No. 20-15568

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MACKENZIE BROWN,

Plaintiff-Appellant

v.

STATE OF ARIZONA, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which concerns the scope of a university's obligations under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The Department of Justice and the Department of Education share responsibility for enforcing Title IX, and both agencies have issued regulations implementing the statute. See 28 C.F.R. 54 (Dep't of Justice); 34 C.F.R. 106 (Dep't of Education). The Department of

Education's current and recently proposed regulations address issues like those raised here. See 34 C.F.R. 106.44(a); 87 Fed. Reg. 41,390 (July 12, 2022).

The United States files this brief in response to the Court's order inviting the Department of Education's views on whether this case should be heard en banc.

STATEMENT OF THE ISSUE

A school receiving federal funds may be liable for damages under Title IX if it responds with deliberate indifference to known acts of student-on-student sexual harassment. See *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644-645 (1999). To prevail on a deliberate-indifference claim, the plaintiff must show, among other things, that the school exercises "substantial control" over the "context in which the known harassment occurs." *Id.* at 645. The question presented is whether a university exercised substantial control over the context of a college football player's off-campus assault of a female student where the player's conduct violated both school and football-program rules, and presented a risk of danger to other students.

STATEMENT OF THE CASE

1. Legal Background

Title IX imposes a "broadly written general prohibition" on "sex discrimination by recipients of federal education funding." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 173, 175 (2005). The statute provides

that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). As relevant here, the statute defines "program or activity" to mean "all of the operations" of a college or university. 20 U.S.C. 1687(2)(A).

In *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court held that a funding recipient may be held liable for damages under Title IX where it is "deliberately indifferent to known acts of student-on-student sexual harassment." *Id.* at 647. In particular, *Davis* held that a recipient may be liable if it responds to the known harassment in a manner so unreasonable that it "cause[s] [students] to undergo harassment or make[s] them liable or vulnerable to it." *Id.* at 645 (internal quotation marks and citation omitted). The Court emphasized, however, that "a recipient of federal funds may be liable in damages under Title IX only for its *own* misconduct." *Id.* at 640 (emphasis added). Thus, the Court held, a student may recover damages only in "circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs." *Id.* at 645.

2. Factual Background

Orlando Bradford was a member of the University of Arizona's football team who attended the school on an athletic scholarship. *Brown* v. *Arizona*, 23

F.4th 1173, 1184 (9th Cir. 2022) (Fletcher, J., dissenting). During his freshman year, from 2015 to 2016, Bradford repeatedly assaulted two female students whom he had been dating. See *id.* at 1176-1177. Although school officials were well-aware of the abuse, they did not suspend him or tell football team staff about the abuse. *Id.* at 1177.

Bradford started dating Brown during their freshman year, and he began physically abusing her during their summer break. *Brown*, 23 F.4th at 1177. Early in their sophomore year, the abuse escalated with Bradford repeatedly attacking Brown at the off-campus house where the football coaches had permitted Bradford and some of his fellow players to live. *Id.* at 1177, 1181. After a particularly violent attack—which ultimately resulted in Bradford's arrest—the University suspended Bradford and the football team dismissed him from the program. *Id.* at 1178.

3. Procedural History

Brown filed this suit under Title IX, alleging that her assault by Bradford resulted from the University's deliberate indifference to his prior assaults on other students. 3-ER 433-436, 438.[1] The district court granted summary judgment to defendants (1-ER 6), and this Court affirmed in a divided opinion. Specifically,

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[1] "__-ER __" refers to appellant's excerpts of record by volume and page number. "Doc. __, at __" refers to the docket entry and page number of documents filed on this Court's docket.

the panel majority held that the University lacked substantial control over the context in which Bradford assaulted Brown. *Brown*, 23 F.4th at 1183-1184. Judge Fletcher dissented. *Id.* at 1184.

After Brown petitioned for rehearing en banc (Doc. 45-1), the panel invited the Department of Education to "submit an amicus curiae brief setting forth its views on the control-over-context requirement" and "whether this case should be reheard en banc" (Doc. 51).

ARGUMENT

I

A SCHOOL'S DISCIPLINARY AUTHORITY OVER A HARASSER'S CONDUCT CAN PROVIDE SUFFICIENT EVIDENCE OF SUBSTANTIAL CONTROL

A plaintiff asserting a Title IX claim based on student-on-student harassment must show, as a threshold matter, that the school "exercise[d] substantial control over both the harasser and the context in which the known harassment occur[red]." *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999). In many cases, the plaintiff can make that showing by demonstrating that the harassment they suffered fell within the scope of the school's authority to discipline students for harming other students. Although the panel correctly recognized that disciplinary authority may not satisfy *Davis*'s control-over-context requirement in every case, it erred in holding that disciplinary authority can never satisfy that requirement. As

explained below, where a school's disciplinary authority regulates interactions between members of its own community, and the school can reasonably exercise that authority to stop the type of harassment at issue, those facts may establish the requisite control over context.

A. Davis*'s Substantial-Control Requirement Ensures That Schools Are Subject To Damages Only For Their Own Misconduct*

Title IX prohibits any person from being "subjected to [sex] discrimination" under education programs and activities receiving federal funds. 20 U.S.C. 1681(a). In *Davis*, the Supreme Court made clear that funding recipients cannot be held vicariously liable for damages under Title IX for harassment committed by students against other students. *Davis*, 526 U.S. at 640-643. Rather, as the Court explained, a funding recipient may be held liable only "for its *own* failure to act" when it learns of sex-based harassment occurring under its programs or activities. *Id.* at 645-646 (emphasis in original).

The "substantial control" requirement serves to effectuate this limitation in two ways. First, it ensures that the conduct at issue "occur[red] 'under' 'the operations of' a funding recipient." *Davis*, 526 U.S. at 645 (quoting 20 U.S.C. 1681(a), 1687). If a school lacks control over the person who committed the harassment or the context in which the harassment occurs, then the harassment cannot reasonably be characterized as arising "under" a covered "program or activity," as the statute requires. 20 U.S.C. 1681(a).

Second, the substantial-control requirement limits liability to circumstances where the recipient actually had some ability "to take remedial action." *Davis*, 526 U.S. at 644. As *Davis* explained, deliberate indifference "makes sense" as a theory of liability under Title IX "only where the funding recipient has some control over the alleged harassment," *ibid.*, and, accordingly, has some ability to "institute corrective measures," *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

Taken together, these dual purposes make clear that assessing substantial control is a functional inquiry. Indeed, in *Davis*, the Court discussed a variety of factors that can bear on whether a funding recipient exercises such control, including the time and location of the harassment, the nature of the educational activity at issue, and the scope of the school's disciplinary authority over the harasser at the time the harassment occurred. See 526 U.S. at 646-647. In each case, a court must examine these and other relevant factors to determine whether the school had "substantial control"—that is, whether the harassment occurred "under" the school's operations and in a context in which the school could have exercised its power to prevent the harassment that ultimately deprived the student of access to a covered program or activity.

B. Substantial Control Can Be Established Based On A School's Assertion Of Disciplinary Authority

One way that a plaintiff can satisfy the substantial-control requirement is by showing that their harassment fell within the scope of "the school's disciplinary authority." *Davis*, 526 U.S. at 647.

1. In *Davis*, the Supreme Court repeatedly pointed to a school's "disciplinary authority" as a key criterion for assessing whether the school exercises substantial control over the context of harassment. See, *e.g.*, *Davis*, 526 U.S. at 646-647 ("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." (alterations in original)). The Court's emphasis on disciplinary authority is not surprising: as discussed, *Davis* limits deliberate-indifference liability to situations where a school had some "authority to take remedial action," and a school's disciplinary authority often provides good evidence of the school's ability to take remedial action. *Id.* at 644.

Indeed, in explaining the virtues of the deliberate-indifference standard, *Davis* emphasized that the standard was "sufficiently flexible" to take into consideration "the level of disciplinary authority available to the school." *Davis*, 526 U.S. at 649; see also *ibid.* (discussing certain "constraints" on a school's disciplinary authority). *Davis* thus explicitly recognizes the value of examining the

range of potential sanctions that a school could have imposed in assessing the extent to which the school had the ability to control the context and prevent the harassment. *Ibid.*; see also *Gebser*, 524 U.S. at 290 (explaining that liability does not arise unless an official "with authority to take corrective action to end the discrimination" fails to respond to known harassment).

2. *Davis*'s emphasis on disciplinary authority makes practical sense for another reason: a school's assertion of its formal disciplinary authority is a strong indicator of the school's belief that it is seeking to control conduct arising "under" its operations. 20 U.S.C. 1681(a). After all, a school is unlikely to assert its authority to discipline misconduct in a particular context if it views that context as wholly outside its operations. Rather, schools typically regulate student behavior that they view as occurring within—and creating a threat to—their academic communities.

For example, rules of conduct that govern how members of a university community interact with each other in off-campus locations reflect the school's judgment that its operations are not bounded by the campus's borders, and that a student's off-campus misconduct is capable of interfering with the school's programs and activities and depriving other students of educational opportunities. Thus, where a school asserts disciplinary authority to address off-campus conduct that interferes with the school's activities or otherwise harms members of the

school community, that can represent an exercise of the school's "regulatory control." *Brown* v. *Arizona*, 23 F.4th 1173, 1183 (9th Cir. 2022); see also *Mahanoy Area Sch. Dist.* v. *B.L.*, 141 S. Ct. 2038, 2045 (2021) (noting that a "school's regulatory interests remain significant in some off-campus circumstances" and "several types of off-campus behavior * * * may call for school regulation," including "serious or severe bullying or harassment").

3. The Department of Education's regulations implementing Title IX reaffirm that disciplinary authority often serves as a key consideration in evaluating *Davis*'s substantial-control requirement. The agency's current regulations, which were adopted in 2020, construe Title IX to apply in "locations, events, or circumstances over which the recipient exercised substantial control over both the [harasser] and the context in which the sexual harassment occurs." 34 C.F.R. 106.44(a). When the agency adopted those regulations, it specifically recognized that "a sexual harassment incident between two students that occurs in an off-campus apartment * * * is a situation over which the recipient" might "exercise[] substantial control" based on "fact specific" considerations. 85 Fed. Reg. 30,093 (May 19, 2020).

The agency recently issued a notice of proposed rulemaking that would reaffirm that schools may sometimes exercise substantial control over off-campus misconduct. The proposed rule aims to further clarify a recipient's duty "to take

action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects." 87 Fed. Reg. 41,391 (July 12, 2022). As the proposed rule explains, this could include an "[o]bligation to address conduct that occurs under the school's disciplinary authority," including where a school has a "code[] of conduct that address[es] interactions * * * between students that occur off campus." *Id.* at 41,402.[2]

C. The Panel Majority's Concerns About Relying On "Disciplinary Authority" Are Misplaced

The panel majority concluded that relying on a school's disciplinary authority to satisfy *Davis*'s substantial-control requirement would "expand[] Title IX's implied private right of action beyond what Title IX can bear." *Brown*, 23 F.4th at 1184. For multiple reasons, however, this concern is misplaced.

1. A school's assertion of disciplinary authority over student-on-student harassment may provide strong evidence that the school considers such harassment to occur "under" one of its programs or activities. 20 U.S.C. 1681(a). As explained, a school's decision to adopt disciplinary rules governing student-on-student harassment typically reflects its view that the covered harassment occurs

[2] The Department of Education's proposed rule would make clear that, under its regulations implementing Title IX, the question of "whether conduct falls under a recipient's education program or activity for purposes of Title IX" depends on "whether the recipient exercises disciplinary authority over the respondent's conduct in that context." 87 Fed. Reg. at 41,402.

within the school's regulatory domain, and that preventing such harassment is necessary to protect its students' "access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650. Thus, contrary to the panel majority's stated concerns, *Brown*, 23 F.4th at 1181-1182, using disciplinary authority as a tool for assessing "control over context" vindicates *Davis*'s instruction that liability be limited to situations where peer harassment impedes a student's access to covered programs or activities.

2. Taking a school's disciplinary authority into account also helps to ensure that substantial control is only found where a school had some ability to prevent the harassment at issue from occurring. The mere fact that conduct falls under a school's disciplinary authority will not always, on its own, satisfy the control-over-context requirement. Although such authority may sometimes suffice to establish "substantial control," it may also fall short where the asserted authority is so general or limited that it does not plausibly indicate that the conduct occurred "under" the school's operations, 20 U.S.C. 1687, or that the school had any means for preventing the harassment.

Thus, to determine whether a school's disciplinary authority establishes control over context, a court cannot simply look at the school's disciplinary authority in a vacuum; rather, it must examine, among other things, whether the nature of the disciplinary authority suggests that the harassment occurred "under" a

covered program or activity, and whether the authority provided the school with a means of preventing the harassment at issue from occurring. See generally *Karasek* v. *Regents of the Univ. of Cal.*, 956 F.3d 1093, 1112 (9th Cir. 2020) (discussing the elements of a pre-assault claim). This inquiry will often support a finding of substantial control where a university has established a code of conduct that regulates peer-to-peer interactions, even where it reaches off-campus conduct. Such a code defines a particular context—specified interactions between members of a defined academic community—over which the school itself has made a deliberate decision to assert control. But in other instances, such as where a school has set out general standards of behavior that are not focused on student-to-student interactions, disciplinary authority alone may not satisfy the substantial-control requirement.

The two hypothetical scenarios offered by the panel majority illustrate this point well. See *Brown*, 23 F.4th at 1182. The majority pointed to these hypothetical scenarios to illustrate the purported scope of a substantial-control test that rests on disciplinary authority. But each hypothetical merely illustrates that, in certain circumstances, disciplinary authority alone might be insufficient to satisfy the substantial-control requirement. Neither hypothetical demonstrates that disciplinary authority can never be enough.

Take the scenario involving the middle schooler who violated her school's code of conduct during a birthday party she hosted over the weekend. See *Brown*, 23 F.4th at 1182. Even assuming that school officials would have had some legitimate basis on which to discipline the harasser prior to the party, it is not clear that such disciplinary action could have prevented the harassment. For instance, even if the school had suspended the harasser before the party, it is not obvious how that the suspension would have prevented the student from hosting her own private party, inviting other students, or engaging in the harassment itself. Depending on what information the school had prior to the party, there may have been other steps that the school could have taken to prevent the harassment from occurring; but, on the facts of the panel majority's hypothetical, it is not clear what the school could have accomplished through an exercise of *disciplinary authority* alone.

The same analysis would apply to the panel majority's other hypothetical, involving a college football player who harasses another student at his childhood home. See *Brown*, 23 F.4th at 1182. Universities have a limited ability to prevent students from engaging in misconduct in their childhood homes. Even if the university in the hypothetical had expelled the player before the harassment, it is not obvious how the expulsion would prevent the player from inviting other students to his childhood home and harassing them.

The panel's hypotheticals thus stand in stark contrast to the present case. Bradford's assault of Brown occurred in a de facto football-team house, where he lived exclusively with other football players, paid his rent with scholarship funds, and was allowed to continue living only with his coaches' permission and on condition of good behavior. In addition, the University had ample options for exercising its disciplinary authority in ways that might have prevented Bradford's assault of Brown. See Part II, *infra*.

3. The panel majority's concern about unduly expanding the scope of Title IX liability is misplaced for another reason: even if a plaintiff can satisfy *Davis*'s substantial-control element, the plaintiff must still satisfy all of *Davis*'s other elements before recovering damages. Those elements—which include showing that the plaintiff's harassment was sufficiently severe, and that the school's response was "clearly unreasonable"—impose a "high standard" for obtaining damages. *Davis*, 526 U.S. at 643; see also *id.* at 652 (describing "very real limitations on a funding recipient's liability under Title IX"). Thus, even if a court finds that the plaintiff has satisfied *Davis*'s threshold "substantial control" requirement, that simply permits the court to proceed to the rest of the *Davis* analysis.

4. Reliance on a school's disciplinary authority does not "[c]onflat[e] the control-over-context requirement into the control-over-harasser requirement."

Brown, 23 F.4th at 1184. Properly analyzed, disciplinary authority considers *both* aspects of control by asking whether a school had the ability to sanction a harasser based on the nature of, and circumstances surrounding, the harassment. Indeed, a school's disciplinary policy generally takes into account a variety of considerations, including the identities of those involved, the type of misconduct at issue, and when and where it occurred. More importantly, such policies typically reflect the school's own judgment that its regulatory authority extends to the context in which the harassment is occurring, and that exercising its authority is necessary to protect members of its community and preserve the integrity of its programs.

II

THE PANEL'S DECISION IS WRONG

Under the principles set forth above, the evidence in the record was sufficient to create a genuine issue of material fact as to whether the University had substantial control over the context of Bradford's assault of Brown. The other key factors in the substantial-control analysis are unchallenged. The panel majority correctly acknowledged that there was "no dispute that the University exercised substantial control over Bradford" himself. *Brown*, 23 F.4th at 1181; see also *Davis*, 526 U.S. at 646 (recognizing that control over the harasser is the "[m]ore important[]" requirement in this analysis).

Additionally, the University did not dispute that it exercised substantial control over the contexts of Bradford's numerous prior assaults of other students. See *Brown*, 23 F.4th at 1193 (Fletcher, J., dissenting). This concession makes sense, given that the University's disciplinary authority over the contexts of Bradford's on-campus assaults would have permitted a variety of remedial measures that could have prevented further harassment from occurring, including dismissal from the football team, termination of Bradford's athletic scholarship, and "exp[ulsion] from the University by the end of his freshman year, months before his assaults on Brown." *Id.* at 1185 (Fletcher, J., dissenting); cf. *Ross* v. *University of Tulsa*, 859 F.3d 1280, 1287 n.5 (10th Cir. 2017) (holding that a fact-finder could reasonably find substantial control over the context of an alleged rape because if the school had found the perpetrator responsible for a prior rape, it could have "expelled him and barred him from the campus," thereby "prevent[ing] him from sexually harassing [other] students").

The sole question regarding the substantial-control requirement, then, is whether the University also exercised substantial control over the context in which Bradford assaulted Brown, such that the conduct fell within the ambit of Title IX's "program or activity" language. 20 U.S.C. 1681(a). Construing the evidence in the light most favorable to Brown, a jury reasonably could conclude, for two reasons, that the University exercised such control.

First, a jury could reasonably find that the University had substantial control over the context in which Bradford assaulted Brown based on the school's disciplinary authority over conduct that harms another member of the school community and endangers other community members. The evidence shows that the University has asserted disciplinary authority with respect to student-on-student assaults in off-campus housing, and that there were multiple disciplinary measures that it could have taken to prevent such assaults by Bradford. For example, given the obvious danger that Bradford posed to Brown's health, safety, and ability to access school programs and activities, the University had the authority to issue a no-contact order and bar Bradford from communicating or interacting with Brown, just as it had done for another student. See *Brown*, 23 F.4th at 1177.[3]

Additionally, the University had the authority to suspend Bradford—and did, in fact, belatedly suspend him—based on its conclusion that his behavior "present[ed] a substantial risk to members of the university community." *Brown*, 23 F.4th at 1189 (Fletcher, J., dissenting). At the time of that suspension, the University knew that Bradford had assaulted *three* female students over the course

[3] Because Brown relies on a "pre-assault" theory of liability, she must show that school officials responded with deliberate indifference to Bradford's prior assaults of other students. See *Karasek*, 956 F.3d at 1112 (explaining why the "pre-assault theory of Title IX liability" is a "cognizable theory" of liability). She need not show that officials responded with deliberate indifference to *her* assault. See *ibid.*

of the preceding year. The University's disciplinary response to that conduct—which was more than justified by the violent nature of the conduct and the harm it caused to another member of the school community—would provide a jury with ample grounds for finding that the University exercised substantial control over the context of Bradford's assault of Brown.

Second, a jury could reasonably find substantial control over the context of Bradford's assault of Brown based on the football team's disciplinary authority over certain off-campus conduct, including acts of violence against women. The football team's head coach testified in his deposition that the team's Player Rules regulated participants' conduct, including some conduct occurring off campus, and violating those rules could result in the loss of program privileges and other sanctions. See 2-ER 49-55. For example, participation in the football program was contingent on players' compliance with the program's "zero-tolerance policy for violence against women." *Brown*, 23 F.4th at 1178. Additionally, players like Bradford who wished to live off campus had to obtain "approval" to do so from the team's coaching staff. *Id.* at 1182. And approval was conditioned on the player's "good behavior." *Id.* at 1193 (Fletcher, J., dissenting).

The football team's rules thus provide an additional basis for finding substantial control. Bradford's assault of Brown clearly violated the team's prohibition on committing acts of violence against women, and for that reason, the

head football coach dismissed Bradford from the football program "[i]mmediately upon learning of [his] arrest." *Brown*, 23 F.4th at 1178. Even if the football staff had not chosen to dismiss him, they plainly would have had the authority to rescind their approval for him to live off campus based on his demonstrable lack of "good behavior." *Id.* at 1193 (Fletcher, J., dissenting).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing en banc and reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING EN BANC:

(1) complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 4,190 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) 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 it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

s/ Jason Lee
JASON LEE
Attorney

Date: August 8, 2022