NO. 103961-1

SUPREME COURT OF THE STATE OF WASHINGTON

AUSTIN CORNELIUS, an individual,

Petitioner,

v.

STATE OF WASHINGTON d/b/a Washington State University,

Respondent,

and

ALPHA KAPPA LAMBDA, a national organization, ETA CHAPTER OF ALPHA KAPPA LAMBDA, a Washington corporation d/b/a/ ALPHA KAPPA LAMBDA, and ETA OF ALPHA KAPPA LAMBDA, a Washington corporation,

Defendants.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Washington State University does not have the capability, authority, or legal duty to control and prevent the illegal actions of adult students occurring in a private, off-campus residence without the University's knowledge. The Washington Supreme Court's recent decision in *Barlow v. State*, 2 Wn.3d 583, 588-97, 540 P.3d 783 (2024) already held as such. The Court in *Barlow* rejected the same arguments that Austin Cornelius makes here, holding that a university's duty to protect students from third-party harm is limited to when a student is on campus for school-related purposes or attending off-campus curricular activities that the university controls and sponsors. *Id.* at 595-98.

None of the grounds for granting review apply here. *See* RAP 13.4(b). The issues raised by Cornelius have been definitively answered by *Barlow* and other controlling cases and do not raise an issue of substantial public importance.

Contrary to Cornelius' assertions, Division I properly affirmed the trial court's dismissal of this action for multiple

reasons. First, as in *Barlow*, the hazing occurred without the University's knowledge—much less sponsorship—inside a private off-campus residence over which the University exercised no control. Second, nothing in the plain language or the legislative history of Washington's hazing statute supports an implied cause of action against the University. Third, Cornelius failed to establish any evidence that his fraternity's nighttime campus marches had a school-related purpose or were foreseeable. Fourth, Cornelius abandoned a Restatement (Second) of Torts § 315(a) argument in appellate briefing and at oral argument. And lastly, Cornelius failed to show the requisite level of control between the University and his fraternity to demonstrate a special relationship under § 315(a).

The petition for review should be denied.

II. COUNTER STATEMENT OF THE ISSUES

1. Did the Court of Appeals properly affirm summary judgment under *Barlow* because the University did not owe Cornelius a duty to protect him from the criminal hazing that

occurred inside a private off-campus fraternity house without the University's knowledge, sponsorship, or control?

2. Did the Court of Appeals properly decide that neither the University's anti-hazing code in former WAC 504-26-206 (2017) nor Washington's anti-hazing statutes in former RCW 28B.10.900-.903 (2017)[1] support an implied cause of action against the University because the plain language of those laws did not require the University to monitor, police, or prevent adult students from engaging in illegal hazing off campus?

3. Did the Court of Appeals, consistent with *Barlow*, properly affirm summary judgment based on Cornelius' failure to establish any evidence that fraternity-directed nighttime campus marching had a school-related purpose or was foreseeable?

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[1] The hazing statute was significantly amended in 2022. Subsequent references to RCW 28B.10.900-.903 and WAC 504-26-206 are to the 2017 version of statutes and regulations in force at the time. *See* App. 1-5.

4. Did the Court of Appeals properly decline to consider Cornelius' argument that the University had a "special relationship" with him under the Restatement (Second) of Torts § 315(a) when he abandoned that issue in appellate briefing and at oral argument?

5. Alternatively, is summary judgment warranted because Cornelius failed to show the requisite level of control between the University and his fraternity to support a § 315(a) special relationship?

III. COUNTER STATEMENT OF THE CASE

A. Alpha Kappa Lambda Supervised and Controlled Cornelius' fraternity, ETA

Alpha Kappa Lambda (AKL) is a national corporate fraternal organization with individual "chapters" scattered across the country. CP 1145. AKL alone decides when and where to open a chapter, charges its members and pledges fees, and helps recruit students to join its chapters. CP 1163-64. AKL also dictates which officers chapters must have and their duties and

the bylaws that control the chapters' operations. CP 1169-89, 1194, 1196.

AKL's Pullman, Washington chapter was ETA. CP 1145-46, 1207. ETA was a Washington nonprofit corporation that operated out of its off-campus chapter house. CP 1145-46, 1207, 1220, 1228. "ETA of AKL" was the housing corporation and owner of ETA's private, off-campus residence. CP 1220, 1228.

In 2017, ETA of AKL leased rooms in its off-campus chapter house to AKL members. CP 1220, 1228, 1305-14. The University did not own, operate, or manage the ETA chapter house. CP 1252, 1282, 1288-89, 1301. Moreover, because it was located off campus, the University police had no jurisdiction over that private residence. CP 1134.

It is undisputed that AKL alone had the authority to revoke its chapters' charters. Revocation of a charter terminates the chapter's ability to operate as a franchise of AKL. CP 1192, 1195, 1200.

B. Privately Owned Off-Campus Fraternities and Sororities Do Not Require University "Recognition" to Operate

The University's limited recognition of a private, independent fraternal organization is detailed in a "Relationship Agreement." CP 1064. The Relationship Agreement preserves the independence of the fraternal organization while establishing requirements for retaining official University recognition. CP 1064.

University "recognition" was neither a license nor a requirement for ETA to operate in Pullman. CP 1065. In fact, ETA had previously operated in Pullman without University recognition. For instance, in 2008, the University's Student Conduct Board found AKL responsible for violating the University's policies for illegal drug and alcohol use. *Alpha Kappa Lambda Fraternity v. Washington State Univ.*, 152 Wn. App. 401, 404, 216 P.3d 451 (2009). Those violations of state law and University policies occurred off campus at private residences owned and controlled by AKL and ETA. *Id.* at 406.

To address those violations, the University sanctioned ETA to a five-year loss of recognition. *Id.* at 412. AKL nevertheless continued its charter of ETA, allowing ETA to operate locally during that five-year period. CP 1841. The University could not close ETA as private organization located off campus. CP 1841; CP 1299-300.

C. ETA Members Hazed Cornelius at ETA's Private, Off-Campus Fraternity House

Cornelius was an adult when he pledged ETA in 2017. ETA subjected Cornelius and his pledge class to various forms of hazing from August to October 2017, involving consumption of alcohol inside the private, off-campus chapter house. CP 1255-56, 1278; CP 1373-74, 1387-88; CP 1402. Cornelius also alleges that on four to five occasions, ETA members required the pledges to line up outside the University library between 8:00-9:00 p.m. and marched them with their heads down back to ETA's chapter house, where they were hazed. CP 1373-

74; CP 1773-74. There is no record evidence that the University had any knowledge of these night-time marches.

D. The University Acted Swiftly to Suspend Recognition of ETA as Soon as Cornelius Reported Hazing

Cornelius did not report the hazing to the University until the day he quit pledging. CP 1302, 1391-95, 1482-83. Within three days of receiving Cornelius' report, the University suspended its recognition of ETA pending the outcome of its investigation. CP 1396, 1485. Following its investigation, the University determined that numerous ETA officers hazed Cornelius. CP 1408-10, 1417-71. The University disciplined all offending students for their violations—including by revoking state-funded financial aid per RCW 28B.10.901 and placing offending students on academic probation. CP 1417-37, 1257-58, 1261-62, 1283-84, 1293-95. ETA also lost University recognition. CP 1487-501, 1275-77.

While the University has the authority to revoke its own recognition of a private fraternal organization, it cannot close a

privately-owned and operated off-campus corporate organization. CP 1202. AKL, in contrast, *does* have the authority to revoke the charters and close the operations of its local chapters, which it did here with ETA. CP 1192, 1195, 1200, 1885.

E. Procedural History

Cornelius sued the University, AKL, ETA, and ETA of AKL for negligence. CP 11-22. The University moved for summary judgment asserting that it owed no legal duty to Cornelius to protect him from illegal third-party acts that occurred inside ETA's private, off-campus residence. CP 1031-54. Cornelius opposed the University's motion and argued that the University owed him a "special relationship" duty of care pursuant to *Restatement (Second) of Torts* §§ 315(a)-(b). CP 1694-721. Unpersuaded, the trial court granted the University summary judgment and dismissed the claims against it with prejudice. CP 2544-47; CP 2611-15.

Cornelius settled his claims against the remaining

entities—AKL, ETA, and ETA of AKL—and appealed the trial court's summary judgment order. CP 3863-66. In his opening appellate brief, Cornelius asserted claims based on *Restatement (Second) of Torts* § 315(b) (Am. Law Inst. 2012) and *Restatement (Third) of Torts Liability for Physical and Emotional Harm* § 40 (Am. Law Inst. 1965), alleging a special relationship between Cornelius and the University. After Cornelius filed that brief, the Court of Appeals temporarily stayed the appeal pending the Washington State Supreme Court's resolution of *Barlow v. Washington State University,* 2 Wn. 3d. 583, 540 P.3d 783 (2024).

After *Barlow* issued, Cornelius filed an amended opening brief, dropping his earlier "special relationship" argument under § 315(b) and § 40. And neither of his original or amended opening briefs raised a special relationship argument under § 315(a). After the University argued in its responsive brief that Cornelius had abandoned any claim based on Restatement (Second) of Torts § 315(a)-(b) (Br. of Resp't at 27 fn. 7),

Cornelius did not raise either argument in reply. *See* Reply generally. At oral argument, Cornelius' counsel also conceded that he could not "see a circumstance in which [Restatement (Second) of Torts §] 315 applies" after *Barlow*. Wash. Ct. of Appeals oral argument, *Austin Cornelius v. Wash. State Univ.*, No. 84657-4-I (November 1, 2024), at 10 min., 20 sec. through 10 min., 30 sec. *video recording* by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-20241111001/?eventID=20241111001.

Division I affirmed summary judgment on multiple grounds. It concluded that Cornelius abandoned any claim based on Restatement (Second) of Torts § 315 and § 40. *Cornelius v. Washington State Univ.*, 33 Wn. App. 2d 477, 481, 562 P.3d 792 (2025). It further held that Cornelius failed to demonstrate a genuine issue of material fact that the University controlled and sponsored off-campus hazing under *Barlow* (*Id.* at 485-89), and failed to proffer evidence that nighttime campus marching advanced a school-related purpose or was foreseeable. *Id.* at 489-

93. Division I also held that neither the plain language nor the legislative history of Washington's hazing statute could support an implied a cause of action against the University. *Id*. at 481-82 (*citing Martinez v. Washington State Univ.*, 33 Wn. App. 2d 431, 455–56, 562 P.3d 802 (2025)).

Cornelius now seeks review by this Court.

IV. REASONS WHY REVIEW SHOULD BE DENIED

None of the factors supporting Supreme Court review are met here because Division I faithfully applied *Barlow* and other controlling case law.

First, Division I meticulously applied *Barlow* in holding that Cornelius failed to establish a genuine issue of material fact that the University controlled and sponsored off-campus hazing or that the nighttime campus marching advanced a school-related purpose or was foreseeable.

Second, the plain language and legislative history of the hazing statute cannot be read to imply a cause of action against

the University, and Cornelius fails to offer any case law to the contrary.

Lastly, directly analogous appellate cases support Division I's holding that Cornelius abandoned his Restatement (Second) of Torts § 315(a) claim.

This Court should deny review.

A. The University Did Not Owe a Duty to Protect Cornelius from Illegal Hazing Occurring Inside ETA's Private, Off-Campus Residence

The University's § 344 premises liability duty does *not* extend to non-curricular, off-campus activities that are not controlled and sponsored by the University. *Barlow*, 2 Wn.3d at 588-98. "Because no ability to control off-campus, non-school-sponsored interactions exists, the duty does not extend to the choices or activities under a student's control." *Id.* at 597.

There was nothing curricular about ETA's criminal off-campus hazing events that the University did not even know about, let alone sponsor. Nor does the University have any legal authority to enter and search a private, off-campus residence to

police, monitor and prevent the illegal actions of adult students. Cornelius' arguments to the contrary do not warrant review.

First, the University did not assume a duty to control the off-campus actions of ETA by adopting anti-hazing provisions in its student code of conduct. *See* Am. Br. Appellant at 31-33, 49, 52, 57. As this Court clarified in *Barlow*, a student code of conduct does not create control of student behavior in a preventative way and thus "is irrelevant to establishment of a duty." 2 Wn.3d at 597.

Second, Cornelius proffered no evidence that the University "sponsored" any of the private off-campus events where ETA hazed Cornelius as required to support a duty under *Barlow*. The term "sponsor," means "a person or an organization that pays for or plans and carries out a project or activity" or "one who assumes responsibility for some other person or thing." *Sponsor*, Merriam-Webster, https://www.merriam-webster.com/dictionary/sponsor (last visited June 2, 2024). It is undisputed here that the University did not pay for, plan, or carry

out ETA's hazing activities.

Third, Cornelius inaptly argues that ETA's hazing was foreseeable because the University had sanctioned the chapter a decade earlier for student conduct code violations. Am. Br. Appellant at 3, 22, 44-45; Pet. for Review at 8, 16. But this speculative assertion erroneously assumes a duty by the University to monitor, police, and prevent adults from engaging in illegal off-campus hazing in the first place. No such duty exists. Moreover, "foreseeability does not establish duty." *Barlow*, 2 Wn.3d at 595.

Furthermore, Division I correctly observed that Cornelius' allegations about ETA's disciplinary history a decade earlier were more generalized and remote in time than the misconduct presented by the plaintiff in *Barlow* against an alleged rapist. *Cornelius*, 33 Wn. App. 2d at 488. In *Barlow*, this Court held that the University had no duty over off-campus and non-sponsored conduct even after receiving two complaints about the same perpetrator not long before the perpetrator raped the plaintiff.

Barlow, 2 Wn.3d at 598. The more attenuated allegations about misconduct by ETA cannot establish a duty here. *See* Pet. for Review generally.

Fourth, Division I correctly rejected Cornelius' argument that the ETA chapter house was "physically proximate" to campus as immaterial to the duty analysis. *Cornelius*, 33 Wn. App. 2d at 488. Under *Barlow*, the test is whether 'a student is *on campus* for school related purposes *or* participating in a school activity.'" *Id.* (quoting *Barlow*, 2 Wn.3d at 597) (emphasis added). Thus, in *Barlow*, the fact that the offending student's apartment was located "directly adjacent to campus" was immaterial. *Id.*; Br. Appellant, *Barlow v. State,* 2022 WL 18144326, at *2 (Jul. 20, 2022) (describing location of the apartment of the rapist). The same is true here.

Fifth, ETA of AKL did not have a housing agreement with the University, and freshmen students, including Cornelius, could not live in the ETA off-campus residence. CP 1125, 1673. Contrary to Cornelius' unsupportable claim, the University did

not offer housing at ETA as a basic necessity. But even if there had been a University-approved housing agreement, this still could not establish a duty. The *Barlow* court rejected the argument that a university owes a duty of care to a student simply because it "is involved in aspects of student life outside of the academic sphere, such as providing basic necessities" like "on-campus housing." Providing off-campus housing certainly cannot support such a duty. *Cornelius*, 33 Wn. App. 2d at 487 n. 5 (quoting *Barlow*, 2 Wn. 3d at 597).

For all these reasons, Division I correctly held that "none of the facts Cornelius proffers creates a genuine issue of material fact that WSU controlled and sponsored the abusive students' off campus interactions with Cornelius." *Cornelius*, 33 Wn. App. 2d at 489-90.

B. Neither RCW 28B.10.900-.903 nor WAC 504-26-206 Create an Implied Cause of Action Against the University

Nothing in the plain language or the legislative history of the hazing statutes (RCW 28B.10.900-.903) can be read to imply a cause of action against the University.

Cornelius must establish three elements necessary to demonstrate a statutorily implied cause of action: (1) he is within the class for whose "especial" benefit the statute was enacted; (2) legislative intent supports creating an implied remedy; and (3) implying a remedy is consistent with the underlying purpose of the legislation. *Bennett v. Hardy*, 113 Wn.2d 912, 920–21, 784 P.2d 1258 (1990). "Critically," the second element requires the Court to determine that "legislative intent supports implying the *requested remedy*, rather than any remedy.'" *Martinez*, 33 Wn. App. 2d at 455 (quoting *Rocha v. King County*, 195 Wn.2d 412, 428, 460 P.3d 624 (2020)). Cornelius cannot meet the second and third elements of *Bennett*.

Regarding the second element, the hazing statutes do not mandate that the University enter and prevent hazing inside a private, off-campus residence, or authorize any invasion by the University into the constitutionally protected privacy rights of adult students in their off-campus lives. RCW 28B.10.900-.903. In fact, nothing in the hazing statutes requires universities to take measures to proactively prevent hazing. *Martinez*, 33 Wn. App. 2d at 453. Rather, a university's role under the hazing statutes is "reactive" in nature, imposing a duty "to create administrative rules to sanction persons and organizations for acts of hazing. Nothing more." *Id.*; *see also Cornelius*, 33 Wn. App. 2d at 481–82. Cornelius fails to rebut any of these fundamental points. *See* Pet. for Review at 17-22.

Cornelius' reliance on *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 398 P.3d 1108 (2017), only undermines his argument. *See* Pet. for Review at 20. The concussion statute (Lystedt Law) in *Swank* imposed three preventative requirements on schools to (1) educate, (2) remove suspected concussed

athletes from play, and (3) prevent return without medical clearance. *Id*. at188. In considering the second element of the *Bennett* test—whether legislative intent supports creating an implied remedy—the *Swank* Court noted that, despite such clear mandatory provisions, "there is no mechanism in the Lystedt law to enforce the requirements intended to address the risks of youth athlete concussions." *Id*. at 677. Accordingly, the Court held that "[f]inding an implied cause of action in the Lystedt law gives its mandatory provisions mandatory effect." *Id*. at 681.

Swank underscores the type of specificity that is conspicuously missing from the hazing statutes here. Unlike the concussion statute, the hazing statutes do not compel the University to preventatively educate students about the dangers of hazing, or to otherwise monitor and police student conduct related to hazing.[2] The hazing statutes cannot support an implied

[2] Nevertheless, the University makes active efforts to educate students about hazing and alcohol and its anti-hazing policy. CP 2500-09; 2503-08, 1067.

remedy for failing to do something the statutes do not require. Cornelius cannot show that legislative intent supports implying the duty asserted here.

Cornelius likewise fails to meet the third element of the *Bennett* test. The plain language of the hazing statutes makes clear that its purpose is to penalize those who engage in hazing, not universities. *Martinez*, 33 Wn. App. at 452. In fact, under RCW 28B.10.901(3), ETA and the individuals who engaged in hazing are "strictly liable" for intentionally engaging in or knowingly permitting the hazing of Cornelius. ETA's individual directors may also "be held liable for damages." *Id*. By contrast, the legislature did not recognize a private cause of action against the University. RCW 28B.10.900-.903. And "although the legislature had an opportunity to create a cause of action against universities when it significantly amended the antihazing statutes in 2022 (by adding several new sections) and in 2023 (by modifying former RCW 28B.10.901), it did not to do so."

Martinez, 33 Wn. App. 2d at 456 n. 33 (citing Laws of 2022, ch. 209, §§ 1-6; Laws of 2023, ch. 196, § 1.).

Cornelius' assertion that WAC 504-26-206 implies a cause of action against the University also lacks merit. The University's anti-hazing provisions within the student code of conduct (*see* WAC 504-26-206) mirrors the hazing statutes (RCW 28B.10.900-.903) and prohibits hazing by any student or recognized organization, on or off campus. But as the Supreme Court held in *Barlow*, the University's student code of conduct "does not create control of students' behavior in a preventative way."[3] *Barlow*, 2 Wn.3d at 597. Rather, the code provides a basis to punish students "after the fact" and is "irrelevant to establishment of a duty." *Id*. Cornelius fails to rebut any of these points. *See* Pet. for Review 17-22.

[3] The code of conduct in *Barlow* is the same as the code of conduct here, as both relate to incidents in 2017. *See* 2 Wn.2d at 587-88.

Lastly, in an "Amended Statement of Additional Authorities" filed on April 17, 2025, Cornelius cites two news articles regarding Washington State University's recent discipline of three fraternities as "legislative facts" that this Court should consider in deciding whether to grant review. Am. Statement of Add'l Authorities at 1-2. Cornelius incorrectly claims that recognizing a duty of care owed by the University to fraternity members is needed because the University's present efforts to curb hazing "continue to fail." *See id.* Yet, the imposition of discipline and sanctions after an investigation of alleged hazing is a tool the Legislature made available to universities to combat illegal hazing. *See*, *e.g.*, RCW 28B.10.902 (providing for revocation of official recognition by university for organizations that knowingly permit hazing), .903 (requiring institutions of higher education to adopt rules providing sanctions for initiation conduct not amounting to hazing), .906(2)(d)- (e) (recognizing sanctions against student organizations that violate a university's antihazing policies).

Indeed, the Legislature chose in 2022 to address illegal hazing by requiring institutions of higher education to "maintain and publicly report actual findings of violations by any student organization . . . of the public or private institution of higher education's code of conduct, antihazing policies, or state or federal laws related to hazing . . . ." RCW 28B.10.906. The articles cited by Cornelius are a direct result of the University's compliance with that legislative policy choice. This Court should reject Cornelius' invitation to legislate from the bench by judicially creating a cause of action the Legislature could have, but did not, enact.

C. Cornelius Failed to Establish Evidence That Night-Marching Had A School-Related Purpose Or Was Foreseeable

This Court has already clearly articulated the bounds of a university's § 344 duty to its students to when "a student is on campus for school related purposes or participating in a school activity." *Barlow*, 2 Wn. 3d at 597; *see also Cornelius*, 33 Wn. App. 2d at 485; Restatement (Second) of Torts § 344 ("A

possessor of land who holds it open to the public for entry *for his business purposes* is subject to liability to members of the public *while they are upon the land for such a purpose*") (emphasis added).

Cornelius testified that, on several occasions, ETA officers ordered him to march from the University library on campus to the off-campus ETA chapter house at night. CP 1373-74; CP 1773-74. On appeal, Cornelius argued for the first time that the University owed a duty under Restatement (Second) of Torts § 344 to protect him from those night marches. *See* Am. Br. Appellant at 43-48.

Division I correctly held that Cornelius failed to establish evidence that the nighttime marching had any school-related purpose that could give rise to a § 344 duty. *Cornelius*, 33 Wn. App. 2d at 489-90.[4] In his Petition for Review, Cornelius again

[4] Division I also gave Cornelius the opportunity at oral argument to explain his best evidence of a school-related purpose. He did not do so. *Cornelius*, 33 Wn. App 2d, n. 6.

fails to present any evidence---or even argue—that the nighttime marches advanced a school-related purpose. *See* Pet. for Review at 9-16.

Nor does Cornelius proffer evidence that the marching was foreseeable. In *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 771, 344 P.3d 661 (2015), the Supreme Court explained, "to establish a genuine issue of material fact concerning a landowner's obligation to protect business invitees from third party criminal conduct under the prior similar incidents test, *a plaintiff must generally show a history of prior similar incidents on the business premises* . . . ." *Id.* (emphasis added); *see also Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 205, 943 P.2d 286 (1997), *as amended* (Oct. 1, 1997) ("Washington courts have been reluctant to find criminal conduct foreseeable.").

Cornelius failed to present any evidence that any University employee or agent witnessed the night marches, that the marches were ever reported to the University, or that any

hazing incidents occurred *on campus* at any time. Cornelius states only that the University "was aware of hazing generally on its campus[.]" Am. Br. Appellant at 47; Pet. for Review at 9. But Cornelius fails to cite to any record evidence supporting this erroneous assertion. *Nivens*, 133 Wn.2d 192. Division I correctly held that Cornelius "fail[ed] to establish a genuine issue of material fact as to whether the [on campus] marches were foreseeable under Restatement (Second) of Torts § 344, comment f." *Cornelius*, 33 Wn. App. 2d at 493.

D. Cornelius Abandoned Any Restatement (Second) of Torts § 315(a) Argument

Division I's well-supported determination that Cornelius abandoned any argument under § 315(a) does not merit Supreme Court review. Appellate courts do not consider issues abandoned on appeal. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006) (quoting *Seattle-First Nat. Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 243, 588 P.2d 1308 (1978) (superseded by statute on other grounds)).

The abandonment test is disjunctive: "A party abandons an issue by failing to pursue it on appeal by (1) failing to brief the issue or (2) explicitly abandoning the issue at oral argument." *Holder*, 136 Wn. App. at 107 (emphasis added). In *Holder*, the plaintiff abandoned his claim by (1) making a "solitary reference" to the claim in the trial court and never raising it on appeal; (2) failing to brief the issue even after the respondent referenced it in its brief, and (3) explicitly abandoning it at oral argument. *Id.*

Cornelius similarly abandoned his § 315(a) claim. He failed to argue a § 315(a) claim anywhere in his original or amended Opening Brief. Even after the University argued abandonment, Cornelius failed to raise the argument in his reply. And to remove any doubt, Cornelius explicitly abandoned the § 315(a) argument at oral argument. *Cornelius*, 33 Wn. App. 2d at 481 fn. 2.

He contends, now, that his statement was an observation, not a concession. Pet. for Rev. at 24. Semantics aside, Cornelius

chose not to pursue a § 315(a) argument at any point on appeal, abandoning his argument. While Cornelius attempts to narrowly construe the concept of abandonment to "claims" and "affirmative defenses" (*see* Pet. for Rev. at 22-27), his interpretation finds no support in the case law. Appellate courts do not consider issues and arguments that have been abandoned. *See Holder*, 136 Wn. App. at 107; *Sprague v. Spokane Valley Fire Dep't*, 189 Wn.2d 858, 876, 409 P.3d 160 (2018) ("We will not consider arguments that a party fails to brief."); *Bldg. Indus. Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 749 n.12, 218 P.3d 196 (2009) ("[E]ven had the parties raised these issues to the trial court, but failed to continue to press those arguments on appeal, ... we would consider the arguments abandoned and not address them.").

Mathieu v. Dep't of Children, Youth, & Families, 23 Wn. App. 2d 777, 786, 520 P.3d 1033 *published with modifications at Mathieu for M.J. v. Dep't of Children, Youth, & Families*, 23 Wn. App. 2d 1025 (2022), is illustrative. There, the plaintiff

asserted a general negligence claim against DCYF, alleging breach of numerous legal duties. The plaintiff failed, however, to allege a legal duty under Restatement (Second) of Torts, § 318 (Am. L. Inst. 1965), requiring landowners to prevent licensees from intentionally harming others. On appeal, the court declined to address plaintiff's argument under this provision, even though plaintiff had alleged general negligence below. Here, as in *Matheiu*, Cornelius similarly abandoned any Restatement-based duty argument.

Cornelius' reference to *Blue Spirits Distilling, LLC v. Washington State Liquor & Cannabis Bd.*, 15 Wn. App. 2d 779, 782, 478 P.3d 153, 156 (2020) does not support his case. *See* Pet. for Rev. at 26. Unlike here, in *Blue Spirits*, the appellant argued and addressed the disputed issue with the trial court and in appellate briefing and did not explicitly abandon the claim at oral argument. *Id.* at 794–95.

This Court should deny Cornelius' petition for review of Division I's well-supported abandonment holding.

E. Cornelius' § 315(a) Argument Also Fails as a Matter of Law

Even if this Court considered Cornelius' § 315 argument, it would not support granting review in this case.

Restatement (Second) of Torts § 315(a) provides there is "no duty to control the conduct of a third person as to prevent him from causing harm to another unless: (a) a special relation exists between the actor and third person which imposes a duty upon the actor to control the third person's conduct." To establish a § 315(a) special relationship, there must be both a "definite, established, and continuing relationship between the defendant and the third party" *and* the ability to control the third party. *Barlow*, 2 Wn.3d at 593.

In support of his cursory argument that the University had the ability to control ETA's actions inside its private, off-campus residence, Cornelius primarily relies on his erroneous assertion that the University entered into a University-approved housing agreement with ETA. *See* Pet. for Rev. at 10, 27-28. It did not. Nor could freshmen students, including Cornelius, live in ETA's

off-campus residence. CP 1125, 1673 ("AKL is not applying for University Approved Housing.").

Cornelius also references the Relationship Agreement between the University and AKL. Pet. for Rev. at 28. Yet, as Division I correctly observed, "Cornelius offers little, if any, substantive analysis beyond listing the contents of this [Relationship Agreement]." *Cornelius*, 33 Wn. App. 2d at 487 n.4. Cornelius fails to cite to any record evidence showing the University's ability to control ETA. Instead, he cites to the record in the *Martinez* case, which involved a separate fraternity. That record cannot support granting review here.

V. CONCLUSION

Cornelius' petition for review should be denied.

This document contains 4,997 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 12th day of May, 2025.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the ANSWER TO PETITION FOR REVIEW with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 12th day of May 2025, at Olympia, Washington.

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APPENDIX

APPENDIX
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Appendix 1

Washington Statutes Annotated - 2017

West's Revised Code of Washington Annotated
Title 28b. Higher Education (Refs & Annos)
Chapter 28B.10. Colleges and Universities Generally (Refs & Annos)

West's RCWA 28B.10.900

28B.10.900. “Hazing” defined

Currentness

As used in RCW 28B.10.901 and 28B.10.902, “hazing” includes any method of initiation into a student organization or living group, or any pastime or amusement engaged in with respect to such an organization or living group that causes, or is likely to cause, bodily danger or physical harm, or serious mental or emotional harm, to any student or other person attending a public or private institution of higher education or other postsecondary educational institution in this state. “Hazing” does not include customary athletic events or other similar contests or competitions.

Credits
[1993 c 514 § 1.]

West's RCWA 28B.10.900, WA ST 28B.10.900

The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

End of Document

Appendix 2

Washington Statutes Annotated - 2017

West's Revised Code of Washington Annotated
Title 28b. Higher Education (Refs & Annos)
Chapter 28B.10. Colleges and Universities Generally (Refs & Annos)

West's RCWA 28B.10.901

28B.10.901. Hazing prohibited--Penalty

Currentness

(1) No student, or other person in attendance at any public or private institution of higher education, or any other postsecondary educational institution, may conspire to engage in hazing or participate in hazing of another.

(2) A violation of this section is a misdemeanor, punishable as provided under RCW 9A.20.021.

(3) Any organization, association, or student living group that knowingly permits hazing is strictly liable for harm caused to persons or property resulting from hazing. If the organization, association, or student living group is a corporation whether for profit or nonprofit, the individual directors of the corporation may be held individually liable for damages.

Credits
[1993 c 514 § 2.]

LAW REVIEW AND JOURNAL COMMENTARIES
Poetry as evidence. Gregory S. Parks, Rashawn Ray, 3 UC Irvine L.Rev. 217 (2013).

The psychology and law of hazing consent. Gregory S. Parks, Tiffany F. Southerland, 97 Marq.L.Rev. 1 (2013).

LIBRARY REFERENCES
Education 1198, 1204(2).
Westlaw Topic No. 141E.

West's RCWA 28B.10.901, WA ST 28B.10.901

The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

End of Document

Appendix 3

Washington Statutes Annotated - 2017

West's Revised Code of Washington Annotated
Title 28b. Higher Education (Refs & Annos)
Chapter 28B.10. Colleges and Universities Generally (Refs & Annos)

West's RCWA 28B.10.902

28B.10.902. Participating in or permitting hazing--Loss of state-funded grants or awards--Loss of official recognition or control--Rules

Currentness

(1) A person who participates in the hazing of another shall forfeit any entitlement to state-funded grants, scholarships, or awards for a period of time determined by the institution of higher education.

(2) Any organization, association, or student living group that knowingly permits hazing to be conducted by its members or by others subject to its direction or control shall be deprived of any official recognition or approval granted by a public institution of higher education.

(3) The public institutions of higher education shall adopt rules to implement this section.

Credits
[1993 c 514 § 3.]

LIBRARY REFERENCES
Education 1198, 1204(2).
Westlaw Topic No. 141E.

West's RCWA 28B.10.902, WA ST 28B.10.902

The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

End of Document

Appendix 4

Washington Statutes Annotated - 2017

West's Revised Code of Washington Annotated
Title 28b. Higher Education (Refs & Annos)
Chapter 28B.10. Colleges and Universities Generally (Refs & Annos)

West's RCWA 28B.10.903

28B.10.903. Conduct associated with initiation into group or pastime or amusement with group--Sanctions adopted by rule

Currentness

Institutions of higher education shall adopt rules providing sanctions for conduct associated with initiation into a student organization or living group, or any pastime or amusement engaged in with respect to an organization or living group not amounting to a violation of RCW 28B.10.900. Conduct covered by this section may include embarrassment, ridicule, sleep deprivation, verbal abuse, or personal humiliation.

Credits
[1993 c 514 § 4.]

LIBRARY REFERENCES
Education 1198.
Westlaw Topic No. 141E.

West's RCWA 28B.10.903, WA ST 28B.10.903

The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

End of Document

Appendix 5

Washington Administrative Code - 2017

Washington Administrative Code
Title 504. Washington State University
Chapter 504-26. Standards of Conduct for Students
Article II. Proscribed Conduct

WAC 504-26-206

504-26-206. Hazing.

Currentness

(1) No student or student organization at Washington State University may conspire to engage in hazing or participate in hazing of another.

(a) Hazing includes any activity expected of someone joining a group (or maintaining full status in a group) that causes or is likely to cause a risk of mental, emotional and/or physical harm, regardless of the person's willingness to participate.

(b) Hazing activities may include but are not limited to the following: Abuse of alcohol during new member activities; striking another person whether by use of any object or one's body; creation of excessive fatigue; physical and/or psychological shock; morally degrading or humiliating games or activities that create a risk of bodily, emotional, or mental harm.

(c) Hazing does not include practice, training, conditioning and eligibility requirements for customary athletic events such as intramural or club sports and NCAA athletics, or other similar contests or competitions, but gratuitous hazing activities occurring as part of such customary athletic event or contest are prohibited.

(2) Washington state law also prohibits hazing which may subject violators to criminal prosecution. As used in RCW 28B.10.901 and 28B.10.902, 'hazing' includes any method of initiation into a student organization or living group, or any pastime or amusement engaged in with respect to such an organization or living group that causes, or is likely to cause, bodily danger or physical harm, or serious mental or emotional harm, to any student or other person attending a public or private institution of higher education or other postsecondary education institution in this state.

(3) Washington state law (RCW 28B.10.901) also provides sanctions for hazing:

(a) Any person who violates this rule, in addition to other sanctions that may be imposed, shall forfeit any entitlement to state-funded grants, scholarships, or awards for a period of time determined by the university.

(b) Any organization, association, or student living group that knowingly permits hazing by its members or others subject to its direction or control shall be deprived of any official recognition or approval granted by the university.

Appendix 5

Credits

Statutory Authority: RCW 28B.30.150. WSR 06-23-159, S 504-26-206, filed 11/22/06, effective 12/23/06.

Current with amendments adopted through the 17-24 Washington State Register dated, December 20, 2017.

WAC 504-26-206, WA ADC 504-26-206

End of Document

May 12, 2025 - 2:46 PM

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