

No. 24-0514

In The
Supreme Court of the United States

DOVE MCMILLAN,

Petitioner,

v.

BOARD OF REGENTS OF
CITY UNIVERSITY OF LANTANA,

Respondent.

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

BRIEF FOR PETITIONER

ORAL ARGUMENT REQUESTED

Team P35

QUESTIONS PRESENTED

- 1) Whether a Rule 50(b) motion is improper when filed 35 days after the initial entry of final judgment and merely addresses a collateral issue undisturbed by the amended judgment.
- 2) Whether a public university's custom of inaction that allows for the majority to silence the minority in a public forum is violative of the right to free speech guaranteed by the First Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATEMENT OF THE CASE.....	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	9
I. The University’s Rule 50(b) motion should be denied because it is untimely and raises new issues beyond the scope of the preceding Rule 50(a) motion.	9
A. Amended judgments do not reset the timer of a Rule 50(b) motion unless modifying the merits of the underlying case.	9
B. The University’s Rule 50(b) deadline did not reset because it renewed an argument unrelated to the amended judgment.	13
II. The University violated McMillan’s First Amendment rights by denying her a minimal level of protection necessary to exercise her free speech.....	15
A. This Court should overrule <i>DeShaney</i> by holding that Section 1983 liability exists when government officials have reasonable knowledge of imminent harmful acts, the victim reasonably relied on government protection, and the absence of protection resulted in injury.	17
1. <i>DeShaney</i> is inconsistent with the government’s obligation to protect citizens in exchange for their allegiance and obedience.....	19
B. Congressional history reveals that the Fourteenth Amendment was intended to afford protections erroneously denied by <i>DeShaney</i> and its progeny.	21
1. Cases relying on <i>DeShaney</i> frequently deny protections to citizens despite congressional intent to prevent such injustices.	24
C. This Court should hold that the University’s custom violates the First Amendment by favoring majority viewpoints over the minority, even if <i>DeShaney</i> stands.....	29
1. Even a facially neutral custom, applied equally among viewpoints, violates the First Amendment when subjugating minority expression under majority rule.....	29
2. The University’s non-enforcement custom impermissibly advantages majority views over minority views.....	31
CONCLUSION	33

TABLE OF AUTHORITIES

United States Supreme Court Cases

<i>Bd. of Regents of Univ. of Wis. Sys. v. Southworth</i> , 529 U.S. 217 (2000)	31, 32
<i>Bd. of Regents v. Roth</i> , 408 U.S. 564 (1972)	12
<i>Buchanan v. Stanships, Inc.</i> , 485 U.S. 265 (1988)	10, 11
<i>Budinich v. Becton Dickinson and Co.</i> , 486 U.S. 196 (1988)	11
<i>Collins v. City of Harker Heights</i> , 503 U.S. 115 (1992)	19
<i>DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.</i> , 489 U.S. 189 (1988)	17, 18, 19, 20, 26, 27, 28
<i>Harris v. McRae</i> , 448 U.S. 297 (1980)	18
<i>Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31</i> , 585 U.S. 878 (2018)	18, 19, 33
<i>Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue</i> , 460 U.S. 575 (1983)	29
<i>Monasky v. Taglieri</i> , 589 U.S. 68 (2020)	9
<i>Monell v. Dep't of Soc. Servs. of City of New York</i> , 436 U.S. 658 (1978)	16
<i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015)	17, 19, 25
<i>Osterneck v. Ernest & Whitney</i> , 489 U.S. 169 (1989)	13
<i>Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.</i> , 487 U.S. 781 (1988)	29, 32
<i>Rosenberger v. Rector and Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995)	29, 31
<i>Santa Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000)	30
<i>Town of Castle Rock v. Gonzales</i> , 545 U.S. 748 (2005)	20, 24, 27, 28

<i>Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.</i> , 546 U.S. 394 (2006)	14, 15
<i>Virginia v. Black</i> , 538 U.S. 343 (2003)	28

United States Circuit Court Cases

<i>Amidon v. Student Ass’n for State Univ. of New York at Albany</i> , 508 F.3d 94 (2d Cir. 2007).....	30, 31
<i>Collard v. United States</i> , 10 F.3d 718 (10th Cir. 1993)	11
<i>Cornist v. Richland Par. Sch. Bd.</i> , 479 F.2d 37 (5th Cir. 1973)	11
<i>Erwin v. Cnty. Of Manitowoc</i> , 872 F.2d 1292 (7th Cir. 1989)	9
<i>Foy v. City of Berea</i> , 58 F.3d 227 (6th Cir. 1995)	25, 28
<i>McNabola v. Chicago Transit Auth.</i> , 10 F.3d 501 (7th Cir. 1993)	12, 13, 14
<i>Pierce v. Springfield Twp.</i> , 562 Fed. Appx. 431 (6th. Cir. 2014).....	20, 25, 26, 28
<i>Tru-Art Sign Co. v. Local 137 Sheet Metal Workers Int’l Ass’n</i> , 852 F.3d 217 (2d Cir. 2017).....	13, 14

Statutes

42 U.S. § 1983	15
Fed. R. Civ. P. 50(b)	10, 13
Fed. R. Civ. P. 6(b)(2).....	10
New Texas Penal Code § 9.31(b)(1).....	26

Other Authorities

Cong. Globe, 39th Cong., 1st Sess. 39 (1865).....	21, 22, 23 27
Steven J. Heyman, <u>The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment</u> , 41 Duke L.J. 507 (1991)	21

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2023. The petition for a writ of certiorari was filed on May 10, 2023, and granted on October 7, 2024. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides:

Congress shall make no law respecting an establish 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.

42 U.S.C. § 1983 provides:

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

STATEMENT OF THE CASE

A. Factual Background

The University. Respondent City University of Lantana is one of the oldest and most preeminent public educational institutions in the state of New Tejas. App. 2a. The University was founded as a coeducational institute in 1849 for the purpose of promoting “academic excellence, civic engagement, and leadership for the common good.” *Id.* Reflecting this commitment is the University’s motto: *Doctrina Perpetua*—“Forever Learning.” *Id.* at 3a. The University proudly generates accomplished alums, generous donors, championship athletics, and myriad student organizations. *Id.* But despite this storied history, the University has recently fallen to a level that “can be charitably described as ‘rowdy.’” *Id.*

The University’s Hands-Off Custom. The University’s Dean of Student Affairs, Mason Thatcher, refuses to discipline students. *Id.* at 4a. Indeed, Thatcher testified that his—and thus also the University’s—disciplinary philosophy is that “boys will be boys” and students merely “need a good talking to, not any kind of ‘punishment.’” *Id.* at 5a. This troubling approach allows students to “blow off a little steam” without any repercussions. *Id.* In recent years, students capitalized off this “hands-off” approach by executing disruptive and dangerous “pranks.” *Id.* at 3a, 5a. These “pranks” included leaving 100 chickens in the Hedge Family Auditorium, creating a slip n’ slide down the central staircase, and placing a car on the roof of New Tejas Hall. *Id.* at 3a. In one especially troubling situation, a student required hospitalization after participating in keg stands during a university graduation

reception. *Id.* at 3a n.2. The University never punished any student for these dangerous and disruptive acts. *Id.* at 4a. And these acts are not just limited to “pranks.”

The University boasts over 60 student groups on campus, some of which invite public figures to deliver speeches. *Id.* at 3a. But disruptive students habitually smother these speakers by interrupting and shouting down their presentations. *Id.* at 5a. Indeed, such behavior prevented numerous invited public speakers from talking to interested student organizations about topics including institutional racism, the legalization of marijuana, climate change, and Second Amendment rights. *Id.* Campus security refused to intervene in any of these incidents. *Id.* The University also declined to ever punish students for interrupting invited speakers. *Id.* This case arises from yet another instance of unpunished student conduct permitted under this hands-off approach.

McMillan’s Attempted Speech. Petitioner Dove McMillan is a prominent vegan advocate invited to speak on campus by the Campus Vegan Alliance. *Id.* at 6a. McMillan flew to Lantana, enjoyed a student-hosted dinner, and stayed the night at a local hotel. *Id.* The next day, McMillan arrived at the Hedge Family Auditorium to deliver her speech concerning the consumption of animal products. *Id.* This speech never happened. Shortly after beginning to speak, a large group of students amassed at the auditorium stage. *Id.* The students wore animal masks and costumes, and carried banners and noisemakers. *Id.* They smothered McMillan’s speech by making so much noise that it was impossible to hear her. *Id.* Despite McMillan’s and the

Campus Vegan Alliance's pleas to leave or quiet down, the students continued the harassment until McMillan left. *Id.* For an hour after McMillan left, the interfering students savaged various objects in the Hedge Family Auditorium, including the podium, tables, chairs, and carpet. *Id.* A member of campus security witnessed the entire incident but never intervened, instead allowing the students to stifle McMillan's speech and destroy property. *Id.* at 7a. The University successfully identified the students involved but refused to discipline any of them. *Id.* Instead, the University adhered to its hands-off custom allowing "boys [to] be boys" no matter the consequences of their actions. *Id.* at 5a, 7a.

B. Procedural Background

After being denied her opportunity to speak, McMillan sued the Board of Regents of City University of Lantana for violating her First Amendment rights under 42 U.S.C § 1983. *Id.* at 7a. The University moved for judgment as a matter of law under Rule 50(a) as to liability, but the district court denied the motion and the case proceeded to trial. *Id.* There, the jury found for McMillan and awarded her \$12,487 in compensatory damages and \$350,000 in punitive damages. *Id.* The district court entered a final judgment awarding compensatory damages on January 20, 2022. *Id.* Seven days later, on January 27, 2022, the district court *sua sponte* modified the judgment to include the punitive damages awarded by the jury. *Id.* On February 24, 2022, the University filed its Renewed Motion for Judgment as a Matter of Law under Rule 50(b) motion, once again challenging the jury's finding of liability. *Id.* at 7a, 21a. The district court denied the University's Rule 50(b) motion as untimely

because thirty-five days passed from the date of the original judgment. *Id.* at 7a. The University appealed to the Thirteenth Court of Appeals, which reversed the district court's ruling and rendered judgment in favor of the University. *Id.* at 10a, 14a. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

I.

The Thirteenth Circuit incorrectly interpreted the Federal Rules of Civil Procedure in holding that a Rule 50(b) motion is timely when filed thirty-five days after the entry of judgment. The plain language of Rule 50(b) requires that the motion be filed twenty-eight days “after the entry of judgment.” Other similar Rules employ identical language. Further, Rule 6 explains that courts “must not extend the time to act” under these rules, including Rule 50(b). But the lower court did exactly that and must be corrected.

The University’s Rule 50(b) motion is untimely because it was filed thirty-five days after the original entry of judgment. Although the district court issued an amended final judgment, it left the merits of the judgment untouched. Indeed, all that was modified was an issuance of punitive damages awarded by the jury but unintentionally absent from the original judgment. Courts have held that monetary awards do not usually disturb the finality of a judgment because they arise from the judgment itself. The present case is no exception—punitive damages were awarded because of the district court’s findings.

Moreover, the University’s Rule 50(b) motion fails because it does not address the issue of damages. A Rule 50(b) motion is limited to the arguments raised in the necessarily preceding Rule 50(a) motion. This is because a Rule 50(b) motion merely renews a Rule 50(a) motion. Here, the University’s Rule 50(a) motion challenged only liability—not an award of damages. Thus, the University’s Rule 50(b) motion only

pertains to liability, which was addressed with finality by the original entry of judgment and undisturbed by the amended judgment. Accordingly, the Thirteenth Circuit erred in its analysis by considering the motion, even if timely. For these reasons, this Court should **reverse** the lower court's decision.

II.

The University violated McMillan's First Amendment right to free speech by refusing to provide any degree of protection. The University possessed the knowledge, means, and exclusive authority to provide McMillan with the protection necessary to exercise her free speech in a public forum. Yet it refused to. The government need not enact a law or official policy for constitutional protections to arise. Mere customs like the University's hands-off approach to discipline is sufficient. Further, individuals may claim constitutional protections even in the absence of a law. Here, McMillan's right to free speech was denied because of the University's custom. McMillan is therefore entitled to relief under Section 1983. But the lower court incorrectly relied on *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.* to hold otherwise.

The Court should overrule *DeShaney* and recognize that in the First Amendment context, the State must provide minimal protection for citizens to exercise their rights. *DeShaney* interprets the Fourteenth Amendment in such a way that the government has no affirmative obligation to protect its citizens' rights, except in extremely limited circumstances like incarceration. *DeShaney* and its progeny permit government entities to avoid liability for inaction. This is most troubling in circumstances where the only legal solution for aggrieved parties is to rely on the

government. And when the government refuses to act, those individuals suffer harm without possibility for redress. This is not how the constitution was meant to operate.

Contrary to the holding in *DeShaney*, the government has a duty to protect its citizens in exchange for consent to be governed. The 39th Congress explained as much and sought for the Fourteenth Amendment to exemplify the principle that the constitution protects all because the government derives its legitimacy and power from the people. If the government is as free from the obligation to protect citizens as *DeShaney* posits, then law-abiding citizens' abilities to exercise their rights and protect themselves from harm are constantly impaired. This fails to comport with congressional history and the intent of the Fourteenth Amendment.

The University's custom of non-enforcement violates the First Amendment by preventing minority groups from using public forums without the consent of the majority. Indeed, the University's hands-off approach prevents any group or viewpoint lacking the majority's approval from exercising their right to free speech on campus. This custom directly conflicts with free speech jurisprudence's principles of viewpoint-neutrality. Thus, the University's custom to never discipline any students, while facially neutral, violates the First Amendment by permitting only popular viewpoints to exist on campus while allowing the free speech rights of minority views to be trampled.

The Court should overrule *DeShaney* and find that McMillan was entitled to protection on the University's campus. Accordingly, the Court should **reverse** the decision of the Thirteenth Circuit.

STANDARD OF REVIEW

Questions of law are reviewed *de novo*. *Monasky v. Taglieri*, 589 U.S. 68, 83 (2020). This case presents two questions of law: (1) whether the timer on a Rule 50(b) motion is reset after an amended judgment that does not affect the merits is issued; and (2) whether the First Amendment protects speech in instances of government inaction. When reviewing a Rule 50(b) motion, courts consider the factual basis of the trial judge's amended final judgment in the light most favorable to the prevailing party. Accordingly, the evidence should be considered in favor of McMillan, as the prevailing party at trial. *See Erwin v. Cnty. Of Manitowoc*, 872 F.2d 1292, 1295 (7th Cir. 1989).

ARGUMENT

I. The University's Rule 50(b) motion should be denied because it is untimely and raises new issues beyond the scope of the preceding Rule 50(a) motion.

The Court of Appeals for the Thirteenth Circuit incorrectly held that the University is entitled to judgment as a matter of law under Rule 50(b) motion. The Thirteenth Circuit's decision was incorrect for two reasons:

- (1) "The entry of judgment" refers to the original judgment because it resolved the merits of the underlying case; and
- (2) A Rule 50(b) deadline does not reset upon an amended judgment that is unrelated to the issue raised in the Rule 50(a) motion.

For these reasons, this Court should **reverse**.

A. Amended judgments do not reset the timer of a Rule 50(b) motion unless modifying the merits of the underlying case.

A Rule 50(b) motion is timely when filed “no later than *28 days* after the entry of judgment.” Fed. R. Civ. P. 50(b) (emphasis added). The Federal Rules make clear that, unlike some rules where deadlines may be extended, a court “must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).” Fed. R. Civ. P. 6(b)(2). Here, the University’s Rule 50(b) motion was filed *thirty-five days* after the original entry of judgment. Thus, the University’s motion was untimely, and the court of appeals lacked the authority to extend that deadline.

Rule 50(b) employs identical language to the other Rules addressed by Rule 6’s strict prohibition on extending time.¹ Each of these rules must be filed within a certain time “after the entry of judgment.” *E.g.*, Fed. R. Civ. P. 50(b). As a result, the question before the Court involves what “the entry of judgment” means. Most courts agree that the relevant judgment is the most recent judgment pertaining to the underlying merits. *See e.g., Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268 (1988). Indeed, the pertinent inquiry is whether the amendment involves “reconsideration of any aspect of the decision on the merits.” *Id.* In other words, an amendment does not reset the timer if it reconsiders “only what was due because of the judgment.” *Id.*

In *Buchanan*, this Court addressed a post judgment Rule 59(e) motion for costs in a wrongful death suit. *Id.* The Court explained that motions for fees or costs do not reset post judgment motion timing because such motions concern “only what was due because of the judgment.” *Id.* This makes sense because a judgment on the merits is

¹ These Rules are 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). While some have different time limits, all use the language “the entry of judgment.” Fed. R. Civ. P. 50(b) and (d), 52(b), 59(b), (d) and (e).

a “final decision” unless disturbed. See *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 199 (1988). A “final decision generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Id.*

Here, the original final judgment fully resolved the litigation on the merits. All the court needed to do was execute the judgment, but inadvertently excluded the jury’s award of punitive damages. App. 7a. Thus, when a court *sua sponte* enters an amended judgment solely to award costs, it does not reset to the timing of a Rule 59(e) motion. *Collard v. United States*, 10 F.3d 718, 719 (10th Cir. 1993). The Tenth Circuit followed the reasoning of *Buchanan*, finding that the original judgment “ended the litigation on the merits” and that “a cost award does not constitute litigation on the merits.” 10 F.3d at 719. This is similar to the present case, where punitive damages do not constitute litigation on the merits, but are merely a result of the resolved merits pertaining to liability.

The Thirteenth Circuit nonetheless relies on the Fifth Circuit’s approach in *Cornist v. Richland Par. Sch. Bd.*, 479 F.2d 37, 38–39 (5th Cir. 1973); App. 9a. In *Cornist*, the Fifth Circuit held that the timer resets when a superseding judgment “mak[es] a change of substance which disturb[s] or revise[s] legal rights and obligation.” 479 F.2d at 38–39. There, the amended judgment considered more than just punitive damages, including substantive obligations related to the underlying merits including the possible reinstatement of a teacher. *Id.* at 38. This necessarily disturbed the finality of the judgment because an obligation—whether to reinstate the teacher or not—implicated the teacher’s liberty interest in public employment.

See id.; *Bd. of Regents v. Roth*, 408 U.S. 564, 574 (1972) (recognizing that public school teachers have a safeguarded liberty interest in continued employment secured by the Fourteenth Amendment). Here, no such constitutional interests are concerned. The only modification was the awarded damages, which had previously been established by the jury. App. 7a. Thus, the Fifth Circuit’s approach is inapposite. This Court should instead apply the Seventh Circuit’s approach in *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 521 (7th Cir. 1993).

In *McNabola*, the district court decided on an issue regarding an award of additional fees and costs. *Id.* The Seventh Circuit held that a “decision on a fee award is left to the discretion of the district court in light of its superior understanding of the litigation and *the desirability of avoiding frequent appellate review of what essentially are factual matters.*” 10 F.3d at 518 (emphasis added). Moreover, in *McNabola*, the defendant contended that the district court erred in granting a prejudgment interest to the plaintiff’s back pay award. 10 F.3d at 519–20. *McNabola*, hoping to delay the timer so his own motion was timely, contended that the defendant “had filed a timely post-trial motion and that the finality of the district court’s judgment was therefore suspended for all purposes.” *Id.* Further, *McNabola* said that even if his motion for prejudgment interest was untimely, it should still be granted because “it was served within ten days of the amended judgment entered after *McNabola* has accepted the court-ordered remittitur.” *Id.*

The Supreme Court clarified this issue, holding that “a motion for prejudgment interest filed after entry of a final judgment is a motion to alter or amend the

judgment under Rule 59(e).” *Osterneck v. Ernest & Whitney*, 489 U.S. 169, 175 (1989). Under Rule 59(e), a timely motion for prejudgment interest “suspends the finality of the judgment and renders a nullity any notice of appeal filed prior to its resolution.” *McNabola*, 10 F.3d at 520. However, McNabola’s motion was not served within ten days of the judgment and was thus untimely. *Id.* Accordingly, the district court could not consider it because a motion for prejudgment interest is considered a Rule 59(e) motion. *Id.*; *Osterneck*, 489 U.S. at 175. Here, the district court similarly lacked the discretion to consider the University’s untimely motion.

The logic of the Seventh Circuit’s approach squares with the language and purpose of Rule 50(b). A Rule 50(b) motion is not intended to raise new issues or bring what are essentially factual issues to the court of appeals. Instead, it is to renew arguments made in a Rule 50(a) motion as to the merits of the case. Here, the University’s Rule 50(a) motion only challenged liability, binding its 50(b) motion to that narrow subject. *See* App. 23a. Because liability—not punitive damages—were raised in the Rule 50(a) motion, the timer would only reset if an amended judgment reconsidered liability. *See Tru-Art Sign Co. v. Local 137 Sheet Metal Workers Int’l Ass’n*, 852 F.3d 217, 221 (2d Cir. 2017). Here, it did not. Thus, the time began with the original judgment and never stopped, rendering the University’s motion untimely.

B. The University’s Rule 50(b) deadline did not reset because it renewed an argument unrelated to the amended judgment.

A Rule 50(b) motion is bound to the arguments raised in the preceding Rule 50(a) motion. *See* Fed. R. Civ. P. 50(b); *Unitherm Food Sys., Inc. v. Swift-Eckrich*,

Inc., 546 U.S. 394, 403–405 (2006). Here, the University’s Rule 50(a) motion addressed only the issue of liability. App. 23a. But this issue was fully resolved and decided in the original final judgment and undisturbed by the amended judgment. *Id.* The University is therefore only permitted to renew its challenge as to liability through a Rule 50(b) motion. *See id.*; Fed. R. Civ. P. 50(b).

Courts may reset the timer on a Rule 50(b) motion if an amended judgment affects the contents of the Rule 50(a) motion. *See Tru-Art*, 852 F.3d at 221. When a motion “bear[s] [no] relationship” to the basis for alteration, the court cannot reset or extend the deadline. *Id.* Indeed, the time runs from the original judgment—not the amended judgment. This is because “when a district court alters its judgment, a party aggrieved by the alteration must ask for correction *of that alteration* to have the timeliness of their correction determined from the date of the altered judgment.” *Id.* at 221–222 (emphasis added). This approach makes sense because it is reasonable for an aggrieved party to have the opportunity to challenge an alteration to a matter the party sought to challenge earlier. *See id.* But because a Rule 50(b) motion merely renews a Rule 50(a) argument, the 50(a) must have addressed the alteration. *See Unitherm*, 546 U.S. at 403–405. Otherwise, litigants would be permitted to renew a Rule 50(a) challenge through a Rule 50(b) motion whenever any amendment is made. This would defeat the purpose of post judgment motion time limits to prevent frequent appellate review of factual issues. *See McNabola*, 10 F.3d at 518.

As articulated by the Second Circuit, if the motion “bears no relationship to the district court’s alteration of the initial judgment, the motion’s timeliness is

determined from the date of the earlier judgment. *Tru-Art*, 852 F.3d at 221–222. The approach aligns with the purpose of post judgment motions and provides a reasonable framework for balancing the interests of the parties and the Rules. When a 50(b) motion pertains to the alteration in an amended judgment, it makes sense for the timer to reset. But when the motion and amended judgment are unrelated, it would be unreasonable to reset the timer. *See id.* Even if the timer reset, the renewed argument would be isolated from the alteration because it addresses a matter resting in finality. *See Unitherm*, 546 U.S. at 403–405. Here, the University could only renew its challenge as to liability. But that issue was settled by the jury when it found in favor of McMillan.

Because the Rule 50(b) motion bears no relationship to the alteration within the amended judgment, the timer remains with the original judgment. Thus, the University filed its Rule 50(b) seven days too late, and the appellate court cannot extend the deadline. Fed. R. Civ. P. 6(b)(2), 50(b). For these reasons, the University’s motion should be denied, and this Court should reverse the Thirteenth Circuit’s decision.

II. The University violated McMillan’s First Amendment rights by denying her a minimal level of protection necessary to exercise her free speech.

Section 1983 imposes liability on government entities and officials who deprive someone of “any rights, privileges, or immunities secured by the Constitution” while acting under the color of state law. 42 U.S. § 1983. It is not a requirement that the government formally approve a policy that violates a person’s constitutional rights.

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978). Rather, “local governments . . . may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval.” *Id.* That is exactly the type of Constitutional deprivation McMillan suffered here—the University’s custom of not disciplining students resulted in the stifling of her speech. *See* App. 6a.

McMillan’s First Amendment rights were violated because of the University’s custom of offering no protection at public forums on campus, even when public speakers and student organizations attempt to exchange ideas. *See* App. 5a. Despite the University having the means and knowledge to provide minimal protection to public speakers on their campus, the University argues there is no duty to afford that protection to anyone. *Id.* The University claims it is shielded from any Section 1983 liability that arises from its hands-off custom, because of this Court’s holding in *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1988). There, this Court held that the government generally has no affirmative obligation to protect citizens’ opportunities to exercise their constitutional rights. *Id.* Even though McMillan had every obligation to adhere to the University’s laws and policies while on campus, the University argues that it owed no positive obligations to McMillan.

Petitioner prays this court will correct this disparity by overruling *DeShaney* by finding that the University possessed an obligation to protect McMillan’s opportunity to exercise her First Amendment right to free speech.

Alternatively, this Court should hold that the University's custom of non-interference and non-punishment violated McMillan's First Amendment rights by values majority views over minority views in a manner inconsistent with the First Amendment's principles of viewpoint neutrality. For either of these reasons, this Court should **reverse**.

A. This Court should overrule *DeShaney* by holding that Section 1983 liability exists when government officials have reasonable knowledge of imminent harmful acts, the victim reasonably relied on government protection, and the absence of protection resulted in injury.

This Court should reconsider *DeShaney* and hold that the constitution *does* entitle citizens protection to exercise their rights in certain circumstances. *See* 489 U.S. at 196. Section 1983 liability should be established in circumstances where (1) government officials have reasonable knowledge of imminent harmful acts—even if committed by private actors; (2) victims reasonably relied on government protection; and (3) victims suffered injury as a result of the absence of protection. Holding so will enhance constitutional protections by rectifying those limited circumstances in which government inaction is permitted despite the suffering of citizens. *See, e.g., id.* (holding government has no duty to investigate reported incidents of child abuse). It cannot be that the constitution permits the government to watch idly as citizens suffer because of the government's inaction. Indeed, the purpose of the Constitution is “to withdraw certain subjects from the vicissitudes of political controversy, *to place them beyond the reach of majorities and officials*, and to establish them as legal principles to be applied by the courts.” *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015)

(emphasis added); *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31*, 585 U.S. 878, 930 n.28 (2018) (emphasizing this purpose specifically regarding the First Amendment).

The Court in *DeShaney* ruled that there is no entitlement to police protection to enjoy the rights guaranteed by the Fourteenth Amendment. *Id.* (“Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . . it does not confer an entitlement to [governmental protection] as may be necessary to realize . . . that freedom.”) (citing *Harris v. McRae*, 448 U.S. 297, 317–318 (1980)). The *DeShaney* Court considered whether the state was liable for violating a child’s Fourteenth Amendment rights by failing to investigate reported instances of child abuse. 489 U.S. at 192. The Court held it was not, reasoning that there are narrow circumstances in which the government owes a duty to protect. *Id.* at 200. In other words, knowledge potential harm to citizens or an expressed intent to provide aid are insufficient. *Id.* Only a government-imposed limitation on an individual’s freedom to act on their own behalf like incarceration qualifies. *Id.*

DeShaney’s standard is too narrow. Affording constitutional protection only to individuals in custody neglects all others. All persons should be entitled to a reasonable expectation of constitutional protection. *See Obergefell*, 576 U.S. at 677. In *Obergefell*, this Court recognized that even historically overlooked populations deserve constitutional protections to exercise the same rights as all others. *Id.* Indeed, this Court admonished past cases that supplanted constitutional protections for

majority viewpoints. *Id.* at 678 (agreeing that “*Bowers* was not correct when it was decided.”). The holding in *DeShaney* similarly fails to afford appropriate constitutional protections to all. *DeShaney* is inconsistent with the drafters’ understanding of the Fourteenth Amendment and detracts from the other constitutional guarantees like the right to free speech.

Here, the Thirteenth Circuit applied this same wayward reasoning in holding that the University need not protect McMillan—and by extension all minority or unpopular viewpoints—from the majority. *See* App. 14a. This cannot stand. *See Obergefell*, 576 U.S. at 677; *Janus*, 585 U.S. at 930. Indeed, an “individual can invoke a right to constitutional protection when he or she is harmed, *even if the broader public disagrees and even if the legislature refuses to act.*” *Obergefell*, 576 U.S. at 677 (emphasis added). Thus, a foundational purpose of the Constitution is to afford protection to those who otherwise cannot protect themselves. *See id.*; *Janus*, 585 U.S. at 930 n.28. Here, the Court should overrule *DeShaney* to the extent that it fails this purpose.

- 1. DeShaney is inconsistent with the government’s obligation to protect citizens in exchange for their allegiance and obedience.**

The holding in *DeShaney* prevents citizens from receiving damages and wrongfully shields government actors in situations where there was a reasonable expectation to receive government protection, and the official had reasonable knowledge of the dangerous nature of the situation.

DeShaney held that the only circumstances in which the government is liable for failing to protect citizens' ability to exercise their rights are formal custody or a state-created danger. See *DeShaney*, 489 U.S. at 198–201. The Court further narrowed the state-created danger doctrine in *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992). Under *Collins*, a government official is only liable for failing to protect a citizen's ability to exercise their rights if inaction by the official is arbitrary or "conscience shocking, in a constitutional sense." *Id.* *DeShaney* and subsequently *Collins* both err in outcome and law.

When considering the custody aspect, *DeShaney* and its progeny downplay the obligations that the government has to its citizens. This is most egregious when a special relationship exists between the state and private actors outside of the prison context. See *DeShaney*, 489 U.S. at 199–200. In *DeShaney*, the Court reasoned that in the absence of state-created danger, the State only has an affirmative duty to facilitate a person's rights when that individual is "taken into its custody" and held there "against [their will]." *Id.* at 200. Courts have interpreted this to mean that outside of the prison context, there is *no* instance where a person is sufficiently in custody to create this obligation. See *DeShaney*, 489 U.S. at 199 (a child supervised by CPS did not sufficiently establish a custodial relationship); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (holding a mother with a restraining order against her ex-husband did not have a custodial relationship with the state); *Pierce v. Springfield Twp.*, 562 Fed. Appx. 431, 437 (6th. Cir. 2014) (an individual suffering

from a gunshot wound in a crime scene secured by police did not constitute custody under *DeShaney*).

Under the *DeShaney* standard, if an individual is under any less than complete and involuntary incarceration, the government has no custodial relationship with that individual. *See DeShaney*, 489 U.S. at 200. This approach is not only at odds with the relationship that governments have with their citizens as how the framers of the Fourteenth Amendment understood it, but also in the way the relationship plays out.

B. Congressional history reveals that the Fourteenth Amendment was intended to afford protections erroneously denied by *DeShaney* and its progeny.

The historical record of the 39th Congress—who debated and ratified the Fourteenth Amendment—makes clear that the drafters expected the Fourteenth Amendment include some affirmative obligation on the government to protect citizens in their exercise of constitutional rights. *See Cong. Globe*, 39th Cong., 1st Sess. 39 (1865).²

Many legislators in the 39th Congress expressed an understanding that citizens should receive more than simple non-interference from their relationship with the government—they should also receive some affirmative protections. *See id.* at 570. Senator Justin Morrill, explained that “essential elements of citizenship” included “allegiance on one side and protection on the other.” *Id.* Representative

² Steven J. Heyman, The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment, 41 Duke L.J. 507 (1991).

Samuel Shellabarger agreed it was “self-evident” that protection by “his government is the right of every citizen.” *Id.* at 1239. Senator Alvin Stewart added that “protection and allegiance are reciprocal.” *Id.* at 2799. Senator Lyman Trumbull elaborated that citizens of a nation accept limitations on their natural liberty in exchange for “the protection which civil government gives him.” *Id.* at 474. These Senators and Representatives understood that by conceding to governance, citizens expect and deserve protection in return. *See id.* If citizens cannot expect protection in exchange for “allegiance,” then there is little reason to consent to be governed at all. *See id.*

Even Legislators opposed to the Fourteenth Amendment agreed that citizens should expect some protection in exchange for citizenship. Senator James McDougall responded to Senator Trumbull’s comments by agreeing that “under all governments that are free, freedom is *perfect protection* in life, liberty, and the enjoyment and pursuit of happiness.” *Id.* (emphasis added). Other Fourteenth Amendment similarly maintained that “all the arrangements of life with regard to the protection of property and persons” were the responsibility of the states and that there was no reason “to assume that a state [would] not do its duty to its citizens.” *Id.* at 1270. Opponents like Senator McDougall did not believe that the Fourteenth Amendment was necessary to further the “duty” of government protection states already had to their citizens. *See id.*

This evidences a consistent understanding that it would be paradoxical to have allegiance to a government authority monopolizing the use of force with no expectation of protection in return. *See id.* at 1757. On the debate floor Senator

Trumbull posed the question, “How is it . . . we have got a Government which is all-powerful to command the obedience of the citizen, but has no power to afford him protection?” *Id.* Senator Trumbull also stipulated that “American citizenship would be little worth if it did not carry protection with it.” *Id.* Representative James Wilson argued that if the national government had a duty to protect its citizens abroad then there is an equal duty to protect them at home.

[I]f all the terrible powers of war may be resorted to for the protection of the rights of our citizens when those rights are disregarded and trampled on beyond our jurisdiction, is it possible that our Constitution is so defective that we have no power under it to protect our citizens within our own jurisdiction through the peaceful means of statutes and courts?

Id. at 1119. Thus, the 39th Congress demonstrated a unified understanding that the Fourteenth Amendment imposed an obligation to provide at least some minimal protection for citizens to exercise their constitutional rights. Despite this, *DeShaney* held otherwise.

The goal of the Fourteenth Amendment is to provide “perfect protection” to citizens—and *DeShaney* falls short of perfection. *See id.* at 474. The drafters never intended for only incarcerated individuals to expect protection from the government; they felt that protection is the “right of every citizen.” *Id.* at 1239. By holding that obligations to provide protection only arise when an individual is incarcerated, *DeShaney’s* holding punishes law-abiding citizens who have adhered to their obligation of “obedience” to the state while rewarding those who have violated the law with the protection of their rights. *See id.* At 1270. This could not be further from how

the 39th Congress intended for the Fourteenth Amendment and the duty of the government to protect its citizens.

1. Cases relying on *DeShaney* frequently deny protections to citizens despite congressional intent to prevent such injustices.

The intended purpose of the Fourteenth Amendment has become lost in *DeShaney* and its progeny. For example, the Court relied on *DeShaney* when holding that police officers have no duty to protect a citizen despite numerous reports of restraining order violations and kidnapping. *Castle Rock*, 545 U.S. at 768. There, Jessica Gonzales was a mother who had secured a permanent restraining order against her former husband. *Id.* at 752. But her ex-husband violated the restraining order and kidnapped their three children. *Id.* at 753. He later murdered all three. *Id.* at 754. Gonzales reported her children's kidnapping and her husband's violation of the restraining order multiple times to the police. *Id.* But the police failed to take any action in response to Gonzales's complaints. The police only acted when the husband arrived at the police station and engaged in a shootout. *Id.* at 754. The Court ultimately held that Gonzales lacked entitlement to protections for a 1983 suit under the Fourteenth Amendment. *Id.* at 768. ("In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause.")

The function of a restraining order is to afford the holder some level of protection against the individual that is restrained. But the *Castle Rock* Court rendered Gonzales's restraining order effectively useless. *Id.* at 768. Indeed, Gonzales

exhausted all available steps the law afforded her to protect herself and her children—she obtained a restraining order and relied on the police when reporting to them. But under *DeShaney*, she was not an incarcerated individual and therefore had no entitlement to protections under the law. *See id.* The Court ultimately suggested that “the people of Colorado are free to craft such a system [to protect themselves] under state law.” *Id.* at 769. This cannot be what the constitution intended. *See Obergefell*, 576 U.S. 644, 677 (“An individual can invoke a right to constitutional protection when he or she is harmed . . . even if the legislature refuses to act.”).

Appellate courts have adopted this troubling reasoning. In *Foy v. City of Berea*, the police knew of danger at an Ohio college but could not be held liable because they did not have custody of the bad actor. *See* 58 F.3d 227, 231 (6th Cir. 1995). There, two drunk college students were questioned about falsely pulling a fire alarm. *Id.* at 228. When police responded to the scene an officer told the two intoxicated students to leave the scene in their car or be arrested. *Id.* at 229. In the subsequent drive, the car was involved in an accident and killed the students. *Id.* The mother of one of the deceased students tried to bring a substantive due process claim arguing that the officers were liable for not protecting him. *Id.* at 231–32. The court concluded that the officers had no duty to protect the two students because they were not in custody and therefore had not sufficiently deprived the two of their “ability to care for themselves.” *Id.* Like the University security officer here, the officers in *Foy* were in the best position to prevent harm. But *DeShaney* permits inaction because the officers did not have complete custody of the bad actors.

In *Pierce v. Springfield Twp.*, the court went so far as to say that an individual with an emergency wound, bleeding out in the presence of police, at a secured crime scene, likewise had no entitlement to police custody. *See* 562 Fed. Appx. at 437. In *Pierce*, the plaintiff suffered a self-inflicted gunshot while running from police. *Id.* at 433. While the police approached the plaintiff and secured the scene, the officers audibly heard the injured plaintiff scream “I’m going to die.” *Id.* The officers observed that the plaintiff was injured and bleeding but did nothing to help until paramedics arrived. *Id.* Despite all the affirmative steps the officers took to create a situation where the plaintiff’s only option for help was to rely on the officers for assistance, because of *DeShaney*, the officers had no affirmative duty to help because the victim was not in custody. *See id.* at 437.

Here, like the police in *Pierce*, a campus officer was on duty at the University when the mob interrupted McMillan’s speech. App. 7a. The campus officer observed the interruption and refused to do anything to stop the interruption and destruction. *See id.* The only avenue for recourse McMillan and the Campus Vegan Alliance had to stop the mob and continue to exercise their First Amendment rights in the moment was to rely on the officer to stop it, but the officer did nothing. *See id.* Both McMillan and the students asked the mob to stop, but their requests were denied. *See* App. 6a. Had McMillan or the attending students been armed, state law would have prohibited the use of force to end the mob’s disruption. *See* New Texas Penal Code § 9.31(b)(1) (use of deadly force is not justified “in response to verbal provocation alone”). The only person in attendance who had the authority to use any level of force to stop the mob

was the officer. *See* App. 7a. However, under *DeShaney*, despite the officer having all the knowledge, means, and authority to help McMillan and the Campus Vegan Alliance, because the speaker and attendees were not incarcerated the officer had no positive duty to assist or protect them. *See DeShaney*, 489 U.S. at 200.

DeShaney emphasized that since the government has not detained an individual, they do not have a duty to protect them because the State has not impaired the individual's ability to protect themselves. *See* 489 U.S. at 201 (reasoning that the State did not "do anything to render [the victim] any more vulnerable" to danger, by not investigating instances of child abuse). This greatly distorts the way that individuals often rely on their governments for protection. Citizens rely on their government's protection while outside of custody every day. In *DeShaney* the appropriate course of action for someone to stop the child abuse in that case was to contact Child Protective Services. *See id.* at 193. In *Castle Rock*, the appropriate remedy for the mother whose children were kidnapped and murdered was to call the police. *See* 545 U.S. at 753. Here, the appropriate remedy for McMillan was for campus security to prevent the disruptive mob.

In all of these cases, the government's refusal to protect absolutely impaired the victim's ability to protect themselves. The only other solution for McMillan to continue to exercise her free speech rights would have been extra-judicial violence. The reality faced by many citizens is that often the government is the only entity that has any avenue to protect them from private violence and for that reason, those citizens should be able to rely on that assurance reasonably.

As the Framers correctly noted, a U.S. citizen's allegiance to the government is omnipresent. *See* Cong. Globe, 39th Cong. at 1270 ("we have got a Government which is all-powerful to command the obedience of the citizen"). No matter where a U.S. citizen is, they have an obligation to adhere to the laws of the United States. If a citizen's duty to their government is ever present, it cannot be that the government's only affirmative obligations to protect its citizens arise when they are in custody. But this is the very paradox that *DeShaney* stands for. *DeShaney* has permitted "horrific" government inaction.³

Petitioner respectfully asks the Court to prevent the damage done by *DeShaney* in the Fourteenth Amendment context from going further and eroding the First Amendment. If McMillan's duty to the government is not limited to the prison context, then the government's protection of her First Amendment rights should not be either. We ask this court to recognize that here, the government had a sufficient custodial relationship with McMillan to require minimal protection of her First Amendment rights.

³ Like *DeShaney's* own horrific facts of a child stuck in an abusive situation, *DeShaney's* progeny is rife with cases where government officials had knowledge of danger, the victim reasonably relied on protection, and the victim suffered an injury due to the absence of that protection. *See DeShaney*, 489 U.S. at 200 (allowed CPS to ignore reported instances of child abuse); *Castle Rock*, 545 U.S. at 768 (allowed police to ignore a violated restraining order); *Pierce* (allowed officers to ignore an injured person when there was no other danger). *Foy*, 58 F.3d 227, 231–32 (allowed police to send intoxicated students off in their car, leading to their deaths).

C. This Court should hold that the University’s custom violates the First Amendment by favoring majority viewpoints over the minority, even if *DeShaney* stands.

To hold that the First Amendment affords no protection to individuals exercising their free speech rights means that any minority voices can be silenced by the tyranny of the majority. The First Amendment guarantees that all voices deserve to speak their position regardless of their popularity or agreement. *Virginia v. Black*, 538 U.S. 343, 358 (2003). Indeed, the “hallmark of the protection of free speech is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting.” *Id.* Here, the University’s failure to protect speakers subjugates unpopular ideas to the exact kind of mob rule prohibited by the First Amendment. *See id.* Such failure cries out for correction.

1. Even a facially neutral custom, applied equally among viewpoints, violates the First Amendment when subjugating minority expression under majority rule.

A law that violates the First Amendment can include facially discriminatory language that singles out a certain perspective, speaker, or opinion. *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 581 (1983) (holding that a tax provision on ink and paper that only applied to certain small newspapers was facially discriminatory and violated the First Amendment). Or the law might be applied in a way that carves out unpopular speech in its application. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-830 (1995) (viewpoint discrimination is an “egregious form of content discrimination” and is “presumptively unconstitutional”).

Even in the absence of evidence of viewpoint discrimination or application, this court has recognized that a facially neutral law can violate the First Amendment if it “necessarily discriminates” in effect against small or unpopular viewpoints. *Riley v. Nat’l Fed’n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 799 (1988). The *Riley* Court held that a North Carolina law prohibiting fundraisers from retaining “unreasonable” or “excessive fees violated the First Amendment even though the law was facially neutral and applied to all charities equally. *Id.* at 786. The Court found that the fundraising regulation violated the First Amendment because it placed less popular charities in a more difficult position, where fundraisers might be disincentivized to engage with them relative to their larger counterparts. *Id.* at 794. Even though the law was applied equally among charities it had a disparate impact on small organizations. *Id.* at 793 (describing how the requirement discriminates against “small or unpopular charities”). It was this disproportionate effect on small or less popular charities that led the *Riley* Court to find the law violated the First Amendment. *Id.* Here, like in *Riley*, the University’s custom of not punishing or disciplining students who smother unpopular public speakers “guarantees, by definition, that minority candidates will *never* prevail and that *their views will be effectively silenced.*” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304 (2000) (emphasis added).

The Second Circuit similarly found that a policy dealing with an allocation of student funds for various organizations violated the First Amendment because the policy favored popular organizations over those with minority views. *See Amidon v.*

Student Ass’n for State Univ. of New York at Albany, 508 F.3d 94, 102 (2d Cir. 2007).

The Court in *Amidon* struck down a student referendum that allocated funds and in doing so the court found that even though the policy was facially neutral any contrary or minority view was at a disadvantage. The referendum simply asked the student body whether an organization is entitled to a certain amount of funding” *Id* at 101.

2. The University’s non-enforcement custom impermissibly advantages majority views over minority views.

The University’s custom of not punishing or discouraging students when they prevent a speaker from exercising their First Amendment rights has the same “favoritism of majority views” effect as the policies discussed above. *See Amidon*, 508 F.3d at 102. The University’s hands-off custom leaves public speakers to rely on the cooperation of the very majoritarian views that they are speaking against. This has the largest impact on small or unpopular groups. Any public speaker who wishes to express an idea even moderately adverse to the popular view has no avenue for redress. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 232 (2000) (taking issue with “insufficient protections” for “objecting students”). Like in *Southworth*, in this case, “the vast extent of permitted expression... underscores the high potential for intrusion on the objecting students’ First Amendment rights.” *Id*. Under this approach, only speakers who share their opinions with the majority will have the opportunity to express their ideas. *See id.* at 235. And anyone who disagrees with those views has no opportunity to refute them in a public forum. *See id.*

This not only infringes on the First Amendment rights of speakers to express ideas but it also infringes on the rights of student groups to hear differing viewpoints.

Universities are a hub of debate, discussion, and ideological exchange. *See Rosenberg*, 515 U.S. at 836 (recognizing that universities are “vital centers for the nation’s intellectual life”). College campuses are one of the most important public forums for the free flow of ideas. *See id.* It is paramount for the learning experience of students that they have the opportunity to hear from a wide range of perspectives during their undergraduate education. *See id.* The University’s custom prevents student groups who want to hear outside voices from receiving from benefitting in those discussions. Protesters have prevented student organizations from hearing talks on a whole host of political issues. Ranging from the legalization of marijuana to climate change to the Second Amendment to institutional racism. C.R. 5. The student organizations invited these speakers to discuss various topics and because the University refuses to provide any protection or punishment to students who disrupt these events, none of the student organizations were able to participate in the dialogues they sought out. *See id.* With this trend of disruptions, speakers will likely be encouraged to “cease engaging” with minority student organizations at the University. *See Riley*, 487 U.S. at 794.

The court has recognized that when a facially neutral law’s discouraging effect only disfavors minority or unpopular voices, then that policy violates the First Amendment. *See id.* (“Whether one views this as a restriction of the charities’ ability to speak or a restriction of the professional fundraisers’ ability to speak, the restriction is undoubtedly one on speech and cannot be countenanced here”). That is exactly the kind of effect the University’s custom has on student organizations and

public speakers. *See id.* The University has given majority perspectives unilateral control over the campus's public forums in a way that is irreconcilable with the principles and foundations of the First Amendment. *See Southworth*, 529 U.S. at 235 (“[t]he whole theory of viewpoint neutrality is that the minority views are treated with the same respect as are majority views.”) If this Court holds that public universities have no positive obligation to protect speakers on their campuses, then universities can suppress unpopular speech through inaction, thereby allowing the majority to extinguish any ideas they disagree with. Such an outcome opposes this Court's jurisprudence and the fundamental principles of the First Amendment. *See, e.g., Janus*, 585 U.S. at 930.

CONCLUSION

First, a Rule 50(b) motion must be filed within twenty-eight days from the entry of judgment. Unless the challenge to be renewed is related to the alteration in an amended judgment, the deadline cannot be reset or extended. Here, the University challenged liability—not punitive damages. Yet punitive damages were the sole alteration. Thus, the timer did not reset, and the University's Rule 50(b) motion was untimely.

Second, the First Amendment guarantees the right to free speech, no matter how unpopular a viewpoint may be. Here, the University's custom of never disciplining students enabled the majority to stifle the views of the minority. McMillan was denied the opportunity to freely speak and share her views because of the University's hands-off approach. Further, the constitution affords protections to

individuals so that they may exercise their rights. DeShaney and its progeny contrarily permits to government to idle while its inaction harms citizens, eroding the protection of the Fourteenth Amendment. This Court should not permit such damage from plaguing the First Amendment and overrule DeShaney by clarifying that the government owes at least a minimal duty to protect citizens.

For these reasons, Petitioner respectfully requests the Court **reverse** the Thirteenth Circuit and deny the Rule 50(b) motion or, alternatively, hold that the University violated the First Amendment by failing to protect McMillan's speech.

Dated: November 18, 2024

Respectfully Submitted,
/s/ Counsel for Team P35

Certificate of Service

Petitioner certifies that this brief has been served on counsel of record for the teams of the MCNC Competition and the MCNC Championship Committee by email to the Championship Committee:

mcncboard@gmail.com

Dated: November 18, 2024

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Certificate of Compliance

The undersigned counsel certifies that the components of this brief included within the word count total **8984** words. Counsel further certifies that the brief was prepared in accordance with all other Championship rules.

Dated: November 18, 2024

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