

No. 24-0514

IN THE
Supreme Court of the United States

SPRING 2025

DOVE McMILLAN,
Petitioner,

-versus-

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 PETITIONER

ORAL ARGUMENT REQUESTED

Team 32
Counsel for Petitioner

QUESTIONS PRESENTED

- I. Whether, after a trial judge amends a final judgment, the time for filing a post-judgment motion challenging unchanged portions of the judgment runs from the entry of the original final judgment or the amend.
- II. Whether a university violates the First Amendment through adopting a viewpoint neutrality policy of refusing to discipline students who interfere with speakers on campus.

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OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Thirteenth Circuit in the case of Dove McMillan v. Board of Regents of City University of Lantana, is unreported, but is available at No. 22-0514 and may be found in the Record at pages 1a–19a. That court reversed the decision of the United States District Court for the District of New Texas, which is unreported, but is available at Civil Action No. 21-cv-1285 and may be found in the Record at pages 20a–24a.

STATEMENT OF JURISDICTION

The Thirteenth Circuit Court of Appeals entered its judgment on May 10, 2023. R. at 1a. Petitioner timely filed a Petition for Writ of Certiorari, which this Court granted on October 7, 2024. R. at 1. This Court has jurisdiction over the subject matter of this case pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The First Amendment to the United States Constitution provides: “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.

42 U.S.C. § 1983 provides in pertinent part: “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.

STATEMENT OF CASE

The University is a limited public forum open to invited speakers.

The City University of Lantana (“University”) is the oldest public educational institution in New Tejas. R. at 2a. It continuously strives to be open to everyone through its commitment to civic engagement, academic excellence, and leadership. R. at 2a. The University’s motto of “forever learning” is aimed at cultivating intellectual commitment and academic excellence. R. at 3a. It also offers over sixty student organizations on campus, including performance groups, arts and culture organizations, political organizations, religious organizations, intramural sports groups, gender and sexuality groups, and social action groups. R. at 3a.

New Tejas Hall is the oldest permanent building on the University’s campus. See R. at 2a (describing the University’s extensive history in the City of Lantana). New Tejas Hall contains the Hedge Family Auditorium. R. at 2a. Student groups regularly invite speakers to speak on the University’s campus, including in the Hedge Family Auditorium. R. at 5a. These speakers are permitted to discuss a topic of their choosing. R. at 5a.

Dean Thatcher’s lack of student discipline enables their disruptive behavior.

In recent years, University students have become increasingly rowdy. R. at 3a. Students’ conduct caused disruption with classes and other scheduled events through senior pranks and throwing unauthorized and outrageous parties. R. at 3a. These incidents, including several others, did not result in formal discipline or punishment of any student. R. at 4a. The University’s Dean of Student Affairs is responsible for student discipline. R. at 4a.

Despite having no academic background or traditional qualifications for that role, the University hired Mason Thatcher to fill it. R. at 4a. After his NFL career was cut short, Dean Thatcher undertook this role. R. at 4a. Dean Thatcher uses a “hands-off” approach to student discipline. R. at 5a. In his view, University students do not need punishment, only “a good talking to.” R. at 5a. Under his approach, he believes students may get out of hand but should not be disciplined. R. at 5a. In line with Dean Thatcher’s beliefs, campus security and employees within his department follow this hands-off approach and generally leave students to their own devices. R. at 5a.

Without discipline from Dean Thatcher, students also shout down on campus speakers, using a “heckler’s veto” to prevent them from speaking. R. at 5a. On four separate occasions, students interrupted and shouted down speakers, effectively preventing them from speaking. R. at 5a. On each occasion, campus security followed Dean Thatcher’s hands-off approach and failed to intervene. R. at 5a.¹ No students were disciplined following these incidents. R. at 5a.

University Students Utilize a Heckler’s Veto to Disrupt McMillan’s Speech.

The Campus Vegan Alliance, a registered University student organization, invited Dove McMillan, a well-known vegan advocate, to speak on the University’s campus at Hedge Family Auditorium. R. at 6a. McMillan planned to encourage people to stop consuming animal products, discuss how the human species exploits

¹ Each speaker spoke on “controversial topics” like McMillan pertaining to racism, gun rights, legalizing marijuana, and climate change. R. at 5a.

animals in the name of consumerism, and explain these activities must stop to save the world and humanity. R. at 6a. A mere five minutes into her speech, a large group of student protestors dressed in animal costumes and carrying banners interrupted McMillan. R. at 6a. Students yelled and used noisemakers to drown her out. R. at 6a. She pleaded with the student protestors to halt the disruption. R. at 6a. Students present for McMillan's speech repeatedly asked the protestors to stop to no avail. R. at 6a. After fifteen minutes, McMillan left the stage, and she did not return. R. at 6a. Campus security was present throughout the altercation but did not engage with the protestors. R. at 7a. Although the protesters were readily identified as University students, the University did not discipline any of the protestors for their actions. R. at 7a.

McMillan files against the University.

McMillan filed suit against the University's Board of Regents for violating her First Amendment rights under 42 U.S.C. § 1983.² R. at 7a. Her case proceeded to trial. R. at 7a. At trial, the University moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). R. at 7a. The district court denied the motion. R. at 7a. On January 20, 2022, the jury awarded McMillan compensatory and punitive damages.³ R. at 7a.

That same day, the district court entered its original final judgment awarding only compensatory damages. R. at 7a. On January 27, 2022, the district court *sua*

² The University is a municipality for *Monell* liability purposes. R. at 11a n.4.

³ The jury awarded McMillan the following damages: \$12,487 in compensatory damages and \$350,000 in punitive damages. R. at 7a.

ponte modified its judgment to include the jury's awarded punitive damages. R. at 7a.⁴ On February 24, 2022, the University filed a renewed motion for judgment as a matter of law under Rule 50(b), renewing arguments challenging its liability that it raised at trial under Rule 50(a).⁵ R. at 21a. This motion was filed thirty-five days from the date of the original judgment and twenty-eight days from the date of the modified judgment. R. at 7a. The district court ruled the University's Rule 50(b) motion was untimely because it was filed thirty-five days after the original judgment's entry. R. at 7a, 24a. The motion also did not bear a relationship to the alterations made to the original judgment. R. at 23a. The district court denied the University's motion without consideration of its merits. R. at 7a, 24a.

The University appealed. R. at 2a. The Thirteenth Circuit reversed the district court's denial of the University's post-judgment motion. R. at 2a. The circuit court held the University's motion was timely because the time to file its post-judgment Rule 50(b) motion ran from the amended judgment, not the original final judgment. R. at 10a. The court proceeded to McMillan's First Amendment claim and held the University did not violate her First Amendment rights when it failed to stop its students from interfering with her speech. R. at 14a. This appeal followed. R. at 1.

⁴ The parties do not dispute the district court's addition of punitive damages in the Amended Final Judgment is a material, non-clerical modification. R. at 3a n.2.

⁵ The parties do not dispute the University preserved the arguments raised in its Rule 50(a) motion at trial. R. at 21a n.1.

SUMMARY OF ARGUMENT

I.

The University's post-judgment motion is untimely. When a party seeks to make a post-judgment motion under Federal Rule of Civil Procedure 50(b), it must be filed within twenty-eight days from the entry of the original judgment. Rule 50(b) is subject to a plain language analysis. The Rule's plain language demonstrates this deadline runs from the entry of the original judgment. Thus, the University's post-judgment motion is untimely because it was filed thirty-five days after entry of the original judgment.

For the deadline to timely file to run from the trial judge's amended judgment, the University's motion must bear a substantial relationship to that judgment. A substantial relationship requires a connection between the alteration to the original judgment and the grounds raised in the party's post-judgment motion. Here, the trial judge amended the judgment to include the jury's awarded punitive damages. However, the University's motion sought to address liability, an issue the amended judgment did not alter. The University's post-judgment motion is untimely because it did not bear a substantial relationship to the amended judgment. Allowing the University a second bite at the apple is inappropriate. Therefore, the Thirteenth Circuit's decision should be reversed because the University's post-judgment motion was not filed within twenty-eight days of the original judgment.

II.

The University's failure to discipline its students violated McMillan's First Amendment rights. The First Amendment guarantees an individual's freedom of speech. This Court should overrule *DeShaney v. Winnebago* to ensure individuals are able to exercise their First Amendment rights. This holding undermines the marketplace of ideas and prevents minority views from being introduced.

In assessing McMillan's First Amendment claim, this Court examines whether the speech is constitutionally protected, the nature of the forum, and whether the government's actions or lack thereof were legitimate in suppressing the speaker's message. Minority view speech is entitled to the equal protection as the majority view. As a limited public forum, the University must protect the speech within that forum. When a university turns a blind eye to its failure to protect speech in the forum, that is unconstitutional viewpoint discrimination.

Here, McMillan's speech is protected. Although controversial, her speech as the minority view is still entitled to constitutional protection. The Hedge Family Auditorium is a limited public forum open to speakers with a constitutionally protected message. The students' disruption, resulting in a heckler's veto, effectively silenced McMillan's constitutionally protected speech within that forum. The students' disruption occurred because of the University's failure to discipline and intervene. The students' disruption only interfered with certain viewpoints. Thus, the University's policy of failing to discipline its students violated McMillan's First Amendment rights because it resulted in viewpoint discrimination.

ARGUMENT

I. THE UNIVERSITY'S POST-JUDGMENT MOTION IS UNTIMELY BECAUSE A PARTY'S TIME FOR FILING RUNS FROM THE ENTRY OF THE TRIAL JUDGE'S ORIGINAL FINAL JUDGMENT.

The University filed its post-judgment motion on February 24, 2022, thirty-five days after the trial judge's original judgment, but only twenty-eight days after the amended judgment. R. at 7a, 21a. Parties are permitted to preserve arguments seeking judgment as a matter of law, if the party seeking judgment files a renewed motion for that relief. FED. R. CIV P. 50(b). A party's deadline for filing a Rule 50(b) post-judgment motions is strict. *See id.* Post-judgment motions may not be filed later than twenty-eight days after the entry of the judgment. *Id.* In contrast to other motion deadlines, courts are not permitted to extend the deadline for Rule 50(b) motions for good cause. Fed. R. Civ. P. 6(b)(2).⁶

After a judgment is entered, a court may act *sua sponte* and alter or amend it. FED. R. CIV. P. 59(e). Courts may render material changes or resolve genuine ambiguities in judgments previously rendered. *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952). When a court amends a judgment, a party affected by that amendment may ask for correction through a post-judgment motion. *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 521 (7th Cir. 1993). Where both an original and an amended judgment exist, a party may not base its untimely request for challenging the amended judgment on a wholly independent

⁶ Courts are also not permitted to extend time for good cause for parties to file under Rules 50(d), 52(b), 59(b), (d), and (e), and 60(b). FED. R. CIV. P. 50(b).

ground from the one that gave rise to that judgment. *Padilla v. Maersk Line, Ltd.*, No. 07 Civ. 3638 (RMB/THK), 2012 WL 4009555, at *1 (S.D.N.Y. Sept. 12, 2012).

For a party's deadline to file to run from the amended judgment, there must be a substantial relationship between the post-judgment motion and the amended judgment. *Winston Network, Inc. v. Indiana Harbor Belt R.R. Co.*, 944 F.2d 1351, 1362 (7th Cir. 1991). To establish a substantial relationship, the motion must challenge the amended judgment's contents, not issues resolved in the original final judgment. *Id.* If a party's motion bears no relationship, the deadline to file that motion runs from the original judgment as it does not relate to the amended judgment. *Id.*

A. This Court Reviews the Thirteenth Circuit's Granting of the University's Post-Judgment Motion De Novo.

A lower court's grant of a Rule 50(b) motion is subject to rigorous review and is especially deferential to the jury verdict. *Olibas v. Barclay*, 838 F.3d 442, 448 (5th Cir. 2016). When deciding a Rule 50 motion, this Court construes the evidence strictly in favor of the party who prevailed before the jury. *Id.* This Court examines the evidence only to determine whether the jury's verdict could be reasonably based on that evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000). A party is not entitled to judgment as a matter of law so long as the jury had a legally sufficient basis to find otherwise. *See* FED. R. CIV. P. 50(a)(1); *Apache Deepwater, L.L.C. v. W&T Offshore, Inc.*, 930 F.3d 647, 652 (5th Cir. 2019). Although this Court reviews the entire record, it must disregard all evidence favorable to the moving party that the jury was not required to believe. *Reeves*, 530 U.S. at 151. If

there is any evidence to support the jury's verdict, then the post-judgment motion should be denied and the verdict upheld. *Goodner v. Hyundai Motor Co.*, 650 F.3d 1034, 1043 (5th Cir. 2011).

B. The University's Post-Judgment Motion is Untimely Because Rule 50(b)'s Plain Language Establishes Motions Must be Filed Within 28 Days of a Court's Original Judgment.

To determine the meaning of a Federal Rule of Civil Procedure, this Court should apply the traditional rules of statutory interpretation. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 347–62 (1981). This Court examines the plain language of the rule. *United States v. Fort*, 472 F.3d 1106, 1110 (7th Cir. 2007). However, the language cannot be read in isolation, as this Court must also consider context. *In re Rufener Constr., Inc.*, 53 F.3d 1064, 1067 (9th Cir. 1995). This requires the relevant provisions be read as a whole. *Id.* The Federal Rules of Civil Procedure are not read through an “overly technical” lens. *Foman v. Davis*, 371 U.S. 178, 181 (1962). These rules are construed to secure a party's just, speedy, and inexpensive resolution of its claims. FED. R. CIV. P. 1. Mere technicalities do not alter the meaning of these rules. *Id.*

1. *Federal Rule of Civil Procedure 50(b)'s plain language and context requires a post-judgment motion be filed within twenty-eight days of the original judgment.*

Rule 50(b) provides in pertinent part: “No later than 28 days after the entry of ***judgment*** . . . the movant may file a renewed motion for judgment as a matter of law.” FED. R. CIV. P. 50(b) (emphasis added). Rule 50(b)'s plain language makes no

distinction between an original or amended judgment, when rule drafters could have chosen to do so. *Compare* Fed. R. Civ. P. 50(b) *with* Fed. R. Civ. P. 58(a).

For example, in *In re Rhodes Companies*, a United States District Court applied a plain language approach to interpret Federal Rule of Civil Procedure 45(c)(3)(A). 475 B.R. 733, 738 (D. Nev. 2012). There, in interpreting that rule, the court examined its plain language. *Id.* The plain language omitted what party could bring a motion to quash under the rule. *Id.* at 739. The parties disputed whether an entity not listed in the rule was still entitled to file a motion to quash. *Id.* In its reasoning, the court explained rule drafters act purposely and intentionally in the disparate exclusion or inclusion of certain terms. *Id.* at 738. When a term is not present, it cannot be read into the rule. *Id.*

Viewing Rule 50(b) in context, the Federal Rules of Civil Procedure differentiate between an amended judgment and judgment. *See, e.g.,* FED. R. CIV. P. 58(a). Federal Rule of Civil Procedure 58(a) explicitly mentions “every ***judgment*** and ***amended*** judgment” when referencing a court’s entry of judgments. *Id.* (emphasis added). A phrase cannot be read into a rule that the drafter chose not to use it in. *Russello*, 464 U.S. at 23.

In *Juno Therapeutics, Inc. v. Kite Pharma, Inc.*, a United States District Court analyzed whether a trial judge’s original judgment determined the timeline under Rule 50(b). Case No. 17-cv-07639 SJO-KS, 2020 WL 2220207, at *2–3 (C.D. Cal. Jan. 7, 2020). The court applied Rule 50(b)’s plain language and context to an original final judgment entered before the jury resolved an enhanced damages award related

to that judgment. *Id.* at *4. The court reasoned the deadline did not run from the court's original judgment because the undetermined damages award established the judgment was pending, not final. *Id.* However, once a judgment is entered and final, a party's deadline to file runs from the entry of that judgment. *Id.*

Here, Rule 50(b)'s plain language and context demonstrate the Thirteenth Circuit's error. The deadline for filing a Rule 50(b) motion is unforgiving and strict. R. at 21a. Rule 50(b) makes no distinction between an original or amended judgment. FED. R. CIV. P. 50(b); R. at 22a. This rule only considers the entry of a judgment. FED. R. CIV. P. 50(b). Additionally, there were no pending damages awards at the time the original judgment was entered. R. at 21a. This renders the trial judge's original judgment as the exact judgment Rule 50(b) envisions. Thus, the original judgment's entry date should determine whether the University's Rule 50(b) was timely.

2. The University's motion is untimely because it was not filed within twenty-eight days of the trial judge's original judgment.

Rule 50(b) requires a party to file its post-judgment motion within twenty-eight days of the original judgment. A party's deadline may not be extended. FED. R. CIV. P. 6(b)(2). A Rule 50(b) motion is excluded from the good cause exception and its deadline for filing cannot be extended. *Id.*; R. at 7a. Because of these limitations, a post-judgment motions deadline for filing is premised on the entry date for the original judgment unless the filing party can demonstrate an amended judgment's date should apply. FED. R. CIV. P. 50(b).

For example, in *Johnston v. Borders*, the Eleventh Circuit used the date of the original judgment to determine whether a party's post-judgment motion was timely. 36 F.4th 1254, 1269–70 (11th Cir. 2022). There, the district court amended its original judgment to include additional damages. *Id.* at 1270. The challenging party filed its post-judgment motion twenty-eight days after the original judgment and argued the amended judgment restarted the time to appeal and file. *Id.* The court rejected this argument because the motion was untimely as to the original judgment. *Id.* It reasoned the amended judgment did not restart the time to appeal because Rule 50(b)'s twenty-eight day deadline runs from the entry of the original judgment. *Id.*

Further, in *Tru-Art Sign Company v. Local 137 Sheet Metal Workers International Association*, the Second Circuit held the deadline for filing a post-judgment runs from the date of the original judgment's entry, not the amended judgment. 852 F.3d 217, 220 (2d Cir. 2017). In that case, the plaintiff filed a post-judgment motion to alter the original judgment to include prejudgment interest. *Id.* The district court entered a second judgment in compliance with a vacated damages award. *Id.* at 222. In rejecting the party's post-judgment motion, the Second Circuit reasoned the party sought to challenge the damages awarded in the first judgment, not the second judgment. *Id.* The court denied the plaintiff's post-judgment motion because it was untimely. *Id.*

Here, the University's post-judgment motion is untimely. Rule 50(b) requires a party to file its post-judgment motion within twenty-eight days of the entry of the

judgment. FED. R. CIV. P. 50(b). On January 20, 2022, the district court entered its original judgment. R. at 20a. Thirty-five days later, on February 24, 2022, the University filed its post-judgment motion. R. at 21a. A judge is not permitted to extend Rule 50(b)'s deadline for good cause. R. at 24a. Even if the University's failure to file was a result of excusable neglect, Rule 50(b) renders this motion untimely. R. at 24a. Therefore, the University's post-judgment motion should be denied because it was not filed within twenty-eight days of the original judgment.

C. The University's Post-Judgment Motion Does Not Bear a Substantial Relationship to the Amended Judgment Because It Addresses Issues Not Raised Within That Judgment.

Parties aggrieved by an amended judgment are permitted to seek review. *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986). When both an amended judgment and original judgment exist, a party's deadline for filing a post-judgment runs from the amended judgment only if the motion bears some relationship to what that judgment altered. *Tru-Art Sign Co.*, 852 F.3d at 221 (citing *McNabola*, 10 F.3d at 521). If the motion bears no relationship, a post-judgment motion's timeliness is measured from the original judgment. *Id.* at 222. This procedure should not be used to seek a "second bite at the apple," through relitigating issues settled under a new theory. *Analytical Survs., Inc. v. Tonga Partners*, 684 F.3d 36, 52 (2d Cir. 2012). Courts use post-judgment motions to consider issues connected with the merits of the amended decision, not to address issues settled in the original judgment. *White v. New Hampshire Dept. of Emp't Sec.*, 455 U.S. 445, 451 (1982).

For example, in *Chen v. Hunan Manor Enterprise, Incorporated*, a United

States District Court examined whether a party's post-judgment motion bore a substantial relationship to the trial court's amended judgment. 18 Civ. 802 (GDB) (GWG), 2024 WL 3344672, at *2–3 (S.D.N.Y. July 8, 2024). There, the court applied the substantial relationship analysis to determine whether the post-judgment motion related to the changes made in the court's amended decision. *Id.* at *2. The court's amended judgment corrected the plaintiffs' original damages award, increasing the overall damages awarded. *Id.* at *3. The defendant's post-judgment motion was filed within twenty-eight days of the amended judgment and challenged the trial court's jurisdiction and their liability as to the litigated claims. *Id.* The court held the post-judgment motion was untimely because its arguments as to liability and jurisdiction did not relate to the court's alteration of the plaintiffs' damages award. *Id.*

Similarly, in *McNabola v. Chicago Transit Authority*, the Seventh Circuit applied the substantial relationship test in assessing whether a party's post-judgment motion was timely filed. 10 F.3d at 521. There, the plaintiff filed a motion for prejudgment interest after the district court lowered his damages award. *Id.* The court acknowledged the decrease in damages aggrieved the plaintiff. *Id.* However, it denied the plaintiff's motion as untimely because the motion for prejudgment interest did not address the decrease in his damages award. *Id.* It reasoned the plaintiff could not file a motion addressed to the initial judgment and claim the amended judgment's entry as the time for filing. *Id.*

The University's post-judgment seeks an unconnected second bite at McMillan's claims. The district court's only modification to the original judgment

was the addition of McMillan’s extensive punitive damages. R. at 7a. The material change was the punitive damages. R. at 23a n.2. The University’s motion must have a substantial relationship to that change. R. at 23a. It does not. R. at 23a. Its motion instead challenges the “wholly independent” issue of liability, which is not raised or altered within the amended judgment. R. at 23a–24a. Without challenging the amount of punitive damages, the University’s motion bears no relationship to the amended judgment’s alteration. R. at 23a–24a. The University’s post-judgment motion should be denied because without a substantial relationship, the time for filing runs from the original judgment. R. at 24a. Therefore, the University’s motion is untimely because it does not bear a substantial relationship to the amended judgment and was filed 35 days after the original judgment’s entry.

D. Allowing the University to Prevail Undermines Rule 50(b)’s Purpose to Secure Final Judgments for Involved Parties.

When a court alters its judgment, the parties aggrieved by the alteration may ask for correction as to that specific alteration. *Kazazian v. Bartlett & Bartlett, LLP*, No. 03 Civ. 7699(LAP)., 2007 WL 4563909, at *3 (S.D.N.Y. Dec. 19, 2007). The deadlines applied to post-judgment motions represent a careful balance between a court’s power to enact accurate judgments and ensure justice is done against a party’s interest in finality and repose. *See id.*

To preserve this balance, a party’s post-judgment motion should only be considered timely if it is filed within twenty-eight days of the original judgment or if it is substantially related to the amended judgment’s alterations. *See id.* Otherwise, parties may continually file new motions, preventing a judgment from ever becoming

final. *Charles*, 799 F.2d at 348. The finality of judgments would be rendered meaningless, and the balancing of interests under the Federal Rules of Civil Procedure would be utterly compromised. *Kazazian*, 2007 WL 4563909, at *3.

Further, enforcing Rule 50(b)'s strict deadline encourages parties to read judgments closely. *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 823 F. App'x 559, 574 (10th Cir. 2020) (Lucero, J., concurring). This ensures the proper functioning of the adversarial system, which relies on parties to raise significant issues and present them to courts in the proper manner and at the appropriate time for resolution. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006). Procedural default rules are specifically designed to encourage parties to raise their claims timely and vindicate the law's significant interest in the finality of judgments. *Id.* Therefore, the Thirteenth Circuit's decision should be reversed because the time for filing a post-judgment motion runs from the time the original judgment is entered, not the amended judgment.

II. THE UNIVERSITY'S VIEWPOINT NEUTRAL POLICY VIOLATED MCMILLAN'S FIRST AMENDMENT RIGHTS BECAUSE ITS REFUSAL TO DISCIPLINE ITS STUDENTS INTERFERED WITH HER CONSTITUTIONALLY PROTECTED SPEECH.

The First Amendment protects an individual's freedom of speech. U.S. CONST. amend. I. Colleges and universities are not enclaves immune to the First Amendment's sweeping protections. *Healy v. James*, 408 U.S. 169, 180 (1972). Although public universities may restrict speech, individuals within the university setting do not shed their constitutional rights to free speech once they reach its campus. *See Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969).

These protections apply with equal force to loathsome and unpopular speech as they do to speech celebrated and widely accepted. *Bible Believers v. Wayne County*, 805 F.3d 228, 243 (6th Cir. 2015). Otherwise, it would be unnecessary to protect speech if those protections only served to safeguard majority views. *Id.* The minority view is the exact speech that often needs First Amendment protection. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 405–06 (1989) (holding flag burning is a form of political expression protected under the First Amendment). If it is the speaker’s minority opinion that gives offense, that consequence is a reason for affording it constitutional protection. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

Viewpoint neutrality is designed to ensure minority views are treated with the same respect as are majority views. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). Allowing majority determinations for viewpoint neutrality undermines the constitutional protection for the minority. *Id.* Constitutional rights may not be denied because of the majority’s hostility towards their exercise. *Watson v. Memphis*, 373 U.S. 526, 535 (1963). A speaker’s message does not lose its First Amendment protections because of the lawless reaction of those who hear it. *Bible Believers*, 805 F.3d at 252.

When a peaceful speaker, whose message is entitled to constitutional protection, is confronted by a hostile crowd, a government actor may not silence the speaker as an alternative to preventing the crowd’s disruptive conduct. *Watson v. City of Memphis*, 373 U.S. 526, 535–36 (1963). Nor can a government actor sit idly by – watching as a crowd imposes a tyrannical majoritarian rule – only later to claim

halting the speaker's message was necessary for the speaker's protection. *Bible Believers*, 805 F.2d at 253. Uncontrolled suppression of a free speech right cannot be made a substitute for the government's duty to maintain order in connection with the exercise of that right. *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 516 (1939). Allowing a crowd's reaction to control a speaker's ability to be heard is an unconstitutional "heckler's veto." *Balogh v. Virginia*, 120 F.4th 127, 135 (4th Cir. 2024). Thus, a corollary of an individual's free speech rights is the extension of protection to secure their exercise against hecklers. *Gay Students Org. of Univ. of New Hampshire v. Bonner*, 367 F. Supp. 1088, 1094 (D. N.H. 1974).

The court reviews questions of constitutional facts *de novo*. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 210 (2014). In First Amendment cases, "an independent examination of the whole record" is conducted in order to make sure "the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984); *see also Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir.1996) ("[W]e are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court.").

To assess whether a heckler's veto violates a speaker's First Amendment rights, this Court considers three elements: (1) whether the involved speech is constitutionally protected, (2) the nature of the forum where the speech is made, and

(3) whether the government’s justifications for a speaker’s limited access to that forum satisfies constitutional standards. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). Because McMillan’s speech is protected under the First Amendment, the Hedge Family Auditorium is a limited public forum, and the University’s failure to discipline its students does not satisfy constitutional standards, the University violated McMillan’s First Amendment rights.

A. This Court Should Overrule *DeShaney v. Winnebago* Because Without Enforcement, First Amendment Rights are Rendered Constitutionally Meaningless.

First Amendment rights are entitled to enforcement. The First Amendment seeks to protect an individual’s right to speak and incorporate that speech into the marketplace of ideas. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537–38 (1980). An open forum for rigorous debate is essential to furthering the First Amendment’s purpose. *See id.* This rigorous debate includes both popular and unpopular speech. *Glasson v. Louisville*, 518 F.2d 899, 905 (6th Cir. 1975). Without enforcement of the First Amendment, minority speech is excluded from the marketplace of ideas. *Id.* Thus, this Court should overturn *DeShaney* because it violates the First Amendment’s purpose and may prevent minority view speech from being spoken.

1. *Lack of enforcement violates the First Amendment’s purpose.*

First Amendment protections are meaningless without a governmental duty to enforce those same protections. In *DeShaney v. Winnebago*, this Court declined to recognize the government has an affirmative duty to secure an individual’s due

process rights. 489 U.S. 189, 195 (1989). It reasoned the Due Process Clause requires the state to protect an individual's life, liberty, and property from invasion. *Id.* However, this does not guarantee a certain minimal level of safety and security for an individual's rights. *Id.* Thus, constitutional rights cannot be extended to impose an affirmative duty on government actors to ensure an individual's constitutional interests are not harmed through other means. *Id.*

DeShaney's holding does not align with the First Amendment's purpose. The First Amendment aims to encourage discussion and protect the expression of both popular and unpopular ideas. *Glasson*, 518 F.2d at 905. If the marketplace of ideas is to remain free, government actors must not allow for the majority to silence those ideas worthy of discussion and debate. *Consol. Edison Co. of N.Y., Inc.*, 447 U.S. at 537–38. A heckler's veto allows for speech to be wrongfully excluded from the marketplace of ideas. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970). The government must maintain an open forum to allow for discourse. *Glasson*, 518 F.2d at 905.

The freedom to engage in discourse about sincerely held religious, political, personal, or philosophical beliefs, especially in the face of hostile opposition, is fundamental to our democracy. *Bible Believers*, 805 F.3d at 252. This freedom is too important to allow the hostility of reactionary listeners who the speaker's message may offend to circumvent it. *Id.* First Amendment protection would be unnecessary if it only served to safeguard the majority's views or lacked enforcement at all. *Id.* at 243. The First Amendment envisions dynamic forums where even the most

contentious, controversial and politically charged ideas are open to debate. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Here, if this Court extends *DeShaney* to First Amendment rights, then an individual loses their right to participate in the marketplace of ideas. *See* R. at 15a–16a. The exact diverse forums the First Amendment seeks to protect would cease to exist. R. at 6a. Further, the University’s motto of “forever learning” is aimed at cultivating intellectual commitment and academic excellence. R. at 3a. *DeShaney* circumvents this motto. Students are now only “forever learning” the majority view. R. at 6a. That directly undermines the First Amendment’s purpose to facilitate a diverse discussion within the marketplace of ideas. Therefore, this Court should overrule *DeShaney* and recognize First Amendment rights are entitled to enforcement.

2. *First Amendment protections and their enforceability are vital to an individual’s exercise of their rights.*

Enforcing First Amendment rights is more important now than ever. Universities are struggling to balance First Amendment protections with institutional efficiency. *See Univ. of Md. Students for Justice in Palestine v. Bd. of Regents of Univ. Sys. of Md.*, Civ. No. 24-2683 PJM, 2024 WL 4361863, at *6–8 (D. Md. Oct. 1, 2024). However, it remains clear universities are environments for vigorous debates. *Students for Justice in Palestine, at Univ. of Houston v. Abbott*, 1:24-CV-523-RP, 2024 WL 4631301, at *11 (W.D. Tex. Oct. 28, 2024). Students form their worldview as adults and engage with the content present on their campus. *Id.*

Allowing protesting students to drown out the message of lawful speakers diminishes the right to free speech. *See Grider v. Abramson*, 994 F. Supp. 840, 848 (W.D. Ky. 1998); Halie Kines, *Supporters claim Charlie Kirk was ‘shut down.’ Here’s what Penn State said happened*, CENTRE DAILY TIMES (Sept. 19, 2024), <https://www.centredaily.com/news/local/education/penn-state/article292729364.html> [https://perma.cc/7HHQ-2VUS].

Further, if the government is not required to enforce an individual’s First Amendment rights, then those rights may never be exercised. Cheryl Leanza, *Heckler’s Veto Case Law as a Resource for Democratic Disclosure*, 35 HOFSTRA L. REV. 1305, 1314 (2007).⁷ Without enforcing an individual’s rights, the government inherently favors the majority’s First Amendment rights over those of the minority. *Bible Believers*, 805 F.3d at 248. The majority view will drown out the minority view. *Id.* The government has a duty to take reasonable measures to secure an individual’s First Amendment rights. *Id.* This Court should overturn *DeShaney* because without enforcement, universities are able to exclude minority view speech without constitutional consequences.

⁷ As lawsuits are filed across the country to secure First Amendment rights on college campuses, the First Amendment’s protections must be enforceable. *See Free Speech*, ACLU, <https://www.aclu.org/court-cases?issue=free-speech#:~:text=On%20September%2010%2C%202024%2C%20the,libraries%20free%20from%20government%20censorship.> [https://perma.cc/5URT-77GY].

B. The University's Policy Violates the First Amendment Because Students' Interference Prevented McMillan From Exercising Her First Amendment Rights.

In assessing McMillan's First Amendment claim, this Court examines whether the speech is constitutionally protected, the nature of the forum, and whether the government's actions or lack thereof were legitimate in suppressing the speaker's message. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). If a speaker's message is constitutionally protected, occurred in the appropriate forum, and the government fails to secure that right, then a constitutional violation has occurred. *Id.*

1. *McMillan's message is protected speech.*

When determining whether speech is protected, courts examine whether the speech itself is constitutional, not whether the speaker's content is endorsed by the majority view. *Bible Believers*, 805 F.3d at 243. Minority views and the right to persuade others to change their views qualify for First Amendment protection. *Hill v. Colorado*, 530 U.S. 703, 716 (2000). However, despite the First Amendment's extensive protections, not all speech is encompassed within constitutional limits. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (establishing speech inciting violence or producing imminent lawless action is unconstitutional); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding fighting words inflicting injury or inciting a breach of the peace are unconstitutional).

There are limited categorical exclusions to the First Amendment's comprehensive protections. *Miller v. California*, 413 U.S. 15, 93 (1973). These

exclusions are rooted in our nation's history and tradition, and only include forms long familiar as falling outside the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 717 (2012). Speech that seeks to encourage use of force is unprotected. *Brandenburg*, 395 U.S. at 447. Speech encompassing words intended to inflict injury or incite a breach of the peace is also unprotected. *Chaplinsky*, 315 U.S. at 572. However, speech that protestors merely disagree with does not render it unprotected. *See Bible Believers*, 805 F.3d at 243. Minority views and the right to persuade individuals to change their views are both protected under the First Amendment. *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

Here, McMillan's speech is entitled to First Amendment protections. McMillan sought to persuade the University's students to abstain from consuming animal products. R. at 6a. McMillan did not seek to incite the students' disruptive behavior, nor did she encourage it. *See* R. at 6a (describing McMillan's pleas to student protesters to allow her to speak). She intended to discuss how humans are exploiting animals at unprecedented levels, and that halting exploitation is needed to save the world and humanity. R. at 6a. This speech is inherently protected under the First Amendment. R. at 18a.

2. *The University's New Texas Hall is a limited public forum.*

This Court must identify the type of forum at issue to determine whether the University's policy is permissible. *People for Ethical Treatment of Animals v. Giuliani*, 105 F.Supp.2d 294, 304 (S.D.N.Y. 2000). In defining the type of forum, courts focus on the access granted to the speaker. *Cornelius*, 473 U.S. at 801.

Universities are considered a limited public forum. *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 863 (8th Cir. 2021). A university is permitted to limit where speakers may speak and which on-campus groups may invite to speak. *See id.* The University may not relinquish total oversight over the content presented to the forum and cannot discriminate against speech based on viewpoint. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995).

There are differences between a traditional public forum and limited public forum on university grounds. *Keister v. Bell*, 29 F.4th 1239, 1254–55 (11th Cir. 2022). A traditional public forum is for the use of the public, and allows the government to impose time, place and manner restrictions. *Id.* at 1252. In contrast, a limited public forum is only open to certain groups and restrictions may be placed on the subjects discussed. *Id.* When a university controls a limited public forum, it must ensure its policies, and the effects of those policies, do not exclude certain speakers. *Id.* Further, universities have a particular mission to educate. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). Universities must ensure a limited public forum satisfies that mission and that once a speaker is invited into that forum, their message is not excluded. *Keister*, 29 F.4th at 1252.

Here, student organizations routinely invite speakers to present on the University’s campus. R. at 5a. The Campus Vegan Alliance, a University student organization, invited McMillan into the University’s limited public forum, the Hedge Family Auditorium. R. at 6a. Once that invitation was extended, McMillan was

entitled to exercise her First Amendment rights without unconstitutional restrictions. *See* R. at 6a; *see also Rosenberg*, 515 U.S. at 829. Although the University is permitted to place reasonable restrictions, those restrictions cannot result in excluding a particular type of speech. R. at 6a. Therefore, if McMillan demonstrates the University's failure to discipline its students resulted in an unreasonable restriction on McMillan's First Amendment rights, then the Thirteenth Circuit's decision should be reversed.

3. *The University's failure to discipline its students enabled unconstitutional viewpoint discrimination.*

Universities make calculated choices about engaging in certain conduct. *Intervarsity Christian Fellowship/USA*, 5 F.4th at 867. When a university turns a blind eye to policy choices violating the First Amendment, it faces liability for those policies. *Id.* When regulating speech in a limited public forum, those restrictions must be reasonable and viewpoint neutral. *Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 681 (2010). Courts do not view a university's policy in a vacuum to assess its constitutionality. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 803 (9th Cir. 2011). A government policy neutral on its face can result in an unconstitutional application. *Id.* If a policy is premised on the speaker's ideology or opinions, that restriction is deemed unconstitutional. *Rosenberger*, 515 U.S. at 829. However, once a university creates a limited public forum for speech, it may not allow for viewpoint discrimination to occur against that speech. *Gerlich v. Leath*, 861 F.3d 697, 704–05 (8th Cir. 2017).

Similarly, a university's viewpoint neutral policy on its face, may be unconstitutional if, when applied, it restricts the rights of a particular group within that limited public forum. *Intervarsity Christian Fellowship/USA*, 5 F.4th at 864. In *Intervarsity Christian Fellowship/USA v. University of Iowa*, the Eighth Circuit held a university's failure to apply its policy uniformly to all registered student organizations constituted a First Amendment violation. *Id.* There, the university selectively enforced membership restrictions against religious organizations. *Id.* This policy did not apply to other organizations acting in the same manner as the religious organizations. *Id.* Despite student organizations violating the same policy as the religious organizations, the University failed to discipline the other student organizations. *Id.* The court reasoned the selective enforcement of a policy provision, whether through action or inaction, is viewpoint discrimination. *Id.* When the government's policy targets a speaker's views, the First Amendment violation is "all the more blatant." *Id.* Thus, a university's policy must function in a viewpoint neutral manner. *Southworth*, 529 U.S. at 229–30.

Further, in *Amidon v. Student Association of State University of New York at Albany*, the Second Circuit recognized a policy is unconstitutional when a minority view is disadvantaged. 508 F.3d 94, 95 (2d Cir. 2007). There, the University used an advisory student referendum to determine how to allocate funds from a mandatory student activity fee among student organizations. *Id.* On its face, the University's policy was viewpoint neutral. *Id.* at 96. However, in its application, the student referendum reflected the student body's majority opinion of the popularity or value

of a student organization's speech. *Id.* at 101. The referendum asked the student body whether a student organization was entitled to funding and in what amount. *Id.* This placed minority views at a disadvantage because the referendum allowed students to determine whether a student organization was entitled to funding. *Id.* at 102. Minority views must be treated with the same respect as the majority's. *Id.* The court struck down the policy because a policy that is viewpoint neutral on its face cannot "serve as a façade for viewpoint discrimination." *Id.* at 101. Favoritism of majority views is not an acceptable principle for applying a policy in a limited public forum. *See id.* at 102.

Here, the effect of the University's failure to discipline its students is viewpoint discrimination. The University's failure to discipline applies equally to all students. R. at 5a. However, it is the effect of that policy that is unconstitutional. R. at 17a–18a. The University's policy placed the students' ideologies and viewpoints above McMillan's. R. at 17a–18a. Rather than addressing student misconduct, the University allowed protesting students views to be heard over all others. *See, e.g.,* R. at 6a (explaining student protestors drowned out the students present for McMillan's speech). This is not a viewpoint neutral effect. The University's policy clearly allows for one viewpoint to prevail over others. R. at 6a. It similarly does not allow for the minority view to participate in the marketplace of ideas. R. at 6a. Through inaction, the University enabled its students to exercise an unconstitutional heckler's veto against speakers they disagree with. R. at 17a–18a. Thus, the

Thirteenth Circuit's decision should be reversed because the University's failure to discipline its students violated McMillan's First Amendment rights.

C. McMillan is Entitled to the Enforcement of Her First Amendment Rights Because These Rights Include Government Protection Against Individuals Who Infringe Upon Them.

The government is not permitted to sit idly on the sidelines – watching as a crowd suppresses a speaker's message. *Bible Believers*, 805 F.3d at 253. If speech provokes hecklers to engage in wrongful conduct, the government must deal with those wrongful acts. *Meinecke v. City of Seattle*, 99 F.4th 514, 518 (9th Cir. 2024) (quoting *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292–93 (9th Cir. 2015)). The government has a duty to make a bona fide effort to protect an individual's speech when another is trying to silence that constitutional right. *Watson v. City of Memphis*, 373 U.S. 526, 535–36 (1963). If the government allows an individual's speech to be silenced before exhausting less restrictive means, their inaction constitutes an infringement on an individual's constitutional rights through enabling a heckler's veto. *Bible Believers*, 805 F.3d at 243.

For example, in *Balogh v. Virginia*, the Fourth Circuit considered whether the government actor failed to secure a speaker's First Amendment rights. 120 F.4th 127, 135 (4th Cir. 2024). In that case, when protestors interrupted a speaker's message, the government did not fail to intervene. *Id.* at 136. The speaker argued law enforcement's failure to allow his message to continue violated their First Amendment rights. *Id.* The court rejected this argument because law enforcement secured the speaker's message by preventing the protestors from intervening. *Id.*

Additionally, law enforcement was not required to continue securing the speaker's First Amendment rights once the speaker participated in violence against the protesters and counter-protesters. *Id.*

In contrast, in *Bible Believers v. Wayne County*, the Sixth Circuit recognized when the government fails to prevent a crowd from silencing a speaker, that constitutes a First Amendment violation. 805 F.3d at 252. There, a religious group preached offensive messages with signs reinforcing those messages. *Id.* at 238. In response to their message, the crowd shouted profanities and sought to disrupt the religious group's message. *Id.* at 239. The religious group remained peaceful while passionately advocating for their cause. *Id.* at 257. Law enforcement did not intervene to stop the crowd's belligerent and assaultive conduct. *Id.* at 239. The Sixth Circuit held this "effectuated a heckler's veto," in direct violation of the First Amendment. *Id.* at 243. Although a government actor is not required to go down with the speaker, the officer must contain or snuff out the lawless behavior to prevent silencing the speaker. *See id.* at 252.

Similar to *Bible Believers*, McMillan was silenced through an unconstitutional heckler's veto. University students routinely shout down on campus speakers, leaving them unable to speak. R. at 5a. The University does not discipline the disruptive students, nor do its employees attempt to secure a speaker's First Amendment rights. R. at 5a. Five minutes into McMillan's speech on the University's campus, student protestors interrupted her and drowned out her attempts to continue speaking. R. at 5a. McMillan pleaded with the students to stop. R. at 5a.

Despite campus security being present, the security did nothing to prevent the students' disruptive behavior. R. at 7a. After fifteen minutes, she left the stage and did not return.⁸ R. at 5a. Although readily identified, these students faced no discipline for their behavior. R. at 5a. This is an unconstitutional heckler's veto. Thus, the Thirteenth Circuit's decision should be reversed because the University's failure to discipline its students violated McMillan's First Amendment rights.

CONCLUSION

Rule 50(b)'s requirements are clear. A party may not file a post-judgment motion more than twenty-eight days after the original judgment is entered. The University filed its motion thirty-five days after the original judgment. The amended judgment does not establish a new deadline for the University without a substantial relationship between the motion and the amended judgment. The University's post-judgment motion addressing liability bears no relationship to the amended judgment's addition of punitive damages. Thus, the University's motion was untimely because it was filed thirty-five days after the original judgment and bore no relationship to the amended judgment.

The University violated McMillan's First Amendment rights. The University's failure to protect McMillan's exercise of freedom of speech effectively silenced her. The University had a duty to do more than stand idly by as its students silence speakers based on their message. Without interference, students disrupt First

⁸ A person can state over 2,250 words in fifteen minutes, but not one word came from University officials to de-escalate the students' disruptive behavior.

Amendment protections and undermine an McMillan's right to speak in the marketplace of ideas.

For the foregoing reasons, Petitioner respectfully requests this Court reverse the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted this 18th day of November, 2024.

/s/ Team 32 _____
Team 32
Counsel for Petitioner