

No. 22-0514

IN THE
SUPREME COURT OF THE UNITED STATES

DOVE McMILLAN,

Petitioner,

v.

BOARD OF REGENTS OF CITY UNIVERSITY OF LANTANA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

- I. Under Federal Rule of Civil Procedure 50(b), does the period for post-judgment motions begin from the entry of an original judgment or an amended judgment when the amended judgment makes a change of substance that alters the legal obligations of the parties?
- II. Under the First Amendment, does the University violate a speaker's right to Free Speech merely by adopting a viewpoint-neutral "hands-off" disciplinary policy for all on-campus student activity?

PARTIES TO THE PROCEEDING

Petitioner in this Court is Dove McMillan. Respondent is the Board of Regents of the City University of Lantana.

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The Thirteenth Circuit's decision reversing the District Court is not reported but is available at No. 22-0514 and reprinted at R. 1a. The District Court's order denying the University's Renewed Motion for Judgment as a Matter of Law is not reported but is reprinted at R. 20a.

JURISDICTION

The Thirteenth Circuit entered judgment on May 10, 2023. R. 19a. On October 7, 2024, this Court granted certiorari. R. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the United States Constitution provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

Section 1983 of Title 42 of the United States Code provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable

exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

INTRODUCTION

The case before the Court asks for guidance on two very different issues—one regarding judicial economy and the creation of workable procedural guidelines, and one regarding the right to Free Speech and the protection of robust participation and debate in higher education. What these two different issues have in common, though, is that they each give this Court the opportunity to establish jurisprudence that gives rise to positive incentives for the judiciary as a whole. By affirming the court below and adopting the Fifth Circuit’s “substantive change” test, this Court can increase the efficiency of the judiciary and allow judges to expend their valuable time on the hard questions. By affirming the University’s right to choose their own disciplinary policy, this Court would encourage public universities to continue to open forums of debate and cultivate environments celebrating the right to Free Speech, ultimately promoting a thriving campus of diverse thought. This Court must consider the potential for positive externalities from its decision today, and therefore should affirm the lower court’s holding on both issues.

STATEMENT OF THE CASE

A. Statement of the Facts

The City University of Lantana (the “University”) is a well-respected coeducational institution in the state of New Tejas, with educational and athletic

traditions dating back to 1849. R. 2a. The University's Dean of Student Affairs, Mason Thatcher, prefers a "hands-off" approach to student discipline. R. 5a. Dean Thatcher believes that the students at the University are "good kids who just need a good talking to." *Id.* This "rule of laxity" or "non-discipline" has gained popularity among other employees at the University, including campus security and employees within the Department of Student Affairs. *Id.* Although Dean Thatcher admits that this strategy at times has been known to create a "rowdy" atmosphere on campus, Thatcher believes this strategy is best for the students at the University. R. 3a.

The University's many student-led organizations have cultivated robust student attendance at their various on-campus speaker events. R. 5a. On some occasions, the students at the University have been known to protest and "shout down" some of the speakers invited to present on campus. *Id.* The shouting down of speakers on campus, also known as the "hecklers veto," is not a form of protest exclusive to the University.

This case arises out of the events that took place at the University's Hedge Family Auditorium. *Id.* The Auditorium, which is regularly used by student groups on campus, has hosted an array of speaker events on a broad range of topics including institutional racism, Second Amendment rights, the legalization of recreational marijuana, and climate change. R. 5a. On February 8, 2020, the Campus Vegan Alliance organization hosted Petitioner, Dove McMillan, as a guest speaker in the Auditorium. R. 6a.

Petitioner, an advocate for veganism, planned her speech as a call to action for humanity to stop at once the “depraved” activity of eating meat, given her view of the meat industry as unethical. R. 6a. Inevitably, this rhetorical claim painted meat-eaters as morally debased, and vegans as morally superior. *Id.* After a few minutes of Petitioner’s speech, students in protest began using their voices, as well as noisemakers, to drown out Petitioner’s speech. *Id.* Despite her efforts to speak over the students, Petitioner gave up after fifteen minutes and departed the stage. *Id.*

Following Petitioner’s speech, some damage did occur to various property in the auditorium, including to tables and chairs. R. 6a–7a. However, there is no evidence that at any point during Petitioner’s speech the student protestors threatened harm against Petitioner and the record indicates that any property damage that occurred took place after her departure from the stage. R. 7a. A campus security officer was present at the speaking event but acted in accordance with the University’s “hands-off” policy when he neither halted the student protests nor prevented Petitioner from attempting to continue her speech. R. 5a, 7a.

B. Procedural History

Petitioner sued the University under 42 U.S.C. § 1983, claiming that her First Amendment rights were violated by the student protest and the subsequent failure of the University campus security to intervene. R. 7a. The case proceeded to trial where the University sought judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). *Id.* The district court denied the University’s pre-judgment motion, as is common at that stage of the litigation. *Id.*

The jury ultimately found for the Petitioner and awarded \$12,487 in compensatory damages and \$350,000 in punitive damages. *Id.* On January 20, 2022, the district court entered a final judgment which included only the compensatory damages. *Id.* Seven days later, the court *sua sponte* modified the judgment to incorporate the punitive damages as determined by the jury. *Id.*

On February 24, 2022—twenty-eight days after the modified judgment and thirty-five days after the original judgment—the University filed a renewed motion for judgment as a matter of law under Rule 50(b). *Id.* The district court ruled that the University’s Rule 50(b) motion was untimely and denied it without considering its merits. *Id.* This Court granted certiorari on October 7, 2024.

SUMMARY OF ARGUMENT

I. The University’s Renewed Motion for Judgment as a Matter of Law was timely under Rule 50(b).

The University’s Renewed Motion was timely under Rule 50(b) because the addition of punitive damages represented a substantive change to the original judgment. The University’s Renewed Motion was filed within twenty-eight days of the Amended Judgment, which was the relevant filing for calculating the post-judgment motion deadline. A circuit split exists regarding whether the twenty-eight-day period in this case began on the date of the Original Judgment or the Amended Judgment. The Fifth and Seventh Circuits have created differing tests, the former restarting the motion clock if a substantial change is made in the superseding judgment and the latter restarting the clock only if the motion bears some

relationship to the alteration of the court’s original judgment. The University would prevail under either test, but this Court’s precedent and longstanding value of judicial economy support adopting the Fifth Circuit’s “substantial change” test and rejecting the Seventh Circuit’s “relationship” test.

The Fifth Circuit’s substantial change test is more consistent with this Court’s precedent and is more easily administrable by the courts. The Amended Judgment in this case made a significant change by adding punitive damages, which revised the University’s legal rights and obligations. Therefore, the period for the University to file their Rule 50(b) motion began on the date of the Amended Judgment, not the Original Judgment. However, the University prevails under either test because the arguments in the Renewed Motion bore a “relationship” to the addition of punitive damages.

II. No reasonable jury could find that the University violated Petitioner’s First Amendment rights by adopting a policy of non-discipline.

Petitioner is unable to successfully argue that the University violated her First Amendment rights pursuant to Section 1983. The University did not owe Petitioner an affirmative duty of protection during her speech. The First Amendment prohibits the government from infringing upon one’s right to Freedom Speech. It does not, however, give private individuals a right to the full force of the State to protect them from other private individuals who may not wish to listen to such speech. This Court’s precedent requires that for an affirmative obligation to be found, there must be a clear and present threat of violence to the speaker—but such a threat cannot be found in the facts at hand. As a matter of policy, creating an affirmative right to

government protection for speakers would chill robust campus participation in the exercise of free speech. Instead of requiring schools only to prevent actual violence, universities would be beholden to prevent any potentially disruptive speech at all, which would disincentivize schools from opening their forums of free speech and debate in the future.

Further, the University's choice of a lax disciplinary policy was substantially related to the important government interest of promoting student education and robust participation in on-campus speech. In applying this policy, the University discriminated neither by viewpoint (for example, only disciplining students promoting veganism) nor by subject matter (i.e., failing to discipline students only at speaking events on campus). Because the policy was not applied in a discriminatory manner, it prevails under intermediate scrutiny.

ARGUMENT

The University's Renewed Motion for Judgment as a Matter of Law was timely under Rule 50(b) and should be granted on the grounds that no reasonable jury could find that the University violated Petitioner's First Amendment rights. The first question before this Court is whether the period for filing post-judgment motions begins anew when a court enters an amended judgment that changes matters of substance and disturbs the legal rights and obligations of the moving party? The answer to this question is "yes." The second question before this Court is whether a reasonable jury could ever find that the University, by enforcing a viewpoint-neutral policy of non-discipline, infringed on Petitioner's First Amendment right to Free Speech? The answer to this question is undoubtedly "no."

I. The University's Renewed Motion for Judgment as a Matter of Law was timely under Rule 50(b).

The time period for filing a post-judgment motion should begin to run from the entry of any superseding judgment that changes "matters of substance" and "disturb[s] legal rights and obligations" of the moving party. *Cornist v. Richland Par. Sch. Bd.*, 479 F.2d 37, 39 (5th Cir. 1973); *see also* R. 7a. (holding that the 13th Circuit adopted the Fifth Circuit's test in *Cornist*). The University filed its Renewed Motion for Judgment as a Matter of Law within twenty-eight days of the Amended Judgment, which was the relevant judgment for calculating the proper filing period in this case. "No later than 28 days after the entry of judgment," a party "may file a renewed motion for judgment as a matter of law." Fed. R. Civ. P. 50(b). This deadline is strictly construed: "[a] court must not extend the time to act under Rule[] 50(b)." Fed. R.

Civ. P. 6(b)(2). Therefore, the timeliness of the University's motion depends on whether the twenty-eight day period began on the date on which the Original Judgment was filed, or the date on which the Amended Judgment was filed. The correct answer is the latter, and therefore the University's Renewed Motion for Judgment as a Matter of Law was timely under Rule 50(b).

The circuits disagree on what is required for a trial judge's superseding judgment to restart the post-judgment "motion clock." The Fifth and Thirteenth Circuits have held that a superseding judgment prevails and begins the running of the clock if it "mak[es] a change of substance which disturb[s] or revise[s] legal rights and obligations," adopting a "substantive change test." *Cornist*, 479 F.2d at 38–39; *see also Wilmington Sav. Fund Soc'y, FSB v. Myers*, 95 F.4th 981, 982 (5th Cir. 2024) ("[A]n order making such substantive changes is construed as a new judgment from which the 30-day appeal clock runs. . . ."); *But see McNabola v. Chi. Transit Auth.*, 10 F.3d 501 (7th Cir. 1993); *accord Tru-Art Sign Co., Inc. v. Local 137 Sheet Metal Workers Int'l Ass'n*, 852 F.3d 217 (2d Cir. 2017). This Court's precedent and the omnipresent concern for judicial economy counsel in favor of rejecting the Second and Seventh Circuit's test and formally adopting the Fifth and Thirteenth Circuit's test as controlling. However, even if this court were to adopt the Seventh and Second Circuit's test, the University's renewed motion was still timely.

- A. Binding precedent and judicial economy support calculating post-trial motion deadlines from the date of a superseding judgment when a substantive change is made.

This Court's precedent and its longstanding concern for judicial economy support adopting the Fifth and Thirteenth Circuit's substantive change test as stated in *Cornist*.¹ In *Cornist v. Richland*, a school board appealed a district court denying the board's motion for a new trial as "filed too late." 479 F.2d at 38. Eleven days after the initial judgment was entered, the court signed a new judgment removing a reference in the original judgment to the potential reinstatement of the board's band director. *Id.* The board filed a motion for new trial nine days after the amended judgment but twenty days after the original judgment.² In finding that the ten-day filing period ran from the original judgment, the district court held the motion to be untimely. *Id.* The Fifth Circuit disagreed. It held that the "general rule enunciated by a long line of judicial authority" points in favor of finding that the second judgment begins the period anew if it makes a "change of substance" or "disturb[s] or revise[s] legal rights and obligations." *Id.* at 39 (quoting *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952)). The court found that the second judgment omitted a substantive paragraph concerning the legal rights of the band director with respect to her possible reinstatement. *Id.* Vacating the district court's order, the court found that the board's motion was timely. *Id.*

¹ The Eleventh Circuit has adopted as binding precedent all decisions handed down by Fifth Circuit prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Until a contrary decision is rendered, *Cornist* is also the controlling authority for the Eleventh Circuit.

² Prior to the 2009 amendment of Rule 59, motions for new trial had to be filed within 10 days of the entry of judgment. *Committee Notes on Rules—2009 Amendment*, Fed. R. Civ. P. 59.

- i. This Court’s precedent supports adopting the Fifth Circuit’s “substantial change” test.

The Fifth Circuit’s approach is more consistent with this Court’s precedent, while also being easily administrable by the courts. Although this Court has never addressed the effect of an amended judgment with respect to the timelines of a Rule 50(b) motion directly, it has examined an amended judgment’s effect with respect to petitions for certiorari.

In *FTC v. Minneapolis-Honeywell Regulator Co.*, the Federal Trade Commission brought a complaint alleging three violations of antitrust laws against the Minneapolis-Honeywell Regulator Company (“Honeywell”). 344 U.S. at 207–08. Following administrative proceedings, the Commission found against Honeywell on all three counts—issuing a cease-and-desist order covering each of the three violations. *Id.* Honeywell then petitioned the Seventh Circuit Court of Appeals to set aside Part III of the order but abandoned any challenge to the legality of Parts I or II of the order. *Id.* at 208.

In a July 5, 1951 decision, the Seventh Circuit stated that because Honeywell did not “challenge Parts I and II of the order based on the first two counts of the complaint we shall make no further reference to them.” *Id.* Only after the Court of Appeals issued what it called its “Final Decree” on September 18, 1951 were Parts I and II of the order affirmed. *Id.* at 209–10. On December 14, 1951 eighty-seven days after the “Final Decree” but 162 days after the earlier order, the Commission filed its

petition for certiorari, which would have been untimely unless the “Final Decree” restarted the period in which it could be filed. *Id.*

The Commission argued that when a court changes its judgment, the time to appeal or petition begins to run anew. *Id.* at 211. But the Court found that interpretation of its prior decisions to be “too liberal.” *Id.* Criticizing the Commission’s interpretation that the time to appeal or petition begins tolling with *every* judgment change, the Court held that the period in which to file a petition for certiorari begins to run anew only “when the lower court changes matters of substance, or resolves a genuine ambiguity.” 344 U.S. at 211. A judgment that has been “reentered or revised in an immaterial way” does not restart the period in which the petition must be filed. *Id.* Instead, “[t]he test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.” *Id.* at 212. Because the Court found that the “Final Decree” did not materially alter the original judgment, the time for filing a petition was not extended. *Id.* Undoubtedly, in adopting this practical approach, the Court considered the value of judicial economy, as this Court should today.

This Court’s practical approach to certiorari petitions should be extended to Rule 50(b) motions. In fact, *Cornist* explicitly did so in the context of a Rule 59 motion.³ 479 F.2d at 39. The court’s substantive change test—as derived from *FTC*—

³ A Rule 59 motion seeks a new trial and must be filed “no later than 28 days after the entry of judgment.” Fed. R. Civ. P. 59(b).

was satisfied by the amended judgment in *Cornist* because the amended judgment omitted an earlier reference in the original judgment to the legal rights and possible reinstatement of a school faculty member. *Id.*

Here, the district judge made an even larger change when it amended the final judgment to include punitive damages. R. 21a. This meant that the University's damages obligation increased by twenty-eight times.⁴ R. at 7a (entering compensatory damage award of \$12,487, but a punitive damage award of \$350,000). Following the addition of punitive damages, it cannot be disputed that the "legal rights and obligations" of the University have been "revised." *FTC*, 344 U.S. at 211. As such, the Amended Judgment passes the Fifth Circuit's test, and the period for filing a Rule 50(b) motion should begin to run from the date of that judgment. *See also* R. 23a n.2 ("Nor is it disputed that the addition of punitive damages to the Amended Final Judgment constituted a material, non-clerical modification.").

By contrast, the Seventh Circuit's relationship test does not originate from this Court's precedents. Instead, the Seventh Circuit determines the scope of its

⁴ There is a strong argument to be made that the punitive damages awarded in this case are excessive. A punitive damages award that is "grossly excessive" violates the Due Process Clause of the Fourteenth Amendment. *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 458 (1993). To determine whether an award is grossly excessive, this Court considers "the degree of reprehensibility of the [conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). Although this Court has disclaimed the idea that "the constitutional line is marked by a simple mathematical formula," a ratio of 28-to-1 should "raise a suspicious judicial eyebrow." *TXO*, 509 U.S., at 481 (O'Connor, J., dissenting).

jurisdiction⁵ based upon what the arguments of a party may be. *See Branion v. Gramly*, 855 F.2d 1256, 1259 (7th Cir. 1988) (“If a judge alters her judgment in response to the first motion, the party aggrieved by the change may file a motion directed to the difference.”) (emphasis added). This is unsettling. As this Court has often repeated, “[f]ederal courts are courts of limited jurisdiction,” and “possess only that power authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The statute applicable to this situation is unmistakably clear: “A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).” Fed. R. Civ. P. 6(b)(2).

In *McNabola v. Chi. Transit Auth.*, the appellant moved for prejudgment interest over four months after the court entered its original judgment. 10 F.3d at 507–08, 520. The court held that the appellant had far exceeded the ten-day filing period and rendered the motion untimely. *Id.* Almost six months after the appellant filed his untimely motion, the court entered a second amended judgment. *Id.* Relying on earlier Seventh Circuit precedent, the appellant claimed that the court’s amended judgment restarted the period in which such post-judgment motions could be filed, but the court rejected his theory for two reasons, neither of which support the Appellant’s argument in the case before this Court. *Id.* at 521.

⁵ The twenty-eight-day limitation is jurisdictional. *See Adams v. Trustees of N.J. Brewery Emp’s Pension Tr. Fund*, 29 F.3d 863, 870 (3d Cir. 1994) (“[T]he [twenty-eight]-day period is jurisdictional, and cannot be extended in the discretion of the district court.” (cleaned up)); *Wright v. Preferred Rsch., Inc.*, 891 F.2d 886, 890 (11th Cir. 1990) (“The [twenty-eight] day period is jurisdictional and cannot be extended by the court.”) (citing Fed. R. Civ. P. 6(b)); *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224, 230 (2d Cir. 2000) (“Rule 6(b) makes the ten-day time limitation [] jurisdictional so that the failure to make a timely motion divests the district court of power to modify the trial verdict.”) (internal quotation marks omitted).

First, the appellant in *McNabola* filed his motion before the second judgment was entered, so the assertion that he filed it in response to the second judgment was factually unsupported. *Id.* Secondly, his motion did not address anything related to the difference in the two judgments, which was the acceptance of a significant remittitur lowering his damages. *Id.* Instead, he argued for the first time that he was entitled to prejudgment interest—an entitlement not affected by whether he had accepted a remittitur. *Id.* Because his motion did not address anything relating to prejudgment interest, the Court held that the motion was not addressed to the second judgment, and that the appellant’s motion was untimely. *Id.* at 521–22. By contrast, neither is true here; but this Court should reject this test altogether.

If the filing period begins anew, it must be simply because the judgment is substantively different—a determination not affected by the argument raised by the parties in their motion. “The test is a practical one.” *FTC*, 344 U.S. at 212. Any additional inquiry is not based upon the text of the statute. The Seventh Circuit’s confused jurisprudence seemingly confirms this. The principal authority upon which *McNabola* is based initially applied the FTC approach, finding that:

The purpose of the rule suggests that when a court *alters* its judgment, a person aggrieved by the alteration may ask for correction. A successive motion directed to the same judgment is ineffectual, but when there is a new judgment—an alteration independently sufficient to restart the time for appeal—there is also a new period in which to file a motion under Rule 59.

Charles v. Daley, 799 F.2d 343, 348 (7th Cir. 1986). The *Charles* court further stated that “[t]he timeliness of the successive motion comes from the alteration of the

judgment. A significant change in a judgment starts all time periods anew, whether the district court alters the judgment at the request of a party or on its own motion.” *Id.* (citing *FTC*, 344 U.S. at 211). The timeliness determination in *Charles* was not based upon whether the party’s motion challenged the altered as opposed to the original judgment. To the extent that *McNabola* analyzed the arguments of the party’s motion to determine which judgment started the filing clock, this approach is contrary to both this Court’s precedent in *FTC* and their own circuit’s precedent in *Charles*. See *Charles*, 799 F.2d at 347–48; *FTC*, 344 U.S. at 212; see generally *Kokkonen*, 511 U.S. at 377 (describing federal court jurisdiction as only that conferred “by Constitution and statute”).

At bottom, the Seventh and Second Circuit’s approach is contrary to this Court’s jurisprudence and is of questionable support even within its own circuit’s jurisprudence. By contrast, the Fifth Circuit’s approach is directly analogous to that endorsed by this Court in *FTC*. Petitioner can state no substantive reason why the logic in *FTC* as applied to petitions for certiorari should not equally apply to renewed motions for judgment as a matter of law, or any other post-judgment motion for that matter. This Court should therefore reject the Seventh Circuit’s test and adopt the Fifth Circuit’s “substantive change” test as its rule of law.

- ii. Judicial economy and administrability counsel against adopting the Seventh Circuit’s “relationship” test.

The Seventh Circuit’s relationship test will prove unworkable for lower courts and force them to expend scarce judicial resources on laborious inquiries. This

unworkable test requires an analysis of the substance of a disputed motion, an extensive inquiry that is irrelevant to the jurisdictional requirements. The Seventh Circuit's relationship test requires that the arguments raised by the party filing the disputed motion "bear[] some relationship" to the basis for the amendment to the original judgment. *McNabola*, 10 F.3d at 521. As previously discussed, the Fifth Circuit's ideal substantial change test requires the court to determine only whether the second judgment "disturbed or revised legal rights and obligations" of either party. *Cornist*, 479 F.2d at 39. This merely requires that the court (1) compare the two judgments, and (2) determine if any legal obligations have been modified, or if any legal rights have been affected. *Id.* By contrast, the Seventh Circuit's arduous test requires not only those two steps, but also that the court (3) examine the arguments in the disputed motion, and (4) determine whether those arguments bear any relationship to the basis for entering the second judgment. *McNabola*, 10 F.3d at 521.

The first two steps are required under either test. All parties agree that a minor, clerical change is insufficient to toll the applicable time period. *See Progressive Indus., Inc. v. United States*, 888 F.3d 1248, 1253 (Fed. Cir. 2018) ("The Amended Judgment altered only [a] collateral issue . . . and therefore did not restart the time period for filing a Rule 59(e) motion in this case."); R. 23a n.2 ("Nor is it disputed that the addition of punitive damages to the Amended Final Judgment constituted a material, non-clerical modification."). But the Seventh and Second Circuit's approach requires two additional steps, while at the same time asking the

court to apply an imprecise standard. These additional steps appear nowhere in any relevant statute and are improper bases for determining a district court's subject matter jurisdiction. *See Kokkonen*, 511 U.S. at 377 (noting federal court jurisdiction as that "authorized by Constitution and statute").

Requiring that the arguments in the disputed motion bear some relationship to the basis for the entry of the superseding judgment also raises some administrability concerns. In *McNabola's* principal authority *Charles*, the Seventh Circuit soundly declares that "[q]uestions of jurisdiction should be clear." *Charles*, 799 F.2d at 347. But its test gives no indication of how close the "relationship" between the arguments in the motion and the amended judgment must be. An open-ended test leaves litigants unsure about whether the time to file post-judgment motions or an appeal has run. *See id.* (noting a concern that parties "do not forfeit appeals by accident").

The Seventh Circuit's test demands that courts spend time and resources to answer substantive questions that the relevant statutes do not require to be answered. In doing so, they will be asked to apply a potentially limitless standard which provides no certainty to litigants. It is unsound, unsupported by statute, and unworkable. This Court should reject it.

B. The University still prevails under the Seventh Circuit's "relationship" test.

The Petitioner's case suffers from a more fundamental flaw in that the University prevails under either circuit's test. As previously mentioned, the Seventh Circuit's

test requires that a party's renewed motion "bear some relationship to the district court's alteration of the first judgment." *McNabola*, 10 F.3d at 521. Admittedly, the University's Renewed Motion did not specifically mention punitive damages and challenged only the University's liability directly. R. 21a. However, the Seventh Circuit's "relationship" test requires only that the relevant motion have "some relationship" to the substantive change made by the second judgment. *McNabola*, 10 F.3d at 521. That standard is quite low. The ordinary language of the term "relationship" is defined as "the state of being related or interrelated." *Relationship*, Merriam-Webster.com, <https://www.merriamwebster.com/dictionary/relationship> (last accessed Nov. 12, 2024).⁶ Black's Law Dictionary similarly defines the phrases to "be related," or "relate to" as "[t]o have some connection to; to stand in relation to." *Relate*, Black's Law Dictionary (12th ed. 2024). This means that the arguments in the University's Renewed Motion must simply have "some connection to" the addition of punitive damages in the Amended Judgment.

Here, the standard is met because of the relationship between liability and punitive damages. The two not only bear a connection to one another, but liability is a *necessary* prerequisite for the award of punitive damages. By arguing against the University's liability in this case, it necessarily argued against the award of punitive damages. It is well-established that there can be no recovery of punitive damages (or compensatory damages for that matter) without a finding of liability. *See, e.g.,*

⁶ Black's Law Dictionary defines "relationship" only with respect to people. *See Relationship*, Black's Law Dictionary (12th ed. 2024).

Restatement (Second) of Torts § 908 cmt. C (1979) (“It is essential, however, that facts be established that, apart from punitive damages, are sufficient to maintain a cause of action.”); *Smith v. Wade*, 461 U.S. 30, 33 (1983) (upholding jury instruction requiring for punitive damages (1) “find[ing] the issues in favor of Plaintiff,” and (2) an “award of actual damages”); *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205, 1214 (1st Cir. 1995) (“[G]enerally a claimant may not recover punitive damages without establishing liability for either compensatory or nominal damages.”).

If accepted, the arguments in the University’s motion would have, *inter alia*, erased the University’s obligation to pay punitive damages—the award of which was the sole basis for amending the judgment. That fact cannot be disputed given that there can be no punitive damages without a finding of liability. *Cf. Smith*, 461 U.S. at 33. It can hardly be said, therefore, that the University’s arguments bear no relationship to the basis of the change to the Amended Judgment, when those arguments, if successful, would have rendered the only change made by the Amended Judgment a legal impossibility.

This is in stark contrast to the facts of *McNabola*. The appellant/respondent filed the disputed motion *before* the court entered its second judgment. *McNabola*, 10 F.3d at 521. So as a factual matter, it was impossible for the appellant in *McNabola* to have filed it *in response* to the second judgment. *Id.* Here, the opposite is true; the University filed its motion exactly twenty-eight-days after the court entered its second judgment. R. 7a. But more significantly, the appellant’s motion in *McNabola*

addressed only prejudgment interest, while the basis for amending the judgment was the acceptance of a remittitur. *McNabola*, 10 F.3d at 521.

The appellant in *McNabola*'s arguments about prejudgment interest bore no relationship to his acceptance of the remittitur because the former did not impact his acceptance of the latter. By contrast, in this case, the University's arguments against liability bear a *direct* relationship to the addition of punitive damages because the former is a requirement for the award of the latter. *See* Restatement (Second) of Torts § 908 cmt. c (1979). The nature of the relationship between liability and punitive damages is fundamentally different from that of a remittitur and prejudgment interest. Neither is a requirement for the other. A finding of liability is required for punitive damages to be awarded which satisfies the "relationship" test.

Again, if the arguments in the disputed motion had been successful, the court would have been categorically precluded from awarding punitive damages, or any damages for that matter. Facing that reality, it is hard to imagine how a court could hold the two bear no relationship. Although the University urges this Court that the Fifth Circuit "substantive change" test should prevail as the controlling test, this Court should affirm the Thirteenth Circuit's decision irrespective of whichever test it chooses to adopt because the University prevails under both.

II. No reasonable jury could find that the University violated Petitioner's First Amendment rights by adopting a non-disciplinary policy.

Petitioner asks this Court to find that the University infringed upon her Constitutional right to Free Speech under the First Amendment. The First

Amendment was established to prohibit government infringement upon the freedoms essential to individual liberty and open discourse in America. The University's viewpoint-neutral policy of non-traditional discipline was applied even-handedly across the board and did not violate Petitioner's First Amendment right to speech. Nor has the First Amendment ever been interpreted to imply an affirmative obligation on behalf of the government to ensure that private individuals are protected from each other. Indeed, because the student protesters also enjoy First Amendment rights, required governmental interference would infringe on the students' right not to be forced to listen to viewpoints they disagree with.

Petitioner brings her claim against the University under 42 U.S.C. § 1983.

Section 1983 provides a cause of action against any person who:

[U]nder color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.

42 U.S.C. § 1983. Under *Monell v. Dep't of Soc. Servs. of City of New York*, "municipalities" can be sued under Section 1983 if they "adopt and promulgate" unconstitutional policies. 436 U.S. 658, 690 (1978).⁷ For Petitioner's claim to survive under Section 1983, she must prove that the University adopted and enforced a policy repugnant to the United States Constitution. Petitioner cannot fulfill that requirement.

⁷ Neither party disputes that the University is a municipality for purposes of *Monell* liability. R. 11a. n.4.

Judgment as a Matter of Law is warranted when “a reasonable jury would not have a legally sufficient evidentiary basis to find for [a] party on [an] issue.” Fed. R. Civ. P. 50(a)(1). No reasonable jury could find that the University implemented a policy that deprived Petitioner of her rights, privileges, or immunities secured to her by the First Amendment to the United States Constitution. Therefore, the prior court’s grant of the University’s Renewed Motion for Judgment as a Matter of Law was not only warranted, but necessary.

A. The University’s disciplinary policy is viewpoint neutral both on its face and in its application.

The University’s anti-disciplinary policy was applied consistently and evenhandedly and therefore was both content and viewpoint neutral. “It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is “all the more blatant.” *Id.* at 829; *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). Viewpoint discrimination is an “egregious” form of content discrimination which requires the government to refrain from regulating speech when “the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger*, 515 U.S. at 829; *see also Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 46 (1983). The University’s non-disciplinary policy does not discriminate on the basis of subject matter or viewpoint. It is also not a restriction,

but rather a lack thereof. The University's policy is simply an alternate avenue to discipline, applied equally to all students in every case of "misbehavior."

Even the dissent agreed that Petitioner "presented no evidence of selective enforcement or viewpoint discrimination and accepted the characterization of the University's policy as a "neutral' and equally applied rule of laxity." R. 17a. However, the dissent argues that the "effect" of the University's policy of laxity is to "leave speech to the whim of the mob: popular speech is permitted and welcomed on campus, and unpopular speech is shouted down and unheard." *Id.* "Majority rule and popularity contests," the dissent argues, are "inconsistent with principles of free speech." *Id.* To support this, he cites to *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, which addresses the constitutionality of a North Carolina law regulating the solicitation of charitable contributions by professional fundraisers. 487 U.S. 781, 784 (1988). The facially neutral law in *Riley* (a content-based mandatory speech provision) violated the First Amendment under a strict scrutiny analysis because it was not narrowly tailored to address the State interest of regulating professional fundraising contributions, given its usage of percentage-based measures and requirements of case-by-case analyses of reasonableness. *Id.* at 791–92. This Court minimally addressed that the statute was "impermissibly insensitive" to the small or unpopular charities which rely on professional fundraisers, which could ultimately have the effect of silencing unpopular charities' fundraising initiatives. *Id.* at 793. But this Court's decision in *Riley* in no way hinged on that finding. The dissent also relies on a similar case out of the Second Circuit, *Amidon v. Student Ass'n of State*

Univ. of New York at Albany, 508 F.3d 94 (2d Cir. 2007). *Amidon* addresses whether a university's policy of fund allocation to student organizations based on student opinion was viewpoint discriminatory. *Id.* at 101. In holding that the practice was viewpoint discriminatory, the court reasoned that organizations which were less popular would receive less funding simply because the student body was disinterested or unfamiliar with those specific groups. *Id.* at 101–02. This case is entirely distinguishable from the facts before this Court today.

Both *Riley* and *Amidon* rely on the concept of “majority rule” or “popularity.” This argument is severely flawed in the context of this case because a speaker’s “popularity” is meaningless to whether they are at risk of protest. It takes only one student to effectively “shout down” a speaker. While multiple students shouting at once may be more effective, as in Petitioner’s case, more than one person is not necessary to form an effective heckler’s veto. To argue that only “unpopular” speakers get shouted down and the “popular” speakers remain free to speak is presumptive of the majoritarian views of the University’s student body. The record gives no indication of the University’s popular and unpopular viewpoints among students.

For example, if a university is 90% one viewpoint and 10% the other, any speaker who supports the same viewpoint as the majority would be considered “popular.” But college campuses tend to have thousands of students, and even the “minority” or “unpopular” students can conjure enough individuals to shout down and effectively protest one of the more popular speakers. It only takes one loud person to shout over another. “Majority” and “popularity” have no place in the facts before this

court. The record even indicates that the students at the University had previously shouted down speakers on both sides of the political aisle, including speakers on non-political issues such as Petitioner. R. 5a–6a. If Petitioner was able to show that speakers belonging to certain demographics and viewpoints were heckled more than others, this argument of popularity would have shaky, but stronger, footing. As the record currently stands, however, speakers of different viewpoints and demographics risk being shouted down by University students, and therefore this is not a question of “popularity” or “majority.”

Additionally, *Riley* is distinguishable because of the mandatory nature of the speech at issue. *Riley*, 487 U.S. at 795. Unlike the University’s policy to *avoid* disciplinary action for students, the North Carolina Charitable Solicitations Act affirmatively required specific speech on the part of professional fundraisers, and thus, was subject to a higher level of scrutiny than the content-neutral “hands-off” policy. *Id.* at 795; R. 5a. The University’s policy is both viewpoint neutral and subject matter neutral. In *Boos v. Barry*, this Court considered a case involving an ordinance which disallowed signage outside of foreign embassies in the District of Columbia if those signs “tend[ed] to bring that foreign government into ‘public odium.’” *Boos v. Barry*, 485 U.S. 312, 315 (1988). The Court held that, though the bar was not specific to viewpoints expressed on the signs and was therefore viewpoint-neutral, it was nonetheless a content-based statute subject to strict scrutiny because it prohibited an “entire category of speech”. *Id.* at 319. This is not a case of the University choosing to prohibit discipline only at speaking events and thus applying its “hands off” policy

to an “entire category”—the University’s laissez-faire approach to student affairs permeates all aspects of campus, from graduation events to senior pranks. *See id.*; *see also* R. 3a–5a.

Because the “hands-off” policy neither requires mandatory speech as in *Riley*, nor discriminates based on the speaker’s ideology or even the event itself, it is wholly content neutral and is subject only to intermediate scrutiny. *See generally Craig v. Boren*, 429 U.S. 190 (1976); *see also Riley*, 487 U.S. at 795; R. 5a. To survive intermediate scrutiny, the regulation “must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Craig*, 429 U.S. at 199. Congress has previously recognized that:

It is the sense of Congress that [] the diversity of institutions and educational missions is one of the key strengths of American higher education; [] individual institutions of higher education have different missions and each institution should design its academic program in accordance with its educational goals; [] [and] an institution of higher education should facilitate the free and open exchange of ideas

See Higher Education Opportunity Act of 2008, 20 U.S.C. § 1011(a). Here, the governmental interests include the promotion of robust student learning and education, and the “hands-off” policy has been designed “in accordance with [the] educational goals” of the University to promote students to become their best and most independent selves. 20 U.S.C. §1011(a)(2)(B); R. 5a. Thus, the content-neutral policy must stand under intermediate scrutiny.

B. The University created and subsequently closed a limited public forum by choosing not to punish students for shouting down speakers.

The University, by opening its campus Auditorium to pre-authorized speaking engagements has created a “limited public forum.” Prevailing constitutional legal theory identifies four kinds of public fora. *See Strict Scrutiny in the Middle Forum*, 122 Harv. L. Rev. 2140 (2009) (describing traditional public fora, designated public fora, limited public fora, and non-fora). In *Widmar v. Vincent*, this Court created the “limited public forum,” recognizing that “[a] university differs in significant respects from public forums such as streets or parks.” 454 U.S. 263 n.5 (1981). In the limited public forum context, the University has opened a public forum but given its unique educational context, the University has “authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.” *Id.* The Constitution forbids a State to “enforce certain exclusions from a forum generally open to the public.” *Id.* at 267–68. The right of a university to establish reasonable time, place, and manner regulations remains crucial. *Id.* at 278.

A university, however, is not required to create and maintain a public forum at all. *Id.* Even more so, its authority under *Widmar* to create reasonable restrictions on speech necessarily comes with it the authority *not* to create such restrictions. By neither requiring the students to stop protesting nor requiring the speaker to quit speaking, the University has effectively closed the limited public forum entirely by not interfering at all—an action the University is permitted to take. *See Koala v. Khosla*, 931 F.3d 887 (9th Cir. 2019) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46, (1983)) (observing that the state may close a designated public forum “whenever it chooses”); *see also Archdiocese of Wash. v.*

Wash. Metro. Area Transit Auth., 897 F.3d 314, 323 (D.C. Cir. 2018); *Verlo v. Martinez*, 820 F.3d 1113, 1129 (10th Cir. 2016); *Satawa v. Macomb Cty. R. Comm'n*, 689 F.3d 506, 517 (6th Cir. 2012).

Under *Ward v. Rock Against Racism*, this Court made clear that the University's choice of a content-neutral "hands-off" approach was proper. 491 U.S. 781 (1989); R. 5a. The dissent argues that the right to free speech requires a right to government protection lest majority rule, but in *Ward*, this Court clarified that "the government's purpose is the controlling consideration" about various regulations placed on a designated forum. *Id.* at 791. Here, the University's purpose and the "work of the school" was to, as allowed by *Tinker*, encourage the robust development of student opinion. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). Because the petitioner "presented no evidence of selective enforcement," the University's choice of how to govern the forum was appropriate and stands up to constitutional muster. R. 17a.

Petitioner may argue that by refusing to regulate the student's speech, the school has embodied the speech as their own and has failed to effectively establish a public forum. This argument must fail. When determining the line between government speech and private expression this Court has held that the "review is not mechanical: it is driven by a case's context rather than the rote application of rigid factors." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022). This Court's prior cases have examined several types of evidence including: the history of the expression at issue; the public's likely perception as to who (the government or a private person)

is speaking; and the extent to which the government has actively shaped or controlled the expression. *Id.*; see also *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209–14 (2015) (deciding whether a proposed specialty license plate design was government or private speech). The history of the expression at issue, the public’s likely perception as to who is speaking, and whether the government has actively shaped or controlled the expression all point in favor of finding that the University simply created a limited public forum for private individuals to speak.

In *Shurtleff*, the city of Boston had a custom of permitting groups to use City Hall Plaza for ceremonies and events, during which the group was authorized to fly a flag of their choosing outside City Hall. *Shurtleff*, 596 U.S. at 243. When the city refused to fly a Christian flag in fear of violating the Establishment Clause, this Court was tasked with determining whether the flying of such flag outside City Hall constituted government speech or was simply the creation of a public forum for private speech. *Id.* In analyzing the three relevant factors above, this Court held that the city’s history of flag flying and public perception of the flag outside City Hall weighed in favor of finding that the flag flying program was government speech. Analyzing the third factor, the extent to which the city shaped or controlled the message, this Court found in favor of the government’s creation of a public forum given the city did not normally review the flag design. *Id.* at 245. Ultimately, this Court held that the city’s history of flag flying outside City Hall and public perception were enough to find that flying the Christian flag would have been government speech.

Unlike the city in *Shurtleff*, the University has created a limited public forum for private speech. As for the first factor, the history of the expression, this Court discussed how the history of flag flying, “particularly at the seat of government,” has always conveyed “a government message.” *Id.* at 244. It cannot be argued that protests on college campuses have a history of “governmental message.” Nor is the public likely to assume that the student protestors speak on behalf of the University. Anyone making this assumption would be hard pressed to determine what the school’s stance on any given topic might be, given that protests occur on both sides of the political aisle. Even in this case, Petitioner was on campus to promote the vegan lifestyle and condemn the consumption of meat. R. 6a. However, Dean Thatcher testified that he actually supports the vegan lifestyle given that his wife is vegan. R. 12a. If the students speak for the University, the University has no clear message on what it actually believes and it stands in contradiction to what we know agents of the University, such as Dean Thatcher, actually do believe.

Given that the Petitioner’s argument hinges on blaming the University’s *inaction*, she cannot claim for purposes of her argument here that government has *actively* shaped or controlled the expression of the students. There is no evidence that the University has any say in which speakers the students decide to protest and how they protest, it is clear this factor points in favor of the University’s creation of a limited public forum. Therefore, all three factors described by this Court in *Shurtleff* require a finding that the students were not speaking on behalf of the

University during their protest and that the school properly created a limited public forum, which it effectively closed.

C. The First Amendment does not create an affirmative obligation on behalf of the University to protect Petitioner's right to Free Speech from infringement by private individuals.

Petitioner asks this Court to usurp the role of Congress and create an affirmative obligation on behalf of the government which inevitably forces them to intervene when private individuals interfere with other private individuals' Free Speech rights. This request is absurd. The First Amendment clearly states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.; *see also Gitlow v. New York*, 268 U.S. 652, 666 (1925) (using the Due Process Clause to apply the Free Speech clause of the First Amendment to the states). The Constitution is not vague on who the First Amendment is intended to regulate. The term "Congress" denotes an intention by the framers for protection against restrictions on speech imposed by the government, not restrictions by private entities like individuals or businesses.

Simply because the government may not interfere with one's right to Free Speech, does not mean that the government must subsidize or ensure one has that right. This Court's precedent supports this contention. In *Harris v. McRae*, this Court addressed the constitutional validity of the Hyde Amendment, which severely limits the use of federal funds to reimburse the cost of abortions under Medicaid programs.

448 U.S. 297, 297 (1980). Plaintiffs argued that a participating State was obligated under Title XIX of the Social Security Act to fund all medically necessary abortions. This Court held that federally permitting a medically necessary abortion and funding it under Medicaid are two separate things, going on to find that:

[I]t does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. . . .

Id. at 298. This Court further agreed that a decision such as this one which reaches far beyond the bounds of the Constitutional text presents a question solely for Congress, not the courts. *Id.* at 318 (“Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.”).

Similarly, in *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, plaintiffs filed a Section 1983 claim against a county department of social services for failing to act in removing a child from their violent home. 489 U.S. 189, 189 (1989). This Court distinctly held that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.” *Id.* at 195. Further, this Court emphasized that:

The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

Id. *Deshaney*'s reasoning has been used by lower courts to support the proposition that the First Amendment does not create an affirmative obligation on behalf of the government to protect a speaker's right to speech. In *Kessler v. City of Charlottesville*, for example, the plaintiff sued under Section 1983 for the city's failure to stop protesters from shouting down the plaintiff's own protest, claiming that the city had an affirmative obligation to intervene. 441 F. Supp. 3d 277, 280 (W.D. Va. 2020). Relying on *DeShaney*, the court held that the First Amendment guarantees that the State will not suppress one's speech, but it does not guarantee that the State will protect individuals when private parties seek to suppress it. *Id.* at 286–87 (citing *Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988) (“We do not believe, however, that the defendant's alleged failure to prevent [another] from violating [the plaintiff's] first amendment rights transgressed any clearly established legal norm. As a general rule, a government official is not liable for failing to prevent another from violating a person's constitutional rights, unless the official is charged with an affirmative duty to act.”)).

Although *Harris* and *DeShaney* do not address the First Amendment specifically, their reasoning should control here. In *Harris*, this Court emphasizes the difference between having the freedom to get an abortion and requiring the government to fund that abortion. *Harris*, 448 U.S. at 317. Further applying this concept to the Second Amendment, the lower court emphasized the difference between having the freedom to bear arms and requiring the government to supply individuals with those arms. R. 13a. Here, there is a difference between having the

freedom to speak and requiring the government to ensure that no one else prevents you from speaking. In *DeShaney*, this Court interprets the Fourteenth Amendment, but a prominent justification behind the decision in *DeShaney* was the finding that the Fourteenth Amendment was clearly written “in the negative.” *DeShaney*, 489 U.S. at 195. It prevents the State from “depriv[ing] individuals of life, liberty, or property without due process of law,” but it does not require the State to ensure that “those interests do not come to harm through other means.” *Id.* (citing U.S. Const. amend. XIV). The First Amendment is also written in the negative. U.S. Const. amend. I (“Congress shall make no law . . .”). It prevents government interference with the freedom of speech, but it does not require government action to ensure speech is free from interference by other private actors.

The concurring opinion in the court below urges this Court to reconsider its holding in *DeShaney*. R. 15a. It goes on to say that because the State “possesses a monopoly on violence,” and thereby deprives Petitioner of her right to silence the protestors herself by prohibiting her from carrying a firearm onto a college campus, the State cannot also refuse to protect her speech. R. 15a. This logic is severely flawed. The concurrence asserts that the only two options are either to permit Petitioner to use violence to stop protestors or require the school to affirmatively act to protect her speech rights. This assertion was not supported by caselaw but instead relied on the idea that the First and Fourteenth Amendments should carry with them “certain minimal levels of safety and security.” R. 16a. Petitioner, unlike the child victim in *DeShaney*, never faced a safety or security risk. *Compare DeShaney*, 489

U.S. at 193; *with* R. 6a. No violent crimes were committed against her, she simply was not able to speak at the exact time and place she wished to speak. R. 6a.

The creation of an affirmative obligation for government protection would exorbitantly increase administrative costs and chill robust participation in free speech discussions on university campuses. *DeShaney* determined that the government owes an obligation to competent protection only where it has already taken steps towards that protection. *DeShaney*, 489 U.S. at 201–03. However, even when this high burden is met, “protection may not be denied discriminately.” Jill R. Orenstein, Negligent Failure to Rescue: Liability Under 42 U.S.C. Section 1983: *Deshaney v. Winnebago County Dep't of Social Services*, 109 S.Ct. 998 (1989)., 12 Hamline L. Rev. 421, 444 (1989). Were government protection required to *enforce* First Amendment rights by protecting individuals from one another, governmental bodies would face not only increased costs from maintaining the security needed to provide this protection, but heightened exposure to liability for protection applied or denied discriminately. As a result, rather than risk litigation or swallow the costs of increased security, it's likely that colleges or universities shouldered with the affirmative obligation to protect First Amendment rights would face an incentive to forego encouraging free speech altogether.

Finally, in *Tinker*, this Court considered the limit of a student's First Amendment right in schools. 393 U.S. at 503. When three students wore black arm bands in protest of the Vietnam War to their respective junior and high schools despite the warnings of school administrators, the school suspended them. *Id.* at 504.

In holding that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” this Court emphasized a limitation on those rights only when the speech “substantially interfere[s] with the work of the school or impinge[s] upon the rights of other students.” *Id.* at 506–09. Rather than *requiring* schools to discipline specific student behavior, it simply *permits* it. *Id.* at 509.

The holding in *Tinker* was further supported by the facts in that case, which addressed the potential need for more administrative control of children in the primary and secondary education context. *Tinker*, 393 U.S. at 509. In the environment of higher education, the “work of the school” includes encouraging students to cultivate critical thinking skills, develop robust opinions, and attend speaker events ready and willing to participate in vigorous debate. *Id.* at 509. In short, *Tinker* allows schools to determine where the ‘line’ is for them. *Id.* Here, where the City University of Lantana employed a “hands-off” approach to student discipline, the University is well within its rights to determine that disciplining the students would indeed interfere with “the work of the school” far more than any words shouted by students at a speaker event. *Id.* at 509; R. 5a.

D. The Heckler’s Veto doctrine prevents the University from silencing speakers but does not require forced listeners.

Frequently thrown about in contentious First Amendment disputes, the so called “heckler’s veto” maintains two dominant definitions—one based in popular culture, and one based in law. The popular definition of the heckler’s veto frames it as an exercise of power by raucous, disrespectful listeners—the court’s use of the

phrase on page 5a of the record is illustrative of this interpretation. R. 5a. In constitutional law though, the heckler's veto frames the onus of power not on the individuals in a crowd, loud as they may be, but places it rightfully on the governmental actors justifying their actions based on the whims of the crowd. The heckler's veto is properly understood not as the crowd's right to refuse to listen to a speaker, but as the government's duty not to *prevent* a speaker from sharing their message merely because that message might be unpopular. What the heckler's veto does *not* impose is a duty upon the government to *protect* a speaker sharing their message.

This Court first adopted the doctrine in *Feiner v. New York*, a 1951 case in which the police arrested a speaker arguing for equal rights after “at least one” in the crowd threatened violence. *Feiner v. New York*, 40 U.S. 315 (1951). Holding the police action against the speaker to be lawful, this Court nevertheless carved a line between permissible and impermissible police action: “the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and [we] are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings.” *See id.* at 320. *Feiner* gave rise to the idea that governmental power may not give effect to the popular heckler's veto. *See id.* at 321. As courts phrase it today, the heckler's veto doctrine “holds that a regulation of speech is to be deemed content based when ‘listeners react to speech based on its content and the government then ratifies that reaction by restricting the speech in response to listeners’ objections.” *Santa Monica Nativity Scenes Comm. v.*

City of Santa Monica, 784 F.3d 1286, 1293 (9th Cir. 2015) (quoting *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep’t.*, 533 F.3d 780, 789 (9th Cir.2008)). The heckler’s veto is a body of law designed to prevent the government from displacing the blame for speech suppression onto the backs of unruly crowds. In the words of the Ninth Circuit, “[i]f speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech.” *See id.* at 1292–93.

As discussed previously, the heckler’s veto is not a requirement that the government protect the speaker *no matter what*. Such a requirement, rather than protecting speech in a content-neutral manner, would indeed require the government to take a content-based approach, by necessitating that it protects only unpopular speakers. Where the dissent argues that the University’s “hands-off” approach allows majority rule, denying the rights of listeners to voice their opinions would deny them their right to protest speech they disagree with and create minority rule by the speaker. R. 17a; 5a.

Though the government may not exercise power against a sole speaker to prevent an unruly crowd, those within the crowd also enjoy First Amendment protections. *Feiner*, 40 U.S. at 321; *see also Phelps-Roper v. Ricketts*, 867 F.3d 883, 901 (2017) (discussing the rights of the crowd). In *Phelps-Roper*, the Eighth Circuit held that where the Westboro Baptist Church (“WBC”) exercised their right to free speech by picketing a deceased soldier’s funeral, holding up signs such as “THANK GOD FOR DEAD SOLDIERS,” “the decedent’s family . . . [were] under no obligation

to listen to WBC’s message.” *See id.* at 901. The case arose following the death in action and subsequent funeral of a Navy SEAL. *Id.* at 888. When the Patriot Guard Riders, a motorcycle club formed with the goal of “shield[ing] the family [of the deceased] from any distractions [at a funeral]” formed a flag line to block the message of the WBC, Phelps-Roper, a member of WBC, brought suit, claiming in part that the Omaha police unconstitutionally allowed the PGR to continue and block the messages of the protesters. *See id.* at 889 (citation omitted).

Dismissing the plaintiff’s argument, the Eighth Circuit made clear that law enforcement has no duty to “force others to listen to WBC’s message—its obligation is to protect WBC’s right to the *opportunity* to reach *willing* listeners.” *See id.* at 900 (emphasis in original). Citing the Sixth Circuit, the court acknowledged the governmental obligation to “*protect from violence*” speakers lawfully presenting their ideas. *See id.* at 900 (emphasis in original) (quoting *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228 (6th Cir. 2015)). But, this obligation must be balanced with the “the fact that the crowd has the same First Amendment rights as [the protesters], which law enforcement also has a duty to protect.” *See Phelps-Roper*, 867 F.3d at 900–01.

Here, the record indicates that the student attendees of Petitioner’s speech “made so much noise that they drowned out all of [petitioner’s] attempts to talk,” “carried banners and various noisemakers,” and “wore animal masks and costumes.” R. 6a. Conspicuously absent from the record though, is any “threatened violence” or speech giving rise to “imminent lawless action.” *Feiner*, 340 U.S. at 317;

Brandenburg v. Ohio, 395 U.S. 444, 449 (1969). Where the student speakers don't threaten violence upon the speaker or lawless action, their First Amendment rights are just as protected as those of petitioner, and not only does law enforcement lack an obligation to silence them, it may not force them to acquiesce. "The First Amendment guarantees free speech, not forced listeners." *Phelps-Roper*, 867 F.3d at 901. Thus, not only did the University lack an express obligation to provide protection for Petitioner, if it had done so, it would have violated the First Amendment rights of the student protesters and acted contrary to the spirit of freedom of speech.

"[Freedom of speech] is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.). The value of the freedom of expression, however, is protected—not diminished—by granting the University the right to discipline its students as it sees fit. The University has the right to adopt a policy of lax disciplinary measures if it finds that such a policy nurtures a learning environment that fosters robust participation in on-campus speaking events and thus contributes towards the "work of the school" in preparing future governors and leaders. *Tinker*, 393 U.S. at 509–09; R. 2a.

Ultimately, the University did not have an affirmative obligation to provide law enforcement protection to Petitioner absent the threat of actual violence. *See Phelps-Roper*, 867 F.3d at 900. The facts here are clear: at no point in time was Petitioner's safety or life threatened by the (admittedly, passionate) students. R. 6–7a. The University's decision not to intervene in the speaking event was subject matter and viewpoint neutral because it was applied uniformly to all students and

across all activities on campus. To accept Petitioner’s argument would be to create an unworkable expansion of government’s ability to provide protection when a speaker’s life is threatened—creating an affirmative right to government protection based upon the discontent of a crowd would, as a matter of policy, require the government to create “forced listeners” and disregard all prior precedent on this issue. *Phelps-Roper*, 867 F.3d at 901.

CONCLUSION

For the foregoing reasons, this court must AFFIRM the decision of the Thirteenth Circuit and grant judgment in favor of Respondent.

Respectfully submitted,

/s/ Team 16

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