No. _____

In the Supreme Court of the United States

STATE OF ARIZONA AND ARIZONA BOARD OF REGENTS
Applicants,

v.

MACKENZIE BROWN,
Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

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TO: The Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Ninth Circuit

The State of Arizona and the Arizona Board of Regents (dba the University of Arizona) (together, the "Applicants") respectfully seek a 30-day extension of time within which to file a petition for a writ of certiorari to review the Ninth Circuit's judgment in this case, to and including January 25, 2024. Absent an extension, the deadline for filing the petition will be December 26, 2023. This application is being filed on December 13, 2023—more than 10 days before the petition is due. *See* U.S. Sup. Ct. R. 13.5.

In support of this request, Applicants state as follows:

1. The Ninth Circuit entered judgement and issued its *en banc* opinion on September 25, 2023. A corrected opinion was issued on October 2, 2023, correcting a minor typographical error. A copy of the corrected opinion is attached. This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. This case concerns the extent of an educational institution's liability under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688, for student misconduct that takes place off school campus. This is an important issue that has divided the circuits and that merits this Court's review.

3. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be

subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), this Court recognized an implied private right of action under Title IX against educational institutions who show "deliberate indifference" to student-on-student harassment in their programs or activities. To succeed on such a claim, *Davis* held that a plaintiff must show that the educational institution "exercises substantial control over both the harasser and the context in which the known harassment occurs." *Davis*, 526 U.S. at 645.

4. *Davis* did not define what it means for a school to have substantial control over the "context" in which known harassment occurs, nor did it address whether and under what circumstances a school may exercise "substantial control" over harassment that takes place in off-campus contexts. The Court has not subsequently addressed this important issue.

5. Mackenzie Brown, the plaintiff and appellant below, brought this Title IX action against Applicants after being physically assaulted by her boyfriend and fellow student, Orlando Bradford, while attending the University of Arizona. The assaults occurred at Bradford's off-campus residence on two consecutive days in September 2016. Bradford was arrested and suspended from the University the next day, and subsequently expelled and sentenced to five years in prison. Brown did not fault the University for

its response to her own abuse, which led to Bradford's arrest, but argued that the University violated Title IX by not adequately responding to Bradford's abuse of two prior girlfriends, who were also students at the University.

6. The district court granted summary judgment in Applicants' favor, holding that the University had no control over the off-campus context in which Brown was abused. It held that the University therefore could not be held liable under Title IX, which, under *Davis*, imposes liability only where the educational institution has substantial control over *both* the harasser *and* the context in which the harassment took place. *See Brown v. Arizona*, No. CV-17-03536-PHX-GMS, 2020 WL 1170838 (D. Ariz. Mar. 11, 2020). Brown appealed the district court's ruling.

7. In a split decision, a three-judge panel of the Ninth Circuit affirmed the district court's ruling that the University had no control over Bradford's off-campus house and, accordingly, could not be liable under Title IX for Bradford's abuse of Brown. *See Brown v. Arizona*, 23 F.4th 1173 (9th Cir. 2022). Writing in dissent, one of the panel members opined that the University exercised substantial control over Bradford's off-campus house because it retained a heightened level of disciplinary authority over Bradford for his assaults on Brown, even though they took place off campus. *Id.* at 1191 (Fletcher, J., dissenting). This was not an argument Brown had raised before the district court or the Ninth Circuit panel.

8. Brown petitioned for *en banc* rehearing, which was granted. In a divided opinion, the *en banc* panel reversed the district court's grant of summary judgment. The majority opinion, authored by the same judge who dissented from the original panel decision, concluded that while *Davis* did not define context, a "key consideration" is whether the school has "some form of disciplinary authority" over the harasser in the context of the alleged harassment:

> [W]hile the physical location of the harassment can be an important indicator of the school's control over the "context" of the alleged harassment, a key consideration is whether the school has *some form of disciplinary authority* over the harasser in the setting in which the harassment takes place. That setting could be a school playground. But, depending on the circumstances, it could equally well be an off-campus field trip, an off-campus research project in a laboratory not owned by the school, or an off-campus residence.

Opinion at 26–27 (citation omitted) (emphasis added).

9. This case is a serious candidate for this Court's review. Three members of the Ninth Circuit's *en banc* panel dissented, writing three separate dissenting opinions. Those opinions correctly noted that the majority's "disciplinary authority" test is "sharp and troubling departure from the two-prong analysis articulated in *Davis*," leaving a "single disciplinary-control requirement" that is "irreconcilable with the Supreme Court's instruction in *Davis* that a school must have control over both the harasser and the context of the harassment." Opinion at 55 (Rawlinson, J., dissenting); *id.* at 66

(Nelson, J., dissenting). They also noted that the majority's "disciplinary authority" test is "unmoored from Title IX's targeted directive of prohibiting discrimination in education programs and activities." *Id.* at 66 (Nelson, J., dissenting). Title IX, by its plain terms, applies only to discrimination occurring within a funding recipient's "programs and activities." 20 U.S.C. § 1681(a). The Ninth Circuit's departure from the text of Title IX and from *Davis* merits this Court's intervention. *See* U.S. Sup. Ct. R. 10(c).

10. The Ninth Circuit's decision also conflicts with decisions in other circuits, further demonstrating that review is warranted. *See* U.S. Sup. Ct. R. 10(a). As one of the dissenters noted, "[n]o other court has gone as far" as the Ninth Circuit did in this case in broadly defining the circumstances in which schools may exercise control over off-campus harassment. Opinion at 65 (Nelson, J., dissenting). The Eighth Circuit expressly rejected the argument, now adopted by the Ninth Circuit, that authority to discipline a harasser for off-campus misconduct subjects schools to Title IX liability for that misconduct. *See Roe v. St. Louis Univ.*, 746 F.3d 874, 884 (8th Cir. 2014) (rejecting the argument that a university's "disciplinary control" over a harasser for off-campus misconduct constitutes control over the context of harassment); *see also Ostrander v. Duggan*, 341 F.3d 745, 750 (8th Cir. 2003) (finding no Title IX liability for an assault in an off-campus residence leased to members of a

fraternity where the university "did not own, possess, or control" the residence).

11. The Tenth Circuit has similarly declined to find that a school exercises control over off-campus harassment simply because it had authority to discipline harassers for that harassment, instead requiring a "nexus" between the off-campus environment and the school for Title IX liability to arise. *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 & n.1 (10th Cir. 2008). Indeed, cases finding that schools have control over the context of off-campus harassment have done so only where there is a connection to the schools' operations, programs, or activities. *E.g.*, *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 687–88 (4th Cir. 2018) (holding that a university exercised control over the context of harassing social media posts when the harassment "actually transpired on campus," including use of the university's wireless network); *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 970 (6th Cir. 2020) (distinguishing settings over which a university had no control over misconduct with settings the university "could and did control," such as classes, university-sponsored social events, and school ceremonies).

12. The dissenters also correctly noted that in proceedings before the district court and before the original three-judge panel, Brown never argued that the University controlled Bradford's off-campus house, instead arguing

that she need only show that the University controlled the context of Bradford's prior abuse of other students. The dissenting judges correctly noted that Brown waived this argument, and that it was improper for the court to entertain it. Opinion at 65, 67–76 (Nelson, J., dissenting); *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020) (holding that the Ninth Circuit abused its discretion when it decided a case based on an argument not raised by the parties, but by the three-judge panel).

13. Applicants respectfully request a 30-day extension of time to file a petition for a writ of certiorari seeking review of the Ninth Circuit's ruling. There is good cause for granting this request. Undersigned counsel of record was retained in November 2023 and did not participate in proceedings before the district court or the Ninth Circuit Court of Appeals. Those proceedings are complex, including two opinions from the Ninth Circuit with separate briefing. The requested extension is necessary to allow appellate counsel to fully familiarize themselves with the record and relevant case law. In addition, Applicants' counsel has been heavily engaged with other appellate matters, including an argument before the Arizona Supreme Court on November 21, 2023 (*Cao v. PFP Dorsey Investments LLC*, No. CV-22-0228-PR), as well as significant briefing in the Ninth Circuit (*Gila River Indian Community v. Schoebroek*, No. 23-2743) and the Arizona Court of Appeals (*Chatha v. Marwah*, No. 1-CA-CV 23-0400; *Young Acres, Inc. v. Mortimer*, No. 1-CA-CV-

23-0632). Counsel of record also serves as general counsel to his law firm, which requires significant attention to year-end matters. Extending the deadline to file the petition in this case to January 25, 2024 will allow Applicants' counsel to carefully research and prepare the petition.

For the foregoing reasons, Applicants respectfully request that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including January 25, 2024.

Dated: December 13, 2023

Respectfully Submitted,

/s/ *Timothy J. Berg*

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