No. 24-0514

In the Supreme Court of the United States

November Term 2024

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 THE RESPONDENT

Team: 2
Counsel for Respondent
November 18, 2024

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The opinion of the United States Circuit Court of Appeals for the Thirteenth Circuit has not been published in a federal reporter. However, the opinion is reported at *McMillan v. Board of Regents of City University of Lantana*, 2024 WL 24601 (13th Cir. 2023) and is reprinted in the Record on Appeal ("R.") at 1a-19a. The district court's opinion is currently unpublished but is reported at *McMillan v. Board of Regents of City University of Lantana*, 2024 WL 54321 (13th Cir. 2022) and is reprinted in R. at 20a-24a.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in relevant part, 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 in relevant part that "Every person who, under color of any. . . custom, or usage, of any State. . . subjects, or causes to be subjected, any citizen of the United States. . . 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.

QUESTIONS PRESENTED

I. When a district court judge *sua sponte* issues a judgment which substantively modifies the original judgment, does the time for filing any post-judgment motion run from entry of the original judgment or from entry of the subsequent judgment that was substantively modified by the district court judge?

II. When the University did not silence the non-violent protests of audience members of McMillan's speech, such that she voluntarily declined to continue speaking, did that inherently constitute a violation of McMillan's First Amendment rights to free speech under the theory that the University had an affirmative duty to silence the protestors?

STATEMENT OF JURISDICTION

The Thirteenth Circuit issued its opinion and entered judgment on May 10, 2023. A petition was timely filed. This Court has appellate jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

I. Statement of the Facts

The City University of Lantana (the "University") has since 1849 served as a prominent focal point for education and dialogue within the state of New Tejas. R. at 2a. Over sixty student organizations operate regularly on the campus grounds. *Id*. at 3a. These organizations include arts and culture groups, political groups, sports groups, social action groups, and religious groups. *Id.*

Recently, the behavior of the student body has markedly shifted towards a boisterous and rowdier norm than in previous years. *Id.* This is due to a change in disciplinary policy instituted by the new Dean of Student Affairs, Mason Thatcher ("Dean Thatcher"). *Id.* at 4a. Dean Thatcher advocates for a lighter disciplinary policy based on his personal philosophy that the student body does not need punishment, but rather "a good talking to" and to "blow off a little steam." *Id.* at 5a. As such, Dean Thatcher's policies can best be described as hands-off in nature. *Id.* This has led to Dean Thatcher becoming popular with the student body. *Id.* at 4a–5a.

This case arises out of an event that occurred on February 8, 2020. A vegan advocate, Dove McMillan ("McMillan") arrived at the University to give a speech

where she planned to promote a message of abstention from eating meat on the basis of the dignity of animals and the preservation of the natural world. *Id.* at 6a.

In response, a student protest formed to oppose McMillan. *Id.* This is not an uncommon occurrence at the University. *Id.* at 5a. Indeed, the student body has staged protests on numerous sensitive political topics including speakers on institutional racism invited by the Lantana Black Student Coalition, speakers discussing recreational marijuana invited by the High Five Society, speakers on climate change invited by the Carbon180, and speakers on Second Amendment rights invited by Lantana Students for Armed Self-Defense. *Id.* During each of these events, campus security did not interfere with the protests. *Id.*

The same pattern of protest occurred during McMillan's event. Within minutes of starting her speech, the protestors engaged in disruptive behavior. *Id.* at 6a. The protesting behavior included yelling, the use of noisemakers, the waving of banners, and the wearing of masks and animal costumes. *Id.* McMillan asked campus security to intervene, but consistent with their behavior during the previous student protests, they did not do so. *Id.* After fifteen minutes, McMillan left the stage. *Id.* At no point were there allegations of actual violence or threats of violence. *Id.* As a result of the protest, McMillan sued the University alleging a violation of her First Amendment rights. *Id.* at 7a.

II. Procedural History

Following the incidents taking place on City University of Lantana's campus, Plaintiff Dove McMillan filed suit against the Board of Regents of City University of Lantana, alleging that the University violated her First Amendment rights pursuant to 42 U.S.C. 1983. R. at 7a. At trial, the University filed a motion for judgment as a matter of law, which the district court denied. *Id.* The jury awarded $12,487 in compensatory damages and $350,000 in punitive damages. *Id.*

On January 20, 2022, the district court issued an original final judgment, which awarded only compensatory damages and expressly denied any remedies not granted. R. at 7a, 20a. Thus, the initial final judgment omitted the jury award of punitive damages entirely. On January 27, 2022, the district court *sua sponte* issued a modified judgment which recognized—for the first time—punitive liability and punitive damages of $350,000. R. at 7a.

Twenty-eight days later, on February 24, 2022, the University filed a renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure ("FRCP") 50(b). *Id.* The District Court denied the motion, dismissing it as untimely, without ruling on its merits. *Id.* The University appealed from the District Court's ruling to the Thirteenth Circuit. *Id.*

The Thirteenth Circuit reversed, holding that the motion was timely because the clock for filing a motion for renewed judgment as a matter of law ran from the

modified judgment rather than from the original. R. at 10a. McMillan then appealed, and this Court granted certiorari on October 7, 2024. R. At 1.

SUMMARY OF THE ARGUMENT

The University's Motion for Renewed Judgment as a Matter of Law was timely. The clock began to run from the amended judgment, not the original. This Court should adopt the Fifth Circuit's test in *Cornist v. Richland Par. Sch. Bd.* for determining the length of the period for appeal, which evaluates the finality of the underlying judgments without inquiring into the substance of any potential appeals.

Petitioner advocates for the use of the test from *McNabola v. 9a Chicago Transit Auth.*, which evaluates both the substance of the underlying judgments and the substance of the motion filed to determine whether the clock for filing restarts. However, the *McNabola* test is inconsistent with the purpose, the procedural integrity, and Due Process guarantees that the Federal Rules of Civil Procedure are designed to protect. Because only the *Cornist* test is consistent with these standards for FRCP interpretation, this Court should adopt the *Cornist* test.

A review of the finality of each judgment in this case reveals that only the modified judgment, not the original, could be the final judgment from which the filing period began to run. The amended judgment altered the substance of the original, disturbing the legal rights and obligation of the parties and resulting in a new final judgment taking the place of the original. The court's intent that the modified judgment supersede the original strengthens the conclusion that the

modified judgment superseded the original. Because the modified judgment superseded the original judgment in its entirety, it replaced the original as the only final judgment from the filing period began to run. Since the University filed its motion for renewed judgment as a matter of law within twenty-eight days of the modified judgment, the motion was timely.

In the alternative, should the court adopt the *McNabola* test from the Seventh Circuit and impose a substantive restriction on the motions that can be filed, the motion here was still valid and timely because the motion was made in direct response to the modification to the original judgment. The modification to the original judgment added a new category of damages, fundamentally changing the nature of liability imposed. Because the nature and severity of the liability changed from the original judgment to the amended judgment, the University's challenge to liability was directly related to the change from the original to the amended judgment. Furthermore, the issues of liability and damages were so inextricably connected that a challenge to one constituted a challenge to both. Therefore, even under the more restrictive *McNabola* test, because the motion challenged the fundamental change to liability and because the issues of liability and damages were interconnected, the motion filed twenty-eight days after the modified judgment was valid and timely

With regards to the merits of the case, the University did not violate McMillan's First Amendment rights. McMillan is alleging that her First Amendment rights were violated because campus security did not silence the

protestors. However, this ignores the fact that the protestors themselves are entitled to the protections of the First Amendment. McMillan does not have preeminent First Amendment rights simply because she spoke before the protestors, because all people lawfully on a university campus are protected by the First Amendment. The speech that the protestors engaged in was non-verbal, but such speech is still protected under the First Amendment. These constitutional protections are even more poignant because the University created a limited public forum through habitual tolerance of the student body's protests, which affords the protestors the benefits of strict scrutiny before their speech may be infringed.

McMillan's claim also fails because, in addition to ignoring the competing First Amendment rights of the protestors, McMillan is incorrect in her assertion that the First Amendment creates an affirmative duty for the University to protect her speech from interference by private citizens. The Constitution has always been understood as granting negative rights—protection from government interference and not positive rights. As such, in order to infringe on a protestor's speech, just as would have been required to infringe on McMillan's speech, there must be violence or the threat of imminent violence. Under these facts, the actions of the protestors did not rise to the level of violence or a threat of imminent violence. Therefore, the protestors' speech could not be infringed in such a manner that privileged McMillan over the protestors.

As such, for all intents and purposes, the amended judgment was the final judgment—making the University's appeal timely—and McMillan's First

Amendment rights were not violated. Therefore, this Court should affirm the decision of the Thirteenth Circuit.

ARGUMENT

I. THE MOTION WAS TIMELY BECAUSE THE PERIOD FOR FILING A RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW BEGAN TO RUN FROM THE AMENDED JUDGMENT, NOT THE ORIGINAL.

The University's Motion for Renewed Judgment as a Matter of Law was timely because the clock began to run from the amended judgment, not the original. To comply with the purpose of the FRCP, the measure for determining when the clock for the filing period restarts is based on the underlying judgments alone, not also on the substance of any specific motion filed. Fed. R. Civ. P. 50(b), 58. Procedural rules must respect due process, encourage cases to be heard on the merits, and be applicable to every action and proceeding. Fed. R. Civ. P. 1. Any interpretation of the FRCP which is inconsistent with these principles, such as that advocated for by petitioner, must be incorrect. Based on an evaluation of the original and modified judgments, and the reason for the change between them, the modified judgment superseded the original. The amended judgment disturbed the legal rights and obligation of the parties and resulted in a new final judgment taking the place of the original. *Cornist v. Richland Par. Sch. Bd.*, 479 F.2d 37 (5th Cir. 1973); *Fed. Trade Comm'n v. Minneapolis-Honeywell Regul. Co.*, 344 U.S. 206 (1952). Furthermore, the court's intent in issuing an amended judgment supports the conclusion that the subsequent amended judgment superseded the original, rendering the original no longer final. The language used to refer to the judgment

as "modified" is not controlling. Furthermore, because the determination of finality applies to a judgment in its entirety, not to individual components, the period for appeal began once, from the modified judgment, and allowed for motions challenging any part of the modified judgment, whether or not that part of the modified judgment was specifically affected by the alteration. Because the University filed its motion for renewed judgment as a matter of law within twenty-eight days of the modified judgment, the motion was timely. In the alternative, even under the *McNabola* test, the motion here was still valid and timely because the motion responded directly to the modification to the original judgment. *McNabola v. 9a Chicago Transit Auth.*, 10 F.3d 501 (7th Cir. 1993). The modification imposed liability of a fundamentally different nature by adding the category of punitive damages. Furthermore, the issues of liability and damages were so inextricably connected that a challenge to one constituted a challenge to both. Therefore, because the University's motion directly responded to the change made to the original judgment, the motion, was valid and timely, even under the *McNabola* test.

A. The starting point for the filing period is measured based solely on the substance of the underlying judgments, and is not based on the substance of any particular motions themselves.

The timeliness of a renewed motion for judgment as a matter of law is governed by Rule 50(b) of the Federal Rule of Civil Procedure, which states that the movant may file a renewed motion for judgment as a matter of law "no later than 28 days after the entry of judgment." Fed. R. Civ. P. 50(b). In cases involving a single judgment, that calculation may be straightforward. See Fed. R. Civ. P. 58. In cases

involving multiple entries of judgment, however, the court must first determine from which specific judgment the 28-day clock begins to run. *See* R. 8a; *see also Cornist*, 479 F.2d at 38 ("the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered"). *United States v. Indrelunas*, 411 U.S. 216 (1973) (determining first when final judgment was entered in order to determine the timeliness of an appeal). Since Rule 50(b) does not expressly state what constitutes the controlling "entry of judgment" in cases involving multiple entries of judgment, circuit courts have developed their own tests to determine which entry is controlling. *See Cornist*, 479 F.2d at 39; *McNabola*, 10 F.3d at 521; *Tru-Art Sign Co., Inc. v. Local 137 Sheet Metal Workers Int'l Ass'n*, 852 F.3d 217 (2d Cir. 2017); *see also Honeywell*, 344 U.S. at 211. Because these circuit tests were developed to aid in interpreting a federal rule of civil procedure, they should be consistent with the express purpose of the FRCP to administer justice uniformly and efficiently to preserve judicial economy. Fed. R. Civ. P. 1. Specifically, the circuit tests should provide for an administration of Rule 50(b) that can be applied consistently to every case and proceeding, that does encourage cases to proceed to judgment on the merits, and that respects the parties' due process rights guaranteed by the Constitution. *See id.* Only the test in *Cornist*, which takes only the substance of the original judgment and the subsequent judgment into account, provides a construction of Rule 50(b) in a manner consistent with these principles.

1. Rule 50(b) must be applicable to every action and proceeding.

Federal Rule of Civil Procedure 1 states that the FRCP "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Because the FRCP must be applicable to every action and proceeding, each rule must be construed in a way which accounts for all possible actions and proceedings. See *id.* Construing the FRCP consistently with the principle that the rule should apply to every action and proceeding supports relying solely on the original and amended judgments to determine whether the clock starts over, rather than relying on information contained in a specific motion.

Here, Rule 50(b) governs the time in which a movant must file a motion for renewed judgment as a matter of law. *See* R. at 8a. Read in conjunction with Rule 58 concerning entries of judgment, it is clear that the clock for filing a motion for renewed judgment as a matter of law begins to run from the entry of a final judgment. *See* Fed. R. Civ. P. 50(b), 58; *see also Reytblatt v. Denton*, 812 F.2d 1042 (7th Cir. 1987). Since the clock starts to run from the entry of a final judgment, then the clock automatically runs in the background from that moment regardless of whether a movant actually files a motion for renewed judgment as a matter of law.

Therefore, for Rule 50(b) to be applicable to every action and proceeding, the time period in which a movant must file a motion must be determinable both in those cases where a movant actually files a motion and in those cases where no

motion is actually filed. Further, because the time period must be determinable even in cases where no motion is ever filed, the time period for filing must be determinable without reference to or evaluation of any particular motions themselves. Because the only information available after the entry of judgment but prior to the filing of a motion is that contained within the judgments themselves, then the point at which the filing period begins must be determinable from the information in the underlying judgments alone.

2. Only the *Cornist* test is applicable to every action and proceeding.

Only the *Cornist* test, derived from this Court's holding in *Honeywell*, makes possible the determination of the filing period without relying on the filing of an actual motion. *Cornist*, 479 F.2d at 39; *Honeywell*, 344 U.S. at 206. Under the *Cornist* test, the court considers whether a subsequent judgment has altered the original such that it disturbs the legal rights and obligations of the parties. *Cornist*, 479 F.2d at 38. Thus, the *Cornist* test looks only to the substance of and circumstances surrounding the change between the original judgment and the subsequent amended judgment. *Id.* Because the *Cornist* test does not rely on the substance of the particular motion filed, it is administrable based on the information contained in the judgments themselves. Therefore, the *Cornist* test to determine when the filing period begins is uniformly applicable to all cases of the same procedural character—that is, all cases involving multiple entries of judgment—including those in which an appeal is never filed. Because the *Cornist* test is possible to apply to all cases involving multiple entries of judgment,

regardless of whether an appeal is ever actually filed, it is administrable in every case and proceeding and is therefore in compliance with FRCP 1.

In contrast, the test originating in *McNabola*, and applied in *Tru-Art*, fails to comply with the FRCP principle of uniform applicability because it cannot apply to all cases. See *McNabola*, 10 F.3d at 521; *Tru-Art*, 852 F.3d at 221. In fact, under the *McNabola* test, it would be impossible to determine when the filing period began for cases involving multiple judgments and in which a motion was never actually filed.

Under the *McNabola* test, the court considers not only the nature of the change between the original and subsequent judgments, but it also considers whether the motion in question relates directly to the aforementioned change. *McNabola*, 10 F.3d at 521. Under this test, a motion is only timely when both the judgment has been amended in a substantive way, and when the motion in question responds directly to the amendment. *Id.* Because the *McNabola* test relies inherently on an evaluation of the motion itself to determine whether the clock restarts, it has an inherently motion-specific application, and therefore, it can only apply to cases in which a motion is actually filed. However, because the filing period runs regardless of whether a motion is actually filed, the *McNabola* test cannot determine the filing period in all potential cases involving multiple entries of judgment.

Although the determination of the timing of the filing period in those cases may not be practically relevant, FRCP 1 still holds true and should guide the interpretation of how to determine when the clock starts over under Rule 50(b). The

McNabola test is inconsistent with this principle. Because only the *Cornist* test is consistent with the expectation of applicability in every case and proceeding, this Court should adopt the *Cornist* test because it focuses only on the nature of the change between the original and amended judgments.

3. Rule 50(b) must be construed to encourage the case to be heard on the merits, rather than to be dismissed on a technicality.

The Federal Rules of Civil Procedure are designed to "allow a plaintiff the opportunity to have his case adjudicated on the actual facts and not to be precluded by strict procedural technicalities." *Banco Cont'l v. Curtiss Nat. Bank of Miami Springs*, 406 F.2d 510 (5th Cir. 1969) (citing *Foman v. Davis*, 371 U.S. 178 (1962); United States v. Stephen Brothers Line, 384 F.2d 118 (5 Cir., 1967); *Builders Corporation of America v. United States*, 259 F.2d 766 (9 Cir., 1958). This principle recognizes the separate spheres that procedural and substantive determinations occupy. Procedural rules regulate "forms, operation and effect of process; and the prescribing of forms, modes, and times for proceedings." *Washington-S. Nav. Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629 (1924). Procedural rules, therefore, have strictly procedural consequences, while only substantive determinations impose substantive consequences. Construing the FRCP Rule 50(b) such that the case is encouraged to be reached on the merits supports measuring when to restart the clock based solely on the substance of the change to the original judgment, not on the substance of any particular motion.

4. Only the *Cornist* test is consistent with hearing cases on the merits because it preserves the distinction between procedure and substance.

Here, only the *Cornist* test interprets Rule 50(b) in a way which encourages the case to be heard on the merits because it acknowledges the distinct spheres of procedure and substance, while the *McNabola* test does not. The *Cornist* test sets a standard for determining whether to restart the clock based simply on an analysis of the change to the original judgment. *Cornist*, 479 F.2d at 39; *Honeywell*, 344 U.S. at 211. In doing so, it recognizes that the time to determine whether the clock starts to run anew—a matter of procedure—is not an appropriate time to decide whether the motion itself is substantively valid. Because the *Cornist* test provides a simple means to evaluate timeliness without inquiring into matters of substance, it allows more cases to proceed forward to be heard on the merits, as is consistent with FRCP interpretation principles.

In contrast, the *McNabola* test, is inconsistent with guiding principles of the FRCP interpretation because it confuses issues of timeliness and validity and imposes substantive restrictions on what should remain matters of pure procedure. *McNabola*, 10 F.3d at 521. Because the *McNabola* test requires courts to analyze not only the change to the original judgment, but also the substance of the particular motion filed and the relation of the motion to the change in the judgment, it adds a substantive determination to a question of pure procedure. In doing so, it violates the separate spheres intended for procedure and substance. *Id.*

Furthermore, because the procedural determination of timeliness is partly dependent on a substantive evaluation of whether the content of the motion filed actually relates to the change to the original judgment, the *McNabola* test prematurely makes a substantive decision, resulting in motions dismissed on technicalities without having a full chance to be heard on the merits. Thus, the *McNabola* test discourages, rather than encourages, case from proceeding forward to be fully heard on their merits at the proper time. Because the *Cornist* test encourages cases to be heard on the merits, while the *McNabola* test leads to premature dismissal on technicalities, this Court should adopt the *Cornist* test to determine whether the motion was timely.

5. Rule 50(b) must be construed to respect due process.

The Federal Rules of Civil Procedure cannot be construed in a manner which deprives a party of due process. *See Lyon v. Mut. Benefit Health & Acc. Ass'n*, 305 U.S. 484 (1939) ("litigants in Federal courts cannot—by rules of procedure—be deprived of fundamental rights guaranteed by the Constitution and laws of the United States"). Due process requires, at a minimum, that parties have fair notice and an opportunity to be heard. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950). Construing Rule 50(b) to respect due process further supports determining when the clock restarts based solely on the information contained in the original and amended judgments, without consulting the motion itself.

Here, in the case of filing a motion for a renewed judgment as a matter of law, the University only has fair notice of the judgment rendered against it if it has

access to all substantive information that may affect its decision of whether to file. Additionally, it must have access to such information for the entire twenty-eight day period provided for in Rule 50(b). Any substantive change to an original judgment indicates that there has been a change to information that is relevant to a party's determination of whether and how to challenge the judgment. *Cornist*, 479 F.2d at 39; *Honeywell*, 344 U.S. at 211. Without access to relevant information regarding the judgment rendered against it, a party cannot have fair notice, nor can it have a full opportunity to develop a legal strategy to challenge the judgment effectively. By depriving a party of fair notice and an opportunity to develop its legal strategy during the allotted time, a test which does not restart the clock at each substantive change would deprive a challenging party of due process. If either the University does not have access to all relevant information, or if it does not have access to all relevant information for the full twenty-eight-day period, then it has been deprived of its due process rights.

6. Only the *Cornist* test respects due process.

Only the *Cornist* test, which restarts the clock when there is a substantive change to the original judgment, can be applied in a manner which does not deprive the University of due process because it allows the University to have access to all relevant information for the entire twenty-eight day period proscribed by the FRCP. Because the *Cornist* test restarts the clock whenever there is a substantive change to the original judgment, it ensures that parties who may want to challenge a

judgment have a full and fair opportunity to do so for the entire period allotted under Rule 50(b).

The *McNabola* test, on the other hand, is inconsistent with principles of ensuring due process. Because it does not necessarily restart whenever there is a change to the substance of a judgment, there exist some cases in which parties will not have access to all information to their decision to challenge a judgment for the entire period in which to challenge.

This is one such case. Here, the University did not learn that liability of a punitive nature and additional damages in excess of $300,000 would be rendered against it until the issuance of the amended judgment, which came a week after the original judgment. R. at 7a. That information of the nature of liability and the amount of damages was highly relevant to the University's decision of whether to challenge the judgment, and if so, how to do so. From a purely practical perspective, if the judgment indicates that the cost to challenge a judgment exceeds the cost to compensate the plaintiff, a party may choose not to challenge liability. Such a decision not to challenge is not necessarily an admission or acceptance of liability; rather, it is a prudent business calculation. Should the nature and amount of liability change such that the cost to incur liability is no longer less than the cost to challenge, a party is owed the full and fair opportunity to challenge that judgment, which is substantively different judgment from the other. In this case, to refuse to restart the clock from the amended judgment would deprive the University of one-fourth of the time guaranteed by the FRCP to challenge a judgment. Because the

University did not have access to critical information needed to determine whether and how to challenge liability for one-fourth of the time to challenge, then a refusal to restart the clock was a violation of the University's due process rights.

B. The amended judgment superseded the original, becoming the new final judgment from which the clock began to run anew.

In accordance with accepted principles of interpreting the Federal Rules of Civil Procedure, the determination of whether to restart the clock should be made based on the substance of the original and subsequent judgments alone, without reference to the substance of any particular motions challenging one of the judgments. When a subsequent judgment substantively alters an original judgment, the clock for filing a renewed motion for judgment as a matter of law may begin to run anew. *Honeywell*, 344 U.S. at 211; *Cornist*, 479 F.2d at 39; *Wilmington Sav. Fund Soc'y v. Myers, 95 F.4th 981 (5th Cir. 2024).* When determining whether a subsequent judgment should supersede the original, courts may consider whether the amendment to the original judgment disturbed legal rights and obligations of the parties and whether the court intended for the subsequent to replace the original. *Cornist*, 479 F.2d at 39; *United States v. Hark,* 320 U.S. 531 (1944). The label given to a subsequent judgment is not controlling. *Cornist*, 479 F.2d at 37.

1. The amendment to the original judgment disturbed legal rights and obligations.

A subsequent judgment supersedes the original when the amendment alters the substance of the original such that it revises or disturbs the legal rights and obligations of the parties. *Honeywell*, 344 U.S. at 211; *Cornist*, 479 F.2d at 39;

Wilmington, 95 F.4th at 983. Only when an amendment is clerical in nature, corrects an error, or affects a collateral issue only does the clock continue running from the original judgment rather than from the amended judgment. P*rogressive Indus., Inc. v. United States*, 888 F.3d 1248 (Fed. Cir. 2018) (amendment affecting only a collateral issue of costs); *Department of Banking v. Pink*, 317 U.S. 264 (1942) (the amendment made a mere declaration of a fact with no effect on substance). In *Cornist*, the lower court issued an original judgment, which ordered that two teachers be reinstated, on April 20, 1972. *Cornist*, 479 F.2d at 38. Later, on May 1, 1972, upon request from defendant's counsel, the lower court issued an amended judgment, which omitted a paragraph concerning reinstatement of one of the teachers. *Id.* The defendant filed its motion for a new trial on May 10, 1972, to which plaintiffs objected as being untimely. *Id.* The *Cornist* court held that the motion was timely because the 10-day period in that case began running from the amended judgment, not the original judgment. *Id.* The court reasoned that the omission of a paragraph of substance was sufficient for the amended judgment to supersede the original and restart the clock for filing a motion. *Id.* Because the alteration disturbed the parties' legal rights and obligations, it superseded the original. *Id.*

Like in *Cornist*, where the alteration substantively changed the judgment, the same is true here. In *Cornist*, the judge omitted a paragraph of substance from the amended judgment which had been included in the original; here, the court added a paragraph of substance to the subsequent judgment which had not only

been omitted, but expressly denied, in the original. R. at 7a, 20a. The parties here agree that the alteration which created the amended judgment is one of substance, not merely a clerical correction. R. at 8a.

Therefore, the rationale from cases like *Progressive* and *Pink*, in which the alteration to the judgment was merely clerical, do not apply. Additionally, here, like in *Cornist*, the alteration affects the legal rights and obligations of the parties. The court's addition to the judgment not only increased the numerical value of the damages owed to the plaintiff, but it added an entirely new, and fundamentally different, category of damages, than was previously awarded. In doing so, the court revised the legal obligations the University owed to the plaintiff, and it revised the nature of the liability imposed on the University. Because the substantive change gave rise to a new final judgment in *Cornist*, it should have the same effect here.

In *Wilmington*, the court issued an original judgment which appeared to dispose of all claims and parties in the case. *Wilmington, 95 F.4th at 983*. Despite the completeness of the content in the original judgment, the defendants filed two motions to amend the original judgment. *Id.* The court granted one of the motions on grounds that the title of the original judgment did not clearly indicate that it was a final judgment, but the court denied the second motion. *Id.* Because a genuine ambiguity existed as to whether the original judgment was final, the court amended the judgment. *Id.* Following the issuance of the amended judgment, on the belief that the amendment to the original judgment constituted a new final judgment, the defendants again filed their previously denied motion to amend as they had before,

just with new evidence, but the court again denied it. *Id.* Thirty days after the denial of the second motion, the defendants filed notice of appeal. *Id.* Plaintiffs challenged the appeal as being untimely because it was filed well after thirty days of the original judgment. *Id.* Defendants argued that the appeal was timely because it was within 30 days of the court's disposal of defendants' final motion to amend following a final judgment. *Id.* The court held that the appeal was timely because the 30-days time for appeal ran from the date of the disposal of the last motion to amend following a final judgment. *Id.* The court reasoned that because the defendants' first motion to amend was granted to resolve a genuine ambiguity about the finality of the original judgment, the subsequent amended judgment replaced the original and became a new final judgment. *Id.* Because the amended judgment became a new final judgment, the period to appeal began to run anew, and defendants' chance to file one motion to amend the judgment started over, as well. *Id.*

If the court in *Wilmington*, where a mere change in the title of the judgment was considered substantive because it resolved a genuine ambiguity, then here, where the change increased the amount of damages the University owed by more than $300,000, but also magnified the severity of the nature of liability imposed on the defendant, this court should find that the change was substantive enough to supersede the original judgment and began the period for appeal anew.

2. The Court's intent supports the idea that the amended judgment superseded the original.

While the substance of the amendment to the original judgment is the primary consideration when determining whether to restart the clock, other factors, such as the court's intent, can offer support that the amendment did, in fact, disturb legal rights and obligations. *Cornist*, 479 F.2d at 39; *Hark,* 320 U.S. at 535. When the court, through express words or actions, demonstrates that it meant to replace the original judgment with a subsequent judgment, this is stronger evidence that a substantive change affecting legal rights and obligations has occurred and that the subsequent judgment has superseded the original. *Cornist*, 479 F.2d at 39; *Hark,* 320 U.S. at 535. The label given to a subsequent judgment is not controlling. *Cornist*, 479 F.2d at 39. Here, the court's *sua sponte* issuance of the amendment judgment supports the finding that the court intended to replace the original judgment with the amended judgment.

In *Cornist*, the lower court issued an original judgment, which ordered that two teachers be reinstated, on April 20, 1972. *Cornist*, 479 F.2d at 38. Later, on May 1, 1972, upon request from defendant's counsel, the lower court issued an amended judgment, which omitted a paragraph concerning reinstatement of one of the teachers. *Id.* The defendant filed its Motion for New Trial on May 10, 1972, to which plaintiffs objected as being untimely. *Id.* The Cornist court held that the motion was timely because the 10-day period in that case began running from the amended judgment, not the original judgment. *Id.* The court reasoned that the subsequent judgment's label as an "amendment" was not controlling. *Id.* Instead, the judge's

deliberate alteration of omitting a paragraph of substance indicated that the judge intended for the subsequent judgment to supersede the original. *Id.*

Like in *Cornist*, where the subsequent judgment's label of "amendment" was not controlling, the same is true, here, of the reference to the subsequent judgment as a "modified judgment." In fact, the court's intent for the subsequent judgment to supersede the original is even clearer here than in *Cornist*. First, by adding an additional category and amount of damages to the award that was previously denied, the court here intended to render invalid the language of the original judgment which expressly denied punitive damages. Second, unlike in *Cornist*, where counsel for defendant had to request that the judge amend the judgment, here, the court acted *sua sponte*, suggesting that the court alone had the intent to replace the original judgment with a new one. *See* R. at 7a. Therefore, while the new judgment might have been referred to as "modified," the court's actions demonstrated its intent to treat the subsequent judgment as superseding.

Additionally, in *Hark*, the lower district court made a docket entry on March 5, 1943, of the district court judge's opinion granting a motion to quash an indictment. *Hark,* 320 U.S. at 533. Later, on March 31, 1943, the judge signed a formal order quashing the indictment. *Id.* Appellants filed an appeal on April 30, 1943. *Id.* The *Hark* court held that the appeal was timely and that the time in which to appeal began from the subsequent order signed by the judge on March 31. *Id.* Giving weight to the actions of the trial judge in the lower court, the appellate

court reasoned that by signing a formal order following the initial docket entry, the judge intended to issue a superseding order. *Id.*

Like in *Hark*, where the judge in the lower court acted deliberately by signing a formal order subsequent to the initial docket entry, the District Court in this case acted *sua sponte* in issuing the amended judgment. In the same way that the judge in *Hark* recognized a need to issue a formal order following the initial entry, the District Court here felt it so necessary to amend the original judgment that it acted on its own. Furthermore, even more than in *Hark*, where the judge acted in response to an application from counsel, here, the court acted independently of any action from either party. Thus, the court's intentional action here should be afforded even more weight than in *Hark*.

C. The renewing of the clock applied to the whole judgment, not just to motions challenging liability.

Based on the prior arguments, that the underlying judgments alone determine the starting point for the filing period, and that any substantive change to an original judgment restarts the clock for filing appeals, it follows that the renewal of the clock must apply equally to every part of the judgment, not just specific issues or components. Even under the *McNabola* test, the court acknowledges that a substantive change to the original judgment causes the clock to restart for at least part of the judgment. The major difference between the tests is simply that, under *Cornist*, the renewal of the clock applies for the whole judgment, while under *McNabola*, it applies only to parts of the judgment. However, because

the renewal of the clock is based on the premise that a substantive alteration gives rise to a new final judgment, and because there can only be one final judgment from which a motion can attach, the *McNabola* test cannot be correct. Otherwise, there would be instances were multiple clocks are running for what is supposed to be a single, determinative, final judgment. When an amended judgment supersedes an original as a new final judgment, it becomes as if the original judgment never existed. Therefore, the clock for filing a motion for renewed judgment as a matter of law restarts for all issues contained within the judgment, not just one particular issue.

1. There can only be one final judgment because a judgment is final only when it disposes of all legal issues.

Rule 50(b) states that the period to file a motion for renewed judgment as a matter of law is not later than 28 days after the entry of judgment. Fed. R. Civ. P. 50(b). For matters of timeliness, it is to the judgment, therefore, and not a particular issue, that the motion must relate. *See id.* The 1963 amendment to Rule 58 provided greater clarity about when a judgment is final. While in most cases, a judgment requires a separate document to be considered final, an amended judgment does not require a separate judgment to meet the standard for finality. 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2781, 85 (3d ed.) (discussing the 1963 amendment to Rule 58). Additionally, while simple judgments—those involving only questions of liability and not involving a written opinion—may become final upon issuance based on the jury verdict alone, complex judgments—involving multiple issues—require the court's approval before they may

become final. *Indrelunas*, 411 U.S. at 219-20. Furthermore, Rule 50(b) refers to judgment in the singular, indicating that for every renewed motion for judgment as a matter of law, there can only be one judgment from which the motion may attach. *See id.* Thus, when a subsequent judgment replaces an original, the subsequent judgment became the final judgment upon issuance. A final judgment is one which disposes of the entire case. *Reytblatt*, 812 F.2d at 1043; *see also* Wright & Miller, *supra* § 2781, 85 (3d ed.) To be final, a judgment must be complete in that it "sets forth the relief to which the prevailing party is entitled or the fact that the plaintiff has been denied all relief." *Id* at 1044*; see also* Wright & Miller, *supra,* § 2781, 85 (3d ed.). Since to be final a judgment must dispose of all legal issues, there can only be a single final judgment. If a judgment failed to resolve a legal issue, it would be an incomplete final judgment, and an incomplete final judgment is not a final judgment at all. *Reytblatt*, 812 F.2d at 1043.

Here, the original judgment was the first instance of a judgment which met the standard for finality. Because the judgment was complex, containing multiple issues, it did not become final until the court issued it on January 20, 2022. Additionally, in accordance with Rule 58, the original judgment was not final until issued in a distinct document. Therefore, jury verdict alone never constituted a final judgment. However, on January 27, 2022, the amended judgment superseded the original. Where, as is the case here, the modified judgment superseded an original judgment, it rendered the original incomplete. As an incomplete judgment, the original could no longer be considered final. The amended judgment, therefore, was

the only final judgment from which the clock for filing a renewed motion for judgment as a matter of law could run. Since the amended judgment replaced the original in its entirety and became the only valid final judgment, any motion for renewed judgment as a matter of law, regardless of which part of the judgment it challenged, was timely within twenty-eight days of the issuance of the amended judgment.

2. Liability and damages were contained within the same judgment.

Based on the foregoing argument, a motion relating to any issue within the amended judgment was timely within twenty-eight days of the issuance of the amended judgment. Because both issues of liability and damages were resolved within the same judgment, a motion relating to either issue, or both, was timely within the twenty-day period.

Here, the issues of liability and damages were determined based on a single trial which led to a single judgment. R. at 7a. One week later, the amended judgment replaced the original as the new final judgment. *Id.* Because the issuance of the amended judgment superseded the original, the amended judgment replaced the original in full. Had the issues of liability and damages been divorced into two separate trials leading to two distinct judgments, then an amendment to either damages or liability would only affect the clock for filing a motion for renewed judgment as a matter of law on that particular issue. However, because both issues were contained in a single judgment, and since it is the judgment to which the

motion attaches, then court's issuance of the amended judgment, which superseded the original, restarted the clock for the entire judgment, not just the issue of damages. *Id.*

D. Even if the clock extended only for motions challenging liability, the University's motion was still timely because the motion directly responded to the change to liability.

Even under the more restrictive *McNabola* test, a motion is timely if a subsequent judgment has substantively altered the original judgment, and the motion is in response to the alteration. *McNabola*, 10 F.3d at 521; *Tru-Art*, 852 F.3d at 221. This test imposes the additional restriction that a motion must respond directly to the alteration. *McNabola*, 10 F.3d at 521. When determining whether a motion is in response to the alteration, courts may consider whether the motion relates directly to the particular issue affected by the alteration, as well as whether the issues in the judgment are distinct and independent enough such that a motion could challenge one without challenging the other. *Id.*

1. The amendment fundamentally changed the nature of liability imposed.

In *McNabola*, the original judgment was issued on March 4, 1991. *McNabola*, 10 F.3d at 521. The question in *McNabola* was whether a motion for prejudgment interest was timely. *Id.* As the party seeking an award of prejudgment interest, McNabola had ten days from entry of judgment in which to file a motion for prejudgment interest. *Id.* McNabola filed a motion for prejudgment interest on July 29, 1991. *Id.* The court entered a second final judgment later, on December 10,

1991, after McNabola had accepted a court-ordered remittur. *Id.* Because the court did not rule on the motion for prejudgment interest until after December 10, McNabola's argument that his prejudgment interest motion was timely was that the relevant 10-day period for filing began to run from the second final judgment, rather than the first. *Id.* The *McNabola* court held that McNabola's motion for prejudgment interest was untimely for two reasons. *Id.* First, the *McNabola* court analyzed timeliness under a test resembling that of the Fifth Circuit—whether the amendment substantively changed the judgment. *Id.* Even under that test, the motion was untimely because it was filed in July, well before the entry of the second final judgment. *Id.* Therefore, even if the second final judgment superseded the original, McNabola could not claim that the filing of the motion relied on running of the clock from the second final judgment because the second judgment did not yet exist when the motion was filed. *Id.* Second, the *McNabola* court added that the motion would not be timely if the party filing the motion was not aggrieved by the alteration to the original judgment. *Id.* The court reasoned that since the alteration only lowered damages, a motion requesting only about prejudgment interest without any relation to damages was untimely. *Id. At 522.*

Unlike in *McNabola*, where the alteration to the judgment regarding damages had no effect on the entirely unrelated determination

of prejudgment interest, the alteration here fundamentally altered both damages and liability. The key difference between *McNabola* and the instant case is that in *McNabola*, the determination of prejudgment interest was completely

independent of a determination about damages, so a change to damages affected nothing about a decision of whether to award prejudgment interest. whereas, here, the original determination of damages was inherently dependent on a determination about liability. At the trial stage, liability and damages were resolved together in a single trial. In making its initial determinations, the jury, therefore, took the severity of liability it saw fit to impose into account when calculating an appropriate numerical value for the award of damages. The award of damages was essentially a reflection of the severity of liability found by the jury. Then, when the court issued its original final judgment, it omitted punitive damages, as an entire category, rather than lowering the amount. The omission of punitive damages categorically suggests an initial rejection by the court of that more severe form of liability, not just an adjustment of a dollar amount. When the court subsequently modified the judgment to include punitive damages at all, it fundamentally changed the nature of liability imposed on the University.

2. The issues of liability and damages were so inextricably connected that a challenge to one was a challenge to both.

Unlike in *McNabola*, where the separate issues of damages and prejudgment interest were determined based on different standards, such that each determination could be made independently, that is not the case here. Here, the issues of damages and liability were so connected that it would be impossible to affect one without affecting the other. Petitioner argues that since the University's challenge was to liability, rather than damages, the University's motion is untimely

because liability was settled at the time of the original judgment and unchanged by the modification.

However, here, since both issues were resolved in a single trial, evidence going to both issues was heard by the jury at the same time. Thus, the same evidence could have influence the jury on both issues of liability and damages. The issues were resolved in a single judgment, rather than split into separate judgments on each liability and damages. Since the issues were so interconnected that it would be impossible to extract the determination of one from that of the other, a motion challenging either issue should be considered a valid challenge to both issues. Therefore, here, where the University's motion following the modified judgment challenged liability, it was essentially a challenge to both issues because they were so inextricably connected.

II. THE SPEECH OF PROTESTORS IS PROTECTED BY THE FIRST AMENDMENDMENT AND SUBJECT TO THE SAME CONSTITUTIONAL PROTECTIONS AS OTHER SPEECH; THEREFORE, THE PROTESTORS MUCH ENGAGE IN VIOLENCE OR THE THREAT OF IMMINENT VIOLENCE TO HAVE THEIR SPEECH INFRINGED.

The Constitution does not limit its protections to those who speak first. Rather, all people lawfully on a university campus are protected by the First Amendment. *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). This includes the protestor as much as the original speaker. Such speech may be non-verbal in nature and still enjoy constitutional protections. *Spence v. State of Wash.*, 418 U.S. 405, 409 (1974). These constitutional protections are even more essential because the University created a

limited public forum which affords the protestors the benefits of strict scrutiny before their speech may be infringed. *Widmar*, 454 U.S. at 267–68.

Even more pressingly, McMillan's claim fails because the First Amendment does not create an affirmative duty for the University to protect her speech from interference by private citizens who are also engaged in free speech by protesting. *See generally DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989). Rather, in order to infringe on a protestor's speech, there must be violence or the threat of imminent violence. *Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949). The actions of the protestors did not rise to the level of violence or a threat of imminent violence.

A. The speech of protestors is protected by the First Amendment and subject to the same constitutional protections as all other speech; The First Amendment does not create an affirmative duty for the University to allow McMillan to speak without interference by private citizens.

Both the speaker and the protestor are afforded the same constitutional protections under the First Amendment. *Widmar*, 454 U.S. at 267. It becomes clearer why this is the case given the shift of the heckler's veto, which has shifted from leveraging state action against the speaker to one of private action between private citizens *both* engaging in free speech. Charles S. Nary, *The New Heckler's Veto: Shouting Down Speech On University Campuses*, 21 U. Pa. J. Const. L. 305, 306 (2018). This distinction is more important in the context of a limited public forum, which affords the protestors greater constitutional protections than they would have in areas not traditionally associated with public discourse. *Widmar*, 454

U.S. at 267–68. Under such circumstances, the University has no affirmative duty to ensure that the McMillan's right to free speech prevails over the protestors' right to free speech because the First Amendment is inherently a restriction upon state action. *DeShaney*, 489 U.S. at 195.

1. The speech of protestors is speech protected by the First Amendment and subject to strict scrutiny protection under the limited public forum doctrine.

Free speech, particularly on college campuses, is fraught with conflict. Nowhere is this truer than when speakers and protesting members of the audience clash. Often, these conflicts are described in terms of the "heckler's veto" as the heckler is able to effectively silence the speaker through their conduct. Nary, *supra*, at 306. The traditional conception of a heckler's veto entails a rowdy crowd that through violence, either threatened or actual, causes the police to arrest or remove the *speaker* and thereby silence that speaker. *Id.* at 307–08. Significantly, this original heckler's veto dealt with the state, through the police, removing a speaker and silencing them. *Id.* at 308.

The new heckler's veto is an altogether more organic affair. There is no state action required in the new heckler's veto. *Id.* at 308. Rather, rowdy and vocal protestors within the audience shout down the speaker in a chaotic back and forth until either the speaker or hecklers give up. *Id.* at 308. This was the case during McMillan's speech, where the protestors, through their boisterous protesting, convinced McMillan to leave the stage. R. at 6a. Notably, this new form of the heckler's veto deals not only with the free speech rights of the speaker, but also of

the protestors who are engaging in speech through heckling. In essence, the traditional heckler's veto leverages state action against a speaker. The new heckler's veto involves private actors engaged in a raucous back and forth. If the state gets involved in the new heckler's veto, it is because one party has asked the state to intervene between the two groups engaged in speech, and silence either the speaker or the protestor. As such, this raises unique concerns for how this Court should analyze the competing interests of the speaker, the protestors, and the University, and should serve as a lens through which to view this issue and this case.

The University is a public institution run by the state of New Tejas, and as such it is subject to the protections and rights guaranteed under the First Amendment. *Widmar*, 454 U.S. at 267. "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 peacefully to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. As this Court has recognized, with "respect to persons entitled to be [on the University campus], our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar*, 454 U.S. at 268–69. Indeed, protests create boisterous, "confused or senseless shouting not in accord with fact, truth or right procedure to say nothing of not in accord with propriety, modesty, good taste or good manners. The happy cacophony of democracy

would be stilled if all 'improper noises' in the normal meaning of the term were suppressed." *Landry v. Daley*, 280 F. Supp. 968, 970 (N.D. Ill. 1968).

Speech is not simply limited to written or spoken words. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). If speech is "imbued with elements of communication" it falls within the protection of the First Amendment. *Spence*, 418 U.S. at 409. In order to determine if there is communicative meaning, this Court has looked to the activity of the speaker and "factual context and environment in which it was undertaken." *Id.* at 410.

The actions of the protestors constitute speech under this broad definition as established by this Court. There is little doubt that the yelling of the protestors constitutes speech as it is the spoken word. *Johnson*, 491 U.S. at 404. This is true even if the purpose is to heckle or shout down the speaker. *In re Kay*, 1 Cal. 3d 930, 944–45 (1970). The protestors also waived banners. R. at 6a. In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* this Court held that the wearing of black armbands was communicative of opposition to the Vietnam War. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969). Flags and banners are also communicative as they are a "form of symbolism comprising a 'primitive but effective way of communicating ideas.'" *Spence*, 418 U.S. at 411 (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943)). The protestors also wore masks and animal costumes. R. at 6a. Further, this Court has recognized that the wearing of American military uniforms in certain contexts was indicative of a protest of the Vietnam War. *Schacht v. United States*, 398 U.S. 58, 90

(1970). In this case, the context was McMillan's speech where she was advocating for abstention from consuming animal products because it is more humane for the animals involved. R. at 6a.

Two potential communicative meanings can be understood based upon the protestors' conduct. The most obvious was that the protestors were communicating opposition to McMillan's vegan advocacy. They were shouting at McMillian, attempting to prevent her from speaking. R. at 6a. They brought banners and used them to disrupt her speech. R. at 6a. While the record is not clear as to what content was on these banners, those actions were likely to be understood as communicating disagreement with McMillan's views. Most tellingly, dressing up in masks and animal costumes is highly indicative of an intent to mock, and communicate mockery, of McMillan's views that animals are worthy of human dignity. R. at 6a. An alternative, and not mutually exclusive, message that the hecklers might have been communicating was support for Dean Thatcher's views that "boys will be boys" and that the student body "just need[s] to blow off a little steam". R. at 5a. Dean Thatcher's philosophy has resulted in a hands-off approach to discipline. R. at 5a. The culture of the student body has shifted to a rowdier one under Dean Thatcher's disciplinary philosophy. R. at 3a. Given this context, the deliberately destructive actions of the hecklers could be understood as verbal and non-verbal communications of anti-vegan sentiment, support for Dean Thatcher's disciplinary philosophy, or both.

Regardless, because the actions of the protestors qualified as free speech—as the speech was both verbal and symbolic—and is protected under the First Amendment. Therefore, the University could not arbitrarily infringe upon it.

a. The City University of Lantana created a "limited public forum" which would place the burden on the University to justify infringing on the protestors' free speech under strict scrutiny.

Given that the actions of the protestors constitute free speech as defined by this Court, had the University silenced the protestors' speech, it would have raised concerns under the limited public forum doctrine.

A university may create a limited public forum by accommodating meetings or making the forum generally available to the student body. *Widmar*, 454 U.S. at 268. Once this occurs, the university bears the burden to "justify its discriminations and exclusions under applicable constitutional norms." *Id.* at 267. The area where McMillan was speaking was one such limited public forum. The limited disciplinary policy has allowed students to have essentially free use of large portions of the campus. R. at 3a. Tellingly, the University allowed the student body to engage in protesting habitually with other speakers. R. at 5a. This included at least five previous speakers. R. at 5a. At each event police were present but did not intervene. R. at 5a. This demonstrates a pattern of general use of the area by the student body to protest such that it qualifies as a limited public forum.

Given this, if the University had infringed the protestors' speech, that infringement would have to first be content neutral or else be subject to strict

scrutiny. *Widmar*, 454 U.S. at 270. The reactions of listeners to speech, in this case McMillan's reactions as a listener to the protestors' speech, *cannot* be the basis for a content neutral suppression of free speech. *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Given that McMillan herself, as well as the other students listening to McMillan, were listeners to the speech of the protestors, silencing the protestors would not be content neutral. R. at 6a. The nature of rowdy public forum that is democratic discourse often involves a back and forth, with both parties often occupying the role of speaker and listener. In this case, McMillan left the stage after fifteen minutes. R. at 6a. To regulate the speech of the protestors based upon McMillan's reaction would not have been content neutral, and so would have subjected this hypothetical University action to strict scrutiny. *Widmar*, 454 U.S. at 270.

This means that the University would have had to provide a compelling state interest that is narrowly tailored to achieve that end. *Id.* at 270. While it could be argued that the University's interest in promoting order on campus and the ability of guest speakers to speak without being disturbed is compelling, silencing the protestors outright fails to meet the narrowly tailored prong. The University could instead limit the number of people in the audience so that the protesting is less effective. The University could move protestors to a location that is slightly further away from the exact location the speaker is speaking so that the protesting is less effective. The University could charge admission for the event which might reduce the number of protestors. And most importantly, the University could simply use

the police to request the protestors cease being disruptive. At a bare minimum this must be tried, first, and it was not tried in this case at all. R. at 6a. As such, McMillan would fail to meet the requirements to compel the University to silence the speech of the protestors.

2. The Constitution does not create an affirmative duty for the University to provide for constitutional protections, rather it creates limitations upon government action to restrict liberties.

Our "Constitution is a charter of negative rather than positive liberties." *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983). As such, the University is under no duty, despite being a public University and therefore affiliated with New Tejas, to affirmatively protect McMillan's right to free speech. *See DeShaney*, 489 U.S. at 195. This recognition is generally accepted in constitutional scholarship. Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. Pa. J. Const. L. 750, 750–51 (2001). Numerous alleged positive rights have been denied recognition by this Court, including housing, public education, medical care, and welfare. *Id.*

This principle extends to numerous rights enshrined within the Constitution itself. *DeShaney*, 489 U.S. at 195–96. "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. The same is true of the Fifth Amendment. *Id.* at 196. During the period that abortion was still a legally cognizable right under the Constitution, this Court declined to recognized that

government had an obligation to subsidize abortion procedures. *Harris v. McRae*, 448 U.S. 297, 317–318 (1980). Indeed, the Thirteenth Circuit in its opinion in this case noted that if the First Amendment granted an affirmative right for the government to provide a venue for free speech, that the Second Amendment would compel the government to provide firearms to citizens. R. at 13a.

This conclusion is supported by the text of the First Amendment itself. The pertinent language states that "Congress shall make no law. . . ." U.S. Const. amend. I. "The first amendment reads in the negative" which is to say that it "constrains our government from acting in ways which infringe upon our right to free speech; it does not create an affirmative duty upon the government to act." *Gartner v. U.S. Info. Agency*, 726 F. Supp. 1183, 1187–88 (S.D. Iowa 1989).

Consider if it were otherwise, specifically with the First Amendment. If the First Amendment granted an affirmative duty under the Free Exercise Clause, the government would be compelled to provide a churches for citizens and then run afoul of the Establishment clause with the exact same act. The Constitution cannot be understood to grant affirmative or positive rights. Rather, the purpose of these constitutional protections is to protect the people from a tyrannical state, to guarantee negative rights, not to protect the people from the actions of individual actors. *DeShaney*, 489 U.S. at 196. Therefore, this Court should decline to recognize an affirmative duty for the University to protect McMillan's right to speech from interference by private citizens protesting.

B. There must be violence or an imminent threat of violence to justify the University infringing on the protestors' right to free speech; This standard prevents the University from privileging either McMillan or the protestors over each other.

As addressed above, the First Amendment limits the government's ability to interfere with free speech. *DeShaney*, 489 U.S. at 196. The University, therefore, may not arbitrarily privilege the speaker over the protestor, nor the protestor over the speaker. Rather, violence or the serious threat of imminent violence is required to justify the government's infringement on one of the competing parties' free speech rights. *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292–93 (9th Cir. 2015). Under this framework, the actions of the protestors failed to cross the threshold established by this Court to determine when speech becomes violence or a threat of immediate violence. *See generally Feiner v. New York*, 340 U.S. 315 (1951); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

1. There must be violence or an imminent threat of violence to justify the University infringing on the protestors' right to free speech.

"If 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." *Santa Monica Nativity Scenes Comm.*, 784 F.3d at 1292–93. The natural consequence of this view is that "[u]ntil that threshold is reached, however, courts will protect the right of a hostile audience to chant, clap, boo, hiss, picket, and protest, even though it may be offensive and disruptive to the sensibilities and interests of the speaker, or others in the audience." Rodney A. Smolla, 1 Smolla & Nimmer on Freedom of Speech § 10:39 (2024).

It is part of democratic life that speakers harass and are harassed alike. *Id.* at § 10:41. "Discomfort and anger" are often part of the democratic process and part of the purpose of the First Amendment. *Id.* at § 10:41 (2024). The First Amendment exists to ensure that all speech, including unpopular speech, is protected, and a necessary consequence of this is that passions will be enflamed. However, if the line from passion to violence is crossed, that is when the protections of the First Amendment cease. *Meinecke v. City of Seattle*, 99 F.4th 514, 518 (9th Cir. 2024).

In *Meinecke*, Matthew Meinecke was a devout Christian who was preaching the Gospel to a group protesting this Court's decision to overrule *Roe v. Wade*, outside of a federal building in Seattle. *Id.* at 518. As part of his speech, Meinecke often holds signs, hands out various forms of literature, and reads from the Bible. *Id*. After an hour of conducting these activities, the protestors surrounded Meinecke. *Id*. Soon after, the protestors grabbed Meinecke's Bible and ripped pages from it before assaulting him. *Id.* The violence escalated and Meinecke was attacked further, knocked down, and had a shoe ripped off. *Meinecke*, 99 F.4th at 518. When the Seattle police finally intervened, they ordered Meinecke to move to another location. *Id.* at 519. When he refused, he was arrested. *Id.*

The Ninth Circuit recognized that Meinecke's speech was being curbed because of the violent reactions of the protestors. *Id.* at 523. The record further indicated that the actions of the Seattle police were motivated by the assaults upon Meinecke and the threats to public *safety* posed by the protestors. *Id.* However, when the protesters themselves are responsible for the threat to public *safety*, they

are the proper targets of state action. *Id.* at 525. Implicit in this rule is the understanding that *before* such a threshold of violence occurs, the protesters are free to carry out their speech. *Id.* at 525. The requirement of actual or imminent violence is essential. *Terminiello*, 337 U.S. at 5. Hence:

> That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Id. (Internal citations omitted). This Court noted that free speech "invites dispute." *Terminiello*, 337 U.S. at 4. This includes anger and even the possibility that free speech serves its "high purpose when it induces a condition of unrest." *Id.* Key to this understanding is that violence, or the imminent threat of it, is required before the protestor's right to speech is infringed.

The Supreme Court of California has also recognized these important competing concerns and requires a balancing test between the rights of the speaker and the hecklers that focuses on how much of a disturbance the protestors cause, including disruption and violence. *Kay*, 1 Cal. 3d at 944–45. "Audience activities, such as heckling, interrupting, harsh questioning, and booing, even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment." *Id.* at 939. It is only in the "most egregious of cases" that the tradition of "heckling and harassment of public officials and other speakers while making public speeches" may be interrupted. *Id.* at 940.

In *Kay*, a congressional candidate was running for office under the backdrop of his unpopular refusal to endorse a boycott of non-union grapes. *Id.* at 935. While

the candidate was giving a speech, a portion of the 6000 people assembled began shouting and clapping. *Id.* at 936. Others waved a flag that the farmers who grew the union grapes used. *Kay*, 1 Cal. 3d at 936.

In this case, the protestors yelled at McMillan. R. at 6a. They carried banners and used noisemakers. R. at 6a. The protestors wore masks and animal costumes. R. at 6a. Importantly, there were no threats of violence. R. at 6a. McMillan left of her own free will without any fear for her safety. R. at 6a. Unlike with *Terminiello* and *Meinecke*, none of the protestors engaged in any of the conduct that this Court has suggested opens the door to state action and the infringement of speech. R. at 6a. McMillan was never assaulted or threatened. R. at 6a. Indeed, there was such a lack of a threat to McMillan that the police stationed at the event, at no time, felt the need to intervene. R. at 6a. This indicates that the University acted well within constitutional limitations. To do other than to allow the democratic process to play out, in the raucous and tumultuous forum that is the marketplace of ideas, would be improper absent any violence or threat of imminent violence. Smolla, *supra*, at § 10:40. The University respected the rights of both McMillan and the protestors and permitted them to be rowdy and disruptive. R. at 6a. Absent violence, this Court should recognize that this does not constitute a violation of McMillan's First Amendment rights.

2. The actions of the protestors did not cross the line into violence or the threat of imminent violence as defined by this Court; Therefore, no infringement by the University could be justified.

The rule that violence, or the threat of violence, is required before the state may silence speech recognizes that both the speaker and heckler are engaging in free speech, and does not unfairly privilege one over the other, thereby promoting the free flow of ideas that is essential to the American Republic. Under this understanding, the actions of the protestors fails to cross either of the standards set forth by this Court to test when speech becomes dangerous enough to be infringed. *See generally Feiner v. New York*, 340 U.S. 315 (1951); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The two tests to identify when speech crosses the line into violence or the threat of violence are established in the seminal cases of *Feiner* and *Brandenburg*. At no point did the actions of the protestors cross the line as described in *Feiner* or in *Brandenburg*. R. at 6a.

At a constitutional minimum, a speaker, loses their first amendment protection to engage in speech only when, and not before, they "pass[] the bounds of argument or persuasion and undertake[] incitement to riot." *Feiner v. New York*, 340 U.S. 315, 321 (1951). This Court recognized in *Feiner* that there is a danger in suppressing otherwise constitutionally protected speech absent some form of physical danger. *Id.* at 320–21 (1951).

The standards this Court recognized as rising to the level of an incitement to riot were incredibly low in *Feiner* but do represent some minimum requirement of a

threat of violence before the speech of a speaker can be silenced. Smolla, *supra*, at § 10:41. In *Feiner*, the speaker, Irving Feiner, was protesting against European Americans, President Truman, the American Legion, the Mayor of Syracuse, and local politicians. *Feiner*, 340 U.S. at 317. Feiner was encouraging African Americans to "rise up in arms and fight for equal rights." *Id.* At this stage, the police who arrived at the location did not interfere with either Feiner or the protestors. *Id.*

As Feiner continued, tensions began to rise among the listeners, both for and against Feiner's position advocating for armed resistance. *Id.* Members of the crowd, too, began to threaten violence. *Id.* Finally, the police stepped in to arrest Feiner to avoid a violent confrontation between both Feiner and the crowd. *Id.* This Court found that the police were motivated by a "proper concern for the preservation of order and protection of the general welfare" and that there was no indication that the police's actions "were a cover for suppression of [Feiner's] views and opinions." *Id.* at 319. The clear implication is that if the police had arrested Feiner absent a compelling fear regarding public safety, it would have been unconstitutional. The police action cannot be arbitrary. *Id.*

This low threshold for when speech may be infringed is contrasted with the far higher threshold this Court established in the case *Brandenburg*. In *Brandenburg*, the standard was raised from the admittedly low bar in *Feiner* to one which recognized that "mere advocacy" for action was not enough a basis upon which to silence speech. *Brandenburg*, 395 U.S. at 448–49. Rather, there must be an "incitement to imminent lawless action." *Id.* at 449. In *Brandenburg*, the speaker in

question was Clarence Brandenburg, the leader of a Ku Klux Klan group in Ohio. *Id.* at 444. Brandenburg was convicted of advocating for violence, including committing crimes, sabotage, terrorism, and the necessity of forming more groups that would teach its members to do the same. *Id.* at 445. He did do while recording his inflammatory speech which would later be broadcast on local television. *Id.* at 445–46. Brandeburg, indisputably, advocated for violence against the United States to promote a bigoted agenda. *Id.* at 447. However, Brandenburg's statements did not rise to the level of "inciting or producing imminent lawless action." *Id.* As such, his conduct was protected under the First Amendment.

These are the same concerns that animated this Court when ruling on when protestors may have their speech silenced. If any speaker were to conduct themselves as the protestors did at the University they would not meet the tests in either *Feiner* or *Brandenburg*. The protestors yelled at McMillan. R. at 6a. The protestors carried banners and used noisemakers. R. at 6a. The protestors wore masks and animal costumes. R. at 6a. Indeed, McMillan left of her own accord without any fear for her safety. R. at 6a. There were no threats of violence. R. at 6a. There was no argument or persuasion to engage in a riot, as *Feiner* required nor was there an incitement to produce and imminent lawless action as *Brandenburg* requires. R. at 6a. Absent these, there was no sufficient constitutional basis to infringe on the speech of the protestors. "A state may not unduly suppress free communication of views. . . under the guise of conserving desirable conditions." *Cantwell v. State of Connecticut*, 310 U.S. 296, 308 (1940). To hold speakers and

protestors to different standards would unfairly privilege one exercise of free speech in a debate between parties unjustly. Under these clear constitutional thresholds, the actions of the protestors were nowhere close to the requirement of violence or imminent threat of violence which would have justified the University in infringing on the protestors' speech. As such, this Court should deny McMillan's claim that the University infringed on her First Amendment rights.

CONCLUSION

Because the modified judgment superseded the original, replacing it in full, the time for filing a motion post-judgment motions began running from the entry of the modified judgment. Because the University filed its motion for renewed judgment as a matter of law within twenty-eight days of the modified judgment, this Court should find that the University's motion was timely.

In the alternative, even if the modified judgment only restarted the clock for motions challenging changed portions of the original judgment, this Court should still find that the motion was timely because it challenged the alteration made to the nature of liability imposed and because issues of liability and damages were interconnected.

Furthermore, because McMillan's First Amendment rights were to be balanced against competing First Amendment rights owed to the protesters, and because protection of First Amendment rights did not impose an affirmative duty on

the University to protect McMillan's rights by silencing the protesters, the University did not violate McMillan's First Amendment rights.

Because the motion was timely, and because the University did not violate McMillan's First Amendment rights, this Court should affirm the Thirteenth Circuit.

Affidavit of Service

I hereby certify that on November 18, 2024 a copy of the foregoing Brief on the Merits by Respondent was served by hand, to counsel as follows:

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Certificate of Compliance

I hereby certify that on November 18, 2024 a copy of the foregoing Brief on the Merits by Respondent is in compliance with Rule 33.1 and contains 13,083 words according to the word-processing system used to prepare the document, including all footnotes.

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