or activity receiving Federal financial assistance.'" (Op. at 18 (quoting 20 U.S.C. § 1681(a).) It would also create a system where the University's Title IX obligations to a particular student depend on the identity of her harasser. Followed to its logical end, Brown's argument would make the University responsible for her abuse mainly because Bradford was an athlete. But if she had been abused by a non-athlete student over whom the University did not exercise additional control in the form of team rules, the University would not have had the kind of additional Title IX obligations she attempts to impose on it now. There is no support for the idea that Congress intended to create a sliding scale of Title IX liability that imposes different obligations for different harassers. It meant to impose obligations on educational institutions when they exercise control over the harasser and the context of the known harassment, and this is noted clearly in *Davis*.

Because the panel majority correctly considered whether the University exercised substantial control over both the harasser *and* the context of the harassment as required under *Davis*, rehearing would be inappropriate.

1. Adopting Brown's new argument, which raises the argument first raised by the dissent, would be improper.

Even if there were merit to Brown's new argument, it is not properly before the court. It first arose in Judge Fletcher's dissent; indeed, the majority noted that "Brown has not advanced this theory, and in fact expressly disclaimed it." (Op. at 16.) This Court should not decide cases on arguments raised, not by the parties, but by the judges on appeal. It should instead heed the lesson that the Supreme Court recently imparted, roundly criticizing a panel of this Court and reversing its ruling in a case in which the panel reversed a judgment based on its own arguments, rather than those that the appellant had raised. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1582 (2020). It was improper to decide the case on an argument that this Court first raised on appeal, even though the appellant had later adopted that argument: "No extraordinary circumstances justified the panel's takeover of the appeal." *Id.* at 1581. Granting rehearing here and deciding the case based on the argument first raised in the dissent would be to commit the same error that occurred in *Sineneng-Smith*. This is reason enough to deny the Petition for Rehearing.

B. The Opinion Does Not Conflict with Opinions from Other Circuits.

Brown asserts that other circuit courts have rejected the majority's ruling that Title IX requires "contemporaneous control precisely akin to a university's

control over its buildings" or relies on "campus boundaries alone." (Pet. ep 14, 16.) Not only does Brown mischaracterize the majority's ruling, the cases she cites do not support her claim of a circuit split.

As discussed above, the Opinion does not adopt a simplistic rule equating the control-over-context element with mere geography or by campus boundaries. Instead it follows Supreme Court precedent, noting that because the text of Title IX "addresses misconduct that occurs 'under' 'the operations of' a funding recipient," actionable harassment must occur in an environment or take place in a context subject to the University's control. (Op. at 11 [citing *Davis*, 526 U.S. at 645].) This Court has previously recognized that establishing a Title IX claim requires proof of a two-pronged control element: "First, the school must have 'exercised substantial control over both the harasser and the context in which the known harassment occurred.'" *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1105 (9th Cir. 2020) (cleaned up) (quoting *Davis*, 526 U.S. at 645).

No other circuits have rejected *Davis*'s two-pronged control element, and the cases that Brown cites do not support her. In *Simpson v. University of Colorado Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007), the Tenth Circuit concluded that a funding recipient can be said to have intentionally violated Title IX when the violation is caused by *an official policy of deliberate indifference* in failing to provided adequate training or guidance necessary for implementation of a specific program

or policy. It explained that "[i]mplementation of an official policy can certainly be a circumstance in which the recipient exercises significant 'control over the harasser and the environment in which the harassment occurs.'" *Id*. (quoting *Davis*, 526 U.S. at 644). Though *Simpson* is an official-policy case similar to *Karasek*, 956 F.3d at 1112-113, it imposed liability for the school's *official policy of deliberate indifference* to sexual harassment in a football recruiting program subject to the school's control, even though the harassment took place off campus. Notably, the harassment in *Simpson* happened specifically within a university sponsored and sanctioned program—not simply at an off-campus party attended by university students. *Simpson* is not relevant to this case.

Likewise, none of the other cases[2] that Brown cites (Pet. ep 16-17) support her claim that the Opinion creates a circuit split. They show just the opposite—that other circuits and district courts consider and abide by *Davis*'s two-prong control test, as they must and as the majority did here. That those cases found that

[2] *Weckhorst v. Kansas State Univ.*, 241 F. Supp. 3d 1154, 1159 (D. Kan. 2017); *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 687-89 (4th Cir. 2018); *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1 (10th Cir. 2008); *T.C. ex rel. S.C. v. Metro. Gov. of Nashville & Davidson Cty.*, 2020 WL 5797978 at *19 (M.D. Tenn. Sept. 25, 2020); *Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1012 (E.D. Cal. 2009); *Crandell v. N.Y. Coll. of Osteopathic Med.*, 87 F.Supp.2d 304, 317 (S.D.N.Y. 2000); *Hall v. Millersville Univ.*, 22 F.4th 397, 409 (3d Cir. 2022).

a Title IX claim existed because the recipient exercised some form of control over the context of the harassment does not create a circuit split.

Brown ignores decisions from other circuits and other district courts in this circuit that, like the panel majority here, found no Title IX liability when there was no evidence that a school had control over student conduct at a private residence or off-campus location where the assaults took place. *See Roe v. St. Louis Univ.*, 746 F.3d 874, 884 (8th Cir. 2014) (finding no evidence that the university controlled the student conduct at an off-campus party where a rape occurred and rejecting the argument that disciplinary control was sufficient); *Doe v. Round Valley Unified Sch. Dist.*, 873 F. Supp. 2d 1124, 1136 (D. Ariz. 2012) (holding that school did not exercise control over context of the harassment that happened off campus); *Samuelson v. Or. State Univ.*, 162 F. Supp. 3d 1123, 1131–32 (D. Or. 2016) (noting that the university had no control over incidents that occurred off campus "at an apartment that simply happened to be located in the same city"), *aff'd*, 725 Fed. Appx. 598 (9th Cir. 2018); *Foster v. Bd. of Regents of U. of Mich.*, 982 F.3d 960, 970-71 (6th Cir. 2020) (noting that much of the adult student's misconduct occurred on Facebook or via external email accounts over which the university had no control).

No circuit conflict exists, and there is no need for en banc reconsideration.

C. Federal Administrative Interpretation of Title IX Is Not Pertinent.

Brown makes a cursory argument that the federal government's Title IX interpretation supports her position that off-campus conduct does not determine whether a school has substantial control sufficient to impose liability under *Davis*. (Pet. ep 17; *see also id.* ep 19.) As argued above, Brown misreads the majority's decision because it applied the two-prong control test required by *Davis* and refused to conflate the two prongs of the control element into one: simple control over the harasser. Regardless, the "Supreme Court in *Davis*, not Congress [or the Department of Education Office of Civil Rights] articulated the deliberate-indifference standard" and set forth the elements to establish Title IX liability for student-on-student harassment. *Karasek*, 956 F.3d at 1108. Therefore, while an administrative agency's interpretative documents regarding Title IX may be considered, they do not bind this Court. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that legal interpretations contained in opinion letters, policy statements, agency manuals, and enforcement guidelines lack the force of law and do not warrant deference as duly promulgated regulations under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

Brown next makes a series of references to, and arguments in support of, Judge Fletcher's dissent. (Pet. ep 18-21.) While Brown acknowledges that the University had control over Bradford as her harasser, she fails to argue or present

any evidence that the University controlled the off-campus environment where she was assaulted or that Bradford's off-campus residence was connected to any school event or activity. And her repeated arguments about what University officials or coaches should have or could have done undercut her claim for Title IX liability since deliberate indifference, not negligence, is the applicable standard. *Karasek*, 956 at 1105.

Finally, Brown invokes Title IX's plain text, notes that 20 U.S.C. § 1681(a) identifies three "types" of violations, and argues that she "may state a claim, regardless of whether the discrimination occurred "under [the] education program or activity." (Pet. ep 21.) Her argument is unavailing. In recognizing a private damages action based on student-on-student harassment, the Supreme Court stated in *Davis* 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 (citations omitted). Brown has not attempted to make any type of claim under 20 U.S.C. § 1681(a) other than being subjected to harassment, and she should not now be allowed to bypass the limiting language—"under any education program or activity"—as provided by statute and highlighted in *Davis*.

II. Brown and the Amicus Raise Important Societal and Policy Questions Regarding Sexual Harassment and Gender Violence, but They Are Issues for Congress, Not This Court.

Brown asserts that the majority devised an "unduly formalistic rule that . . . will absolve schools of their responsibilities to address gender violence" and will limit victims' access to education. (Pet. ep 22-23.) Similarly, the Amicus claims that the Opinion "impermissibly narrows the scope of actionable sex discrimination" and asks the Court to "protect students' rights to access education." (Amicus Br. ep 9.) Like Brown's Petition, the Amicus Brief miscasts the majority-panel's Opinion. Amicus asserts that the Opinion implemented a "broad blanket rule that a school *never* has control over off-campus student housing" and implemented simplistic boundary considerations. (*Id.* ep 16.) That is simply not what the panel majority ruled.

Nothing in the Opinion says that victims of actionable harassment cannot recover damages under Title IX if the harassment occurs off-campus. The crux of the holding is this:

> Title IX's elements, as delineated by the Supreme Court, are not met where an educational institution controlled the context where abuse against other victims occurred but not where the plaintiff was abused. Likewise, a Title IX claim fails where the educational institution has substantial control over the harasser but no control over the context where the harassment occurred. We do not dispute that control over the harasser is a key component of a Title IX claim, but it is not sufficient. Conflating the control-over-context requirement into the

> control-over-harasser requirement expands Title IX's implied private right of action beyond what Title IX can bear.

(Op. at 21.) The Opinion does not narrow the scope of actionable Title IX conduct. Rather, it follows the Supreme Court precedent, recognizing *Davis*'s two explicit prongs in the control test and refusing to conflate the two separate and distinct control elements into one.

According to *Davis*, Title IX liability applies to student-on-student harassment "in certain limited circumstances." 526 U.S. at 643. *Davis* does not guarantee fairness or "access to education" to victims or allow far-reaching liability for unknown victims or in all circumstances. To read *Davis* and the majority Opinion as Brown and Amicus suggest would ignore the plain language of 20 U.S.C. § 1681, undermine Supreme Court precedent, and shatter established limits on liability for student-on-student harassment in an education program or activity. Their interpretation would expose the University and other Title IX recipients to potential liability not for their own official acts but vicariously for harassers' independent misconduct, regardless of the context of their harassment or its connection to a university program or activity. It could require schools to ensure the safety of all students and police the conduct of students in situations beyond the University's actual programs and activities. Such far-reaching policy considerations are beyond the province of this Court. If they are to be written into the law, that is a function for Congress.

The majority correctly applied *Davis*, and this Court should reject Brown's and Amicus's flawed interpretation of the two-pronged control element.

CONCLUSION

The Court should deny the Petition for Rehearing and Rehearing en Banc.

Respectfully submitted this 20th day of April, 2022.

Arizona Attorney General's Office

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CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

I certify that pursuant to this Court's order dated March 30, 2022, the attached Response to Plaintiff-Appellant's Petition for Rehearing and Rehearing En Banc and Response to the Amici Curiae brief in support of Plaintiff-Appellant's Petition is:

Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6), contains 3,318 words, and does not exceed 15 pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

Dated this 20th day of April, 2022.

/s/Claudia Acosta Collings
Claudia Acosta Collings
Stephanie Elliott
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 20, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: s/Sara Franz
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