

Docket No. 24-0514

IN THE

Supreme Court of the United States

OCTOBER TERM 2024

DOVE MCMILLAN,

Petitioner,

v.

BOARD OF REGENTS OF CITY UNIVERSITY OF LANTANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team 36
Counsel for Petitioner
November 18, 2024

QUESTIONS PRESENTED

- I. Whether an amendment to a final judgment only extends the deadline for filing post-judgment motions related to the substance of that amendment when revisions to the Federal Rules of Civil Procedure created a consistent deadline for post-judgment motions and when the rules explicitly prohibit extension of that deadline?

- II. Whether a university may be held liable for violating the First Amendment when it adopts a policy of refusing to protect speakers who were invited to speak on campus from student hecklers attempting to silence the speakers and when campus security officers are present during such speech-silencing but refuse to intervene?

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The opinion of the United States District Court for the Eastern District of New Texas is unpublished and may be found at *McMillan v. Board of Regents of City University of Lantana*, No. 21-cv-1285 (E.D. New Texas Mar. 29, 2022). The most recent opinion issued in that case appears on pages 20a to 24a of the record. The opinion of the United States Court of Appeals for the Thirteenth Circuit is unpublished and may be found at *McMillan v. Board of Regents of City University of Lantana*, No. 22-0514 (13th Cir. May 10, 2023) and on pages 1a to 19a of the record.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of New Texas had original jurisdiction of this action under 28 U.S.C. § 1331 and entered its most recent final judgment on March 29, 2022. R. at 20a. The United States Court of Appeals for the Thirteenth Circuit had jurisdiction over the appeal under 28 U.S.C. § 1291 and entered its judgment on May 10, 2023. R. at 1a. Petitioner filed a timely petition for writ of certiorari, which this Court granted pursuant to 28 U.S.C. § 1254(a) on October 7, 2024.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This action was brought pursuant to 42 U.S.C. § 1983, but one of the central issues on appeal is the timeliness of post-judgment motions for judgment as a matter of law. Such motions are governed by Federal Rule of Civil Procedure 50, and the timeliness of such motions is affected by Federal Rule of Civil Procedure 6(b). The central constitutional provision in this case is the First Amendment to the United

States Constitution. U.S. Const. amend. I. The pertinent portions of each of these provisions, statutes, and rules have been reproduced in the Appendix.

STATEMENT OF THE CASE

Mason Thatcher Becomes Dean of Student Affairs

After seven years in the NFL, Mason Thatcher was hired as Dean of Student Affairs at Lantana University (“the University”). R. at 4a. Despite having no prior academic experience, Dean Thatcher excelled in many aspects of his job. *Id.* His tailgate parties became popular with alumni, and donations increased substantially under his leadership. *Id.*

The University Adopts a Hands-Off Approach to Student Discipline

After Dean Thatcher was hired as the Dean of Student Affairs, the University’s campus security began to take a more hands-off approach to student discipline. R. at 5a. This approach is consistent with the philosophy Dean Thatcher espouses. *Id.* In his own words, he prefers to take a “boys will be boys” approach to student discipline. *Id.* In his mind, the University’s students are “good kids,” and rather than any sort of “punishment,” all they need is “a good talking to” from time to time. *Id.*

Since the campus security shifted towards a more hands-off approach, many students have engaged in destructive or disruptive behavior without facing any formal punishment. *See* R. at 3a–5a. For example, no students were formally disciplined after a car was placed on the roof of New Tejas Hall as part of an elaborate prank. R. at 3a. Similarly, no students faced discipline after turning the University’s central staircase into a giant slip-n-slide. *Id.* And when one hundred chickens were let loose in Hedge Auditorium, the University’s campus security staff took no steps to punish the students. *Id.* Dean Thatcher admits these sorts of pranks might “get out

of hand every now and then,” but still professes to believe that the students “work hard” and “just need to blow off a little steam.” *Id.*

Students Begin Silencing Speakers Invited to Speak on Campus

In recent years, University students’ rowdy behavior has not just been confined to pranks. *Id.* Although some of their parties have grown wild enough to disrupt classes and other scheduled events, *id.*, none of the students responsible for the parties have been disciplined, R. at 4a. The University’s students have also adopted the habit of attending speaking events and making enough noise to drown out the speaker’s words. R. at 5a. Each time this happened, the scheduled speaker had been invited by one of the University’s sixty different student organizations, R. at 3a, to speak on a matter of importance to that organization, R. at 5a. For example, when the Black Student Coalition invited a speaker to campus to address issues relating to institutional racism, that speaker was silenced by the student protestors. *Id.* The same thing happened to speakers who had been invited by the High Five Society and by Carbon 180 to speak about marijuana legalization and climate change. *Id.* And when the Lantana Students for Armed Self-Defense invited speakers to campus to discuss Second Amendment rights, they could not hear the speaker’s planned speech—again because of the student protestors. *Id.*

With respect to each of these disruptions, the University’s security officers did nothing. *Id.* They never intervened to make sure the speakers were able to speak or that attendees were able to listen. *Id.* Nor did the University discipline any of the students who played a part in silencing the speakers. *Id.*

Dove McMillan's Speech is Drowned Out

As many of the University's other student organizations have done, the Campus Vegan Alliance invited a speaker to the University to discuss an issue of importance to the group's members. *See* R. at 6a. That speaker was Dove McMillan, a well-known vegan advocate, who had planned to deliver a speech in the Hedge Family auditorium on the importance of abstaining from animal products. *Id.* Approximately five minutes into the speech, however, her words began to be drowned out by a large group of students gathered near the foot of the auditorium stage. *Id.*

Some students were wearing animal masks; several were also carrying noisemakers. *Id.* Together, they made enough noise to prevent Ms. McMillan's words from being understood. *Id.* Repeatedly, students who had come to listen to the speech pleaded with the protestors to stop, but they were unsuccessful, and Ms. McMillan's own pleas fared no better. *Id.* After about fifteen minutes of asking the protestors to stop the noise, Ms. McMillan left and did not return. *Id.*

The student protestors, however, did not leave. *Id.* They remained in the auditorium for about another hour, breaking chairs and tables, staining the carpet, and damaging the podium. R. at 6a–7a. None of these students were difficult to identify, yet none were disciplined for their actions. R. at 7a. Although a campus security officer was present at the start of Ms. McMillan's speech, that officer never engaged with the protestors. *Id.*

Procedural History

In response to her experience on campus, Ms. McMillan brought the present

action against the University under 42 U.S.C. § 1983. *Id.* She alleged the University violated her First Amendment rights by adopting a custom of refusing to prevent hecklers from silencing those invited to speak on campus. R. at 12a. During the trial, the University filed a Rule 50(a) motion, asserting that, as a matter of law, it could not be liable for the fact that Ms. McMillan had been prevented from speaking. R. at 7a. The United States District Court for the Eastern District of New Texas denied that motion, and the jury returned a verdict in Ms. McMillan's favor, awarding her \$12,487 in compensatory damages and \$350,000 in punitive damages. *Id.*

The district court entered a final judgment on January 20, 2022, that listed the \$12,487 in compensatory damages but did not mention the punitive damages. *Id.* Seven days later, the court *sua sponte* amended the judgment to include the punitive damages. *Id.* Nothing else about the judgment was changed. *Id.*

Exactly 28 days after the district court amended the judgment, the University filed a Rule 50(b) motion, attempting to renew the issues raised in its Rule 50(a) motion. *Id.* The district court noted that the 28-day deadline for filing Rule 50(b) motions is unable to be extended. R. at 21a. Therefore, the court concluded that the motion was untimely and, as a result, denied the motion without considering its merits. R. at 24a.

The University appealed that decision. R. at 1a. The Thirteenth Circuit reversed the district court's opinion regarding the timeliness of the motion, R. at 2a, reasoning that because the amended judgment made a substantive change affecting the parties' rights and obligations, all deadlines for filing post-judgment motions

began to run anew upon entry of the amended judgment. R. at 9a. Therefore, the Rule 50(b) motion was timely. R. at 10a.

Having concluded the Rule 50(b) motion was timely, the Thirteenth Circuit considered its merits. *Id.* Citing *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989), a majority of the panel held that because a municipality cannot be liable for failing to act, the University could not be liable for violating Ms. McMillan’s First Amendment rights. R. at 13a–14a. Judge Carson concurred, stating that although *DeShaney* determined the case’s outcome, *DeShaney* should be overruled because it prevented certain minimum guarantees of safety from attaching to constitutional rights. R. at 15a–16a. Judge Arroford dissented, writing that the First Amendment is violated when students are allowed to determine which speech will or will not be heard on campus. R. at 17a.

Ms. McMillan petitioned this Court to hear an appeal of both the timeliness issue and the First Amendment issue, and on October 7, 2024, this Court granted certiorari.

SUMMARY OF THE ARGUMENT

The Federal Rules of Civil Procedure and the federal courts’ standards of review work together to promote fairness, efficiency, and finality in the judicial system. This is clearly demonstrated by the 28-day rule that governs many post-judgment motions, including those filed under Rule 50(b). When parties fail to adhere to the strict 28-day deadline, the standards of review on appeal are appropriately less deferential. This framework ensures that legal errors in a

judgment are brought to the attention of the court and other parties while those errors may still be corrected, thus conserving resources that would otherwise be spent addressing issues on appeal. It also provides all parties with clear expectations for the post-judgment process and the confidence that, at a certain point, judgment will be final.

In this case, the University filed a Rule 50(b) motion 35 days after the final judgment was originally entered. The University argues its motion should be considered timely because the district court amended the final judgment *sua sponte* to include the jury's award of punitive damages seven days after judgment was originally entered. The University contends this amendment reset the deadlines for all post-judgment motions because it changed the substance of the final judgment. However, this position contradicts the values of the Federal Rules. Instead, this Court should affirm the principle articulated by the Second and Seventh Circuits: When both an amended and an initial judgment exist, a post-judgment motion filed more than 28 days after the initial judgment can only be considered timely if it pertains to the substance of the amendment. This rule safeguards efficiency, fairness, and finality, while still allowing the deadline to be extended for motions that truly relate to the substance of the amendment. Because the University's motion did not relate to the substance of the amendment, this Court should consider it untimely.

Given that the University's Rule 50(b) motion was untimely, the Thirteenth Circuit could not review the sufficiency of the evidence. The only question it could review was the purely legal question of whether a university could ever be liable for

adopting a custom of refusing to intervene when student protestors silence those invited to speak on campus. The answer is yes. Public universities, having made themselves into limited public forums, must ensure that minority viewpoints are not discriminated against. If a university knows viewpoint discrimination is likely, it must take steps to try to prevent such discrimination from occurring. This is true despite this Court's holding in *DeShaney* that individuals generally do not have a right to police protection. Moreover, even if the Rule 50(b) motion was timely, the evidence here is sufficient to allow a reasonable jury to conclude that each element of a *Monell* liability claim was satisfied. Therefore, the decision of the Thirteenth Circuit should be reversed.

ARGUMENT

The Federal Rules set strict deadlines for motions seeking to alter a judgment after entry. *See* Fed. R. Civ. P. 6. Such motions must be filed within 28 days of the judgment date, *see, e.g.*, Fed. R. Civ. P. 50, and this deadline cannot be extended. *See* Fed. R. Civ. P. 6. Missing the deadline severely curtails an appellate court's power to grant relief sought in the motion. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 407 (2006). With a Rule 50(b) motion, for instance, the appellate court would be unable to consider the sufficiency of the evidence, *id.*, and its review would be limited to pure questions of law, *Belk, Inc. v. Meyer Corp.*, U.S., 679 F.3d 146, 161 (4th Cir. 2012).

In this case, the University's motion for judgment as a matter of law was filed 35 days after judgment was entered. R. at 21a. It was thus untimely, so the appellate

court could not review the sufficiency of the evidence. The only question it could consider was whether a university can ever be liable for First Amendment violations caused by a custom of refusing to prevent protestors from silencing those invited to speak on campus. Because such a policy impermissibly allows minority viewpoints to be suppressed in a limited public forum, the answer to that question is yes. Moreover, even if the Rule 50(b) motion was timely, the evidence in this case is sufficient to allow a reasonable jury to conclude the University had a custom of refusing to interfere with hecklers and its custom caused Ms. McMillan's rights to be violated. Therefore, the jury's verdict must stand.

Standard of Review

The first issue on appeal asks whether a post-judgment motion filed 28 days after an amended judgment is timely under the Federal Rules of Civil Procedure. "Determinations of timeliness are generally matters of statutory interpretation," which are reviewed *de novo*. *Tru-Art Sign Co. v. Loc. 137 Sheet Metal Workers Int'l Ass'n*, 852 F.3d 217, 220 (2d Cir. 2017). The second issue on appeal asks whether a university can violate the First Amendment by adopting a custom of refusing to prevent hecklers from silencing speakers on campus. Whether a cause of action exists is a question of law, *Bell v. Hood*, 327 U.S. 678, 682 (1946), and as such, it is also reviewed *de novo*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). If the Court holds that the post-judgment motion was timely, then the second issue will also require the Court to consider the sufficiency of the evidence. *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 515 (7th Cir. 1993). Questions regarding the sufficiency

of the evidence, too, are reviewed *de novo*, though with an emphasis on construing the evidence in a light most favorable to the non-moving party. *Id.*

I. THE RULE 50(b) MOTION WAS UNTIMELY BECAUSE A TRIAL COURT’S AMENDMENT OF A FINAL JUDGMENT SHOULD ONLY AFFECT THE DEADLINES FOR FILING POST-JUDGMENT MOTIONS IF THOSE MOTIONS RELATE TO THE SUBSTANCE OF THE AMENDMENT, WHICH WAS NOT TRUE OF THE UNIVERSITY’S RULE 50(b) MOTION.

The Federal Rules of Civil Procedure require that a large number of post-judgment motions and amendments, including Rule 50(b) motions, be filed or made within 28 days of entry of judgment. *See, e.g.*, Fed. R. Civ. P. 50(b) (regarding renewed motions for judgment as a matter of law); Fed. R. Civ. P. 52 (regarding amendments of findings in a non-jury trial); Fed. R. Civ. P. 59(b) (regarding motions for a new trial); Fed. R. Civ. P. 59(d) (regarding *sua sponte* orders for a new trial); Fed. R. Civ. P. 59(e) (regarding motions to alter or amend a judgment and certain *sua sponte* amendments). The Rules also distinguish the deadlines for filing these motions and making these amendments from other deadlines by prohibiting their extension. *See Banister v. Davis*, 590 U.S. 504, 508 (2020). In this way, the rules strike a balance between, on the one hand, ensuring parties have an opportunity to address legal or factual deficiencies in a judgment and, on the other, delivering a sense of finality to the legal proceeding within a reasonable time. *See Johnson v. N.Y., N.H. & H.R. Co.*, 344 U.S. 48, 53 (1952) (describing the timeliness requirement of Rule 50 as being “firmly grounded in principles of fairness”); *see also Browder v. Dir., Dep’t of Corr. of Ill.*, 434 U.S. 257, 271 (1978) (describing the timeliness requirement of Rule 59 as being based on an “interest in speedy disposition and finality” (quoting *Silk v.*

Sandoval, 435 F.2d 1266, 1268 (1st Cir. 1971))).

The court below erred by concluding that whenever an amendment to a judgment changes a party's legal rights or obligations, the 28-day clock begins to run anew. R. at 9a. This interpretation is inconsistent with the principles of fairness, efficiency, and finality that lie at the heart of the Rules. *See, e.g., Tru-Art*, 852 F.3d at 220. It is also inconsistent with the logic of cases that have previously considered this question, including the two Fifth Circuit cases the Thirteenth Circuit cited as authority for its proposed rule. *See Cornist v. Richland Par. Sch. Bd.*, 479 F.2d 37, 39 (5th Cir. 1973); *Wilmington Sav. Fund Soc'y, FSB v. Myers*, 95 F.4th 981, 983 (5th Cir. 2024). The better rule is one that holds that a trial court's amendment of a final judgment only affects the deadline for filing post-judgment motions if those motions relate to the substance of the amendment. *Tru-Art*, 852 F.3d at 221. Because the University's motion in this case did not relate to the substance of the district court's *sua sponte* amendment, it was untimely; therefore, the appellate court was without power review the sufficiency of the evidence. *Unitherm*, 546 U.S. at 401.

A. The Federal Rules of Civil Procedure seek to cultivate fairness, efficiency, and finality in the judicial process, and to allow all amendments that significantly change the judgment to extend the deadline for filing post-judgment motions would undermine those values.

One of the primary ways the Federal Rules of Civil Procedure foster fairness, efficiency, and finality is by strictly enforcing the 28-day rule. *See Fed. R. Civ. P. 6(b)* (prohibiting the extension of the 28-day rule). By imposing this deadline, the Federal Rules ensure that all parties will bring to the court's attention any errors that might be plaguing a judgment while the court can still address them. *Teneyck v. Omni*

Shoreham Hotel, 365 F.3d 1139, 1149 (D.C. Cir. 2004). This promotes efficiency by avoiding the unnecessary appeal of issues that could have been corrected by the trial court, and it promotes fairness by alerting all parties that they must act swiftly after judgment is entered to avoid losing their opportunity to correct a legal error. *Puga v. RCX Sols., Inc.*, 922 F.3d 285, 290 (5th Cir. 2019). At the same time, though, the 28-day rule also ensures that a sense of finality will be brought to the action. *See Sun-Tek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 848 F.2d 179, 182 (Fed. Cir. 1988). Because the 28-day rule applies both to the parties’ post-judgment motions and to the court’s ability to amend the judgment *sua sponte*, *see Burnam v. Amoco Container Co.*, 738 F.2d 1230, 1232 (11th Cir. 1984), it ensures the possibility of identifying “a definite point where it can be said a judgment is final.” Fed. R. Civ. P. 6 advisory committee’s note to 1946 amendment.

The Thirteenth Circuit’s proposed rule regarding post-judgment motions—which would allow all substantive changes to a judgment to reset the deadline for filing all post-judgment motions—runs contrary to the values inherent in the Federal Rules. It forestalls the sense of finality that the 28-day rule offers without enhancing any of the other values that the Rules seek to protect, and it promises to increase the amount of time spent debating whether an amendment is actually substantive or collateral. Neither of these results are desirable. *Cf. Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) (emphasizing the importance of “operational consistency and predictability” in judicial processes). On the other hand, a rule that a post-judgment amendment only affects the 28-day window with respect to

post-judgment motions related to the substance of an amendment would, in all cases, foster predictability, consistency, and finality, while also protecting against unfairness by extending the deadline when a motion truly does relate to the amendment. Because of this, it is a better rule and one that this Court should adopt.

- 1. *A rule that does not consider the relationship between the post-judgment motion and the amendment wastes judicial resources and forestalls finality without enhancing fairness in any meaningful way.***

The Court below asserted that its proposed rule—which would reset the 28-day deadline for filing post-judgment motions whenever a substantive amendment is made to a judgment—is derived from this Court’s opinion in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211–12 (1952). *See* R. at 9a. However, *Minneapolis-Honeywell* does not mandate that whenever a “lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered,” then “the period within which an appeal must be taken or a petition for certiorari filed begin[s] to run anew.” *Id.* (quoting *Minneapolis-Honeywell*, 344 U.S. at 211–12). Rather, *Minneapolis-Honeywell*’s language—which places the phrase “only when” just before the language quoted by the Thirteenth Circuit—sets a prerequisite that must be met in order for those time periods to begin to run anew. 344 U.S. at 211–12. It does not follow, though, that whenever that prerequisite is met, the conditional rule automatically must apply. To say that a child may only eat cake if she has cleaned her room does not mean that whenever she cleans her room she may also eat cake. The two rules are radically different. By omitting the word “only” and adding the word “then,” the court below imbued

Minneapolis-Honeywell's words with meaning they were never meant to carry.

Unfortunately, the fact that *Minneapolis-Honeywell* did not require resetting all deadlines whenever an amendment substantively modifies a judgment is often overlooked in cases where the post-judgment motions clearly relate to the amendment's substance. *See, e.g., Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986). For example, in *Charles*, the court modified the original judgment to add a new defendant it held jointly and severally liable. *Id.* at 348. It would indeed be unfair to consider that new defendant's post-judgment motions untimely when they could not have known they needed to file post-judgment motions until they were added as a defendant. *See id.* In justifying its conclusion, though, the Seventh Circuit paraphrased this Court in a not-entirely accurate way: "A significant change in a judgment starts all time periods anew" *Id.* (citing *Minneapolis-Honeywell*, 344 U.S. at 211). Similarly, in *Cornist*, an original judgment stipulated that a defendant school district would reinstate three fired teachers. 479 F.2d at 38. An amendment to that judgment excluded one of the teachers' names. *Id.* Again, it would have been unjust to consider a post-judgment motion for a new trial untimely in light of such an alteration. Yet the Fifth Circuit's simplistic statement of the rule—that the timeliness turned upon whether the "second judgment omitted a paragraph of substance"—oversimplified the inquiry. *Id.* at 39.

Even if a judgment is amended in a way that changes matters of substance or resolves ambiguities, that amendment should only reset the deadlines for filing post-judgment motions related to the amendment's substance. *McNabola*, 10 F.3d at

520. The Seventh Circuit recognized this principle in *McNabola*. *Id.* In that case, the district court amended its judgment because the award of damages had erroneously included amounts to which the plaintiff was not entitled. *Id.* at 515. Subsequently, the plaintiff filed a motion seeking post-judgment interest, and the defendant challenged the motion as untimely, even though it was timely with respect to the amended judgment. *Id.* at 519. The Seventh Circuit agreed with the defendants. *Id.* at 520. It pointed out that although certain post-judgment motions would have been considered timely if filed at that time, the plaintiff's motion for prejudgment interest was not one of them because it bore no relationship to the substance of the amendment. *Id.* If the plaintiff felt entitled to post-judgment interest because of the merits of the case, he should have filed a request for that interest within 28 days. *See id.* Nothing about the amendment changed his entitlement to interest; therefore, it made no sense to allow the amendment to extend the time period for requesting interest. *See id.*

When a post-judgment amendment provides a party with additional knowledge related to the motion it wishes to file, the deadline for filing that motion should be extended. *Tru-Art*, 852 F.3d at 221. In *Wilmington*, for example, it was unclear whether what seemed to be a final judgment was in fact final because it was mislabeled. 95 F.4th at 983. Although re-labeling a document would not normally adjust the rights and obligations of the parties, the Fifth Circuit held that, in that case, it did. *Id.* Without knowing whether the judgment was final, the plaintiff did not know whether she was within the window for filing post-judgment motions. *See*

id. Therefore, the court considered those post-judgment motions timely, even though they were only timely with respect to the amendment. *Id.* The same logic dictated the opposite result in *Tru-Art*. 852 F.3d at 222. There, the Second Circuit held that a plaintiff's post-judgment motion for costs and prejudgment interest was untimely, even though it was timely with respect to an amendment that lowered the amount of damages to which it was entitled. *Id.* The distinction turned upon the fact that the plaintiff's motion had no connection to the substance of the amendment. *See id.* If the plaintiff believed it was entitled to costs and prejudgment interest before the amendment, it had all the knowledge necessary to make those motions after the original judgment was entered; the amendment provided no knowledge necessary to file the motions. *See id.*

In light of the principles derived from these cases, this Court should explicitly adopt the rule stated by the Second Circuit in *Tru-Art*: “When both an initial judgment and an amended judgment exist, the timeliness of a [post-judgment] motion is determined from the date of the amended judgment only if the motion bears some relationship to the district court's alteration of the first judgment.” *Id.* (quoting *McNabola*, 10 F.3d at 521). This rule protects the interests of efficiency, finality, and fairness central to the Federal Rules, and it is consistent with the logic underlying cases such as *McNabola*, *Cornist*, and *Wilmington*. Those cases, like *Minneapolis-Honeywell*, adhere to the principle that a change in substance or the resolution of a genuine ambiguity is a prerequisite for resetting post-judgment motion deadlines; they do not stipulate that whenever those prerequisites occur, the

deadlines must be reset. This Court should now make that distinction explicit.

2. A clear line does not always exist between “collateral” and “substantive” amendments.

Another reason this Court should make the distinction explicit is that it is not always easy to distinguish between post-judgment amendments that affect the substance of a judgment and those that merely affect collateral issues. For example, although it is true that changes related to attorney’s fees, costs, and prejudgment interest can usually be categorized as either collateral or substantive, *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174–177 (1989), exceptions abound in which those distinctions have not been easy to apply, *see, e.g., Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1065 (7th Cir. 1992). In some instances, consideration of a request for attorney’s fees has been regarded as intricately entwined with the merits of the original proceeding even though such requests, under *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 451 (1982), are typically regarded as collateral to the main cause of action. *See, e.g., Hastert v. Ill. State Bd. of Election Comm’rs*, 28 F.3d 1430, 1438 n.8 (7th Cir. 1993). Costs, too, are often regarded as substantive—*see, e.g., Carolina Power & Light Co. v. Dynegy Mktg. & Trade*, 415 F.3d 354, 360 (4th Cir. 2005)—even though this Court has held that a motion for costs is generally wholly collateral, *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268–69 (1988). And motions for prejudgment interest have occasionally been regarded as collateral, despite this Court’s holding to the contrary. *See, e.g., Kosnoski v. Howley*, 33 F.3d 376, 379 (4th Cir. 1994).

The same difficulty often arises when trying to determine whether other

changes to a judgment are collateral or substantive. Changing a judgment's designation from "without prejudice" to "with prejudice" has sometimes been construed as a substantive change, *see, e.g., Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1131 (11th Cir. 1994), and sometimes as a change that is clerical in nature, *see, e.g., Rivera v. PNS Stores, Inc.*, 647 F.3d 188, 195 (5th Cir. 2011), even though the change undoubtedly affects the parties' rights and interests. Similarly, the question of whether punitive-damages considerations are substantive or collateral has often vexed the courts. *See, e.g., Scheufler v. Gen. Host Corp.*, 895 F. Supp. 1411, 1414 (D. Kan. 1995) (concluding that questions related to punitive damages should be considered separate from questions related to actual damages); *Reyher v. Champion Int'l Corp.*, 975 F.2d 483, 488 (8th Cir. 1992) (attempting to discern whether a request for liquidated damages was mechanical—and therefore collateral—or whether it required the "painstaking study" of the merits that transforms a request into a substantive issue; concluding the latter (quoting *Osterneck*, 455 U.S. at 176 n.3)).

Because it can be difficult to discern substantive changes from collateral changes, both the drafters of the Federal Rules of Appellate Procedure and the federal courts have occasionally adopted rules to remove the question from consideration altogether. The Fifth and Seventh Circuits, for instance, recognized that valuable time and resources are often wasted considering whether a post-judgment motion is sufficiently related to the merits to be regarded as a Rule 59(e) motion, and these circuits have accordingly adopted a rule that if a motion is filed within the timeline

for Rule 59 and could possibly be construed as a Rule 59 motion, it will be treated as such. *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 670 (5th Cir. 1986); *Charles*, 799 F.2d at 347 (7th Cir. 1986); *see also Herzog*, 976 F.2d at 1065 (7th Cir. 1992) (noting the difficulty of drawing the distinction in some cases and concluding that debatable cases should be shoveled into the “substantive bin in order to avoid the ‘endless hassle over proper characterization’ that would [otherwise] ensue” (quoting *W. Indus., Inc. v. Newcor Canada, Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983))). Disputing whether an amendment is substantive wastes the time and resources of both the parties and the courts. Such disputes are, however, likely to increase if the Thirteenth Circuit’s proposed rule regarding post-judgment amendments is adopted.

B. The University’s Rule 50(b) motion did not relate to the substance of the trial court’s amended judgment because Rule 50(b) motions can only renew issues raised in a Rule 50(a) motion and the Rule 50(a) motion did not concern punitive damages.

Even if the timeline for filing some post-judgment motions is reset by a post-judgment amendment, that will almost never be the case with Rule 50(b) motions. This is because Rule 50(b) motions can only renew issues previously raised in a Rule 50(a) motion. *Puga*, 922 F.3d at 291. Rule 50(a) motions are akin to summary judgment motions in that they are a way to assert that “under the governing law, there [is] but one reasonable conclusion as to the verdict.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). As such, they are inevitably bound up in the merits of the case. *Mountain Dudes v. Split Rock Holdings, Inc.*, 946 F.3d 1122, 1131–34 (10th Cir. 2019). Therefore, Rule 50(b) motions are also inevitably tied to the merits of the case. *See id.* For this reason, Rule 50(b) motions would never be

substantively related to post-judgment amendments that do not address the merits of the case—such as the one at issue here—and, in accordance with the principles articulated in *Tru-Art*, the deadline for filing such motions would, therefore, never be extended by those amendments.

The facts in this case demonstrate the appropriateness of the principles articulated in *Tru-Art*. Here, the University filed a Rule 50(a) motion asserting only that no reasonable jury could find it liable under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), for violating Ms. McMillan’s First Amendment rights. R. at 8a. Therefore, that is the only issue that could be renewed in its Rule 50(b) motion. *Lambert v. Genessee Hosp.*, 10 F.3d 46, 53–54 (2d Cir. 1993). The University’s position on that issue is unaffected by any subsequent adjustment to the amount of damages it must pay, and there is no logical reason that an amendment to the amount of punitive damages should extend the University’s deadline for filing motions asserting it is not liable at all. *See McNabola*, 10 F.3d at 520. Such an extension would destroy the finality the 28-day rule provides, without furthering any other values central to the Rules. Because such a result should be rejected, this Court should hold that when both an initial judgment and an amended judgment exist, a post-judgment motion is timely with respect to the latter only if it pertains to the substance of the amendment. *See Tru-Art*, 852 F.3d at 222.

1. *The purpose of Rule 50 is fundamentally different than the purpose of other rules governing post-judgment motions to amend.*

There are few situations in which the deadline for filing a Rule 50(b) motion would be extended by an amendment to a final judgment under the principles

articulated in *Tru-Art*. This is because Rule 50(b) motions do not exist to alter judgments or to obtain relief from judgments; they exist to allow judgment as a matter of law to be rendered when there is no legal basis by which a reasonable jury could find in favor of the non-moving party on a specific issue. *Belk*, 679 F.3d at 160. Because of this unique purpose, the subject matter of a Rule 50(b) motion will often not be intricately entwined with the subject matter of a post-judgment amendment affecting fees, costs, interest, or the like. While the deadline for filing Rule 59 or Rule 60 motions might arguably be extended by such amendments, the deadline for filing a Rule 50(b) motion almost never would be.

- a. Rule 50 exists not to alter a judgment, obtain relief from a judgment, or fix errors in a judgment, but to allow judgment to be rendered as a matter of law when appropriate.*

Rule 50(b) exists to allow a jury's verdict to be set aside when there is no legally sufficient evidentiary basis on which that verdict could be based. *Ortiz v. Jordan*, 562 U.S. 180, 189 (2011). Technically, this is a form of post-judgment relief, but it is a form altogether different than that offered by Rule 59(e), Rule 60(a), or Rule 60(b). Those latter rules allow parties to seek to amend a judgment when they believe the legal reasoning or factual basis for the judgment is somehow wrong, Fed. R. Civ. P. 59(e), to request a judgment be amended in a way that does not involve reconsidering the reasoning behind the decision, Fed. R. Civ. P. 60(a), and to seek relief from the judgment without actually modifying the judgment itself, Fed. R. Civ. P. 60(b). Rule 50(b), on the other hand, seeks the equivalent of summary judgment, but it does so after the verdict has already been rendered. *See Dupree v. Younger*, 598 U.S. 729, 731 (2023). Moreover, it is specifically tied to a Rule 50(a) motion that could only have

been filed prior to the jury's verdict. *Mountain Dudes*, 946 F.3d at 1131. These two facts make Rule 50(b) motions quite different than other motions seeking post-judgment relief.

Because a Rule 50(b) motion seeks the powerful remedy of setting aside the jury's verdict, it has been limited to addressing only issues first raised in a pre-verdict Rule 50(a) motion. *Id.* This limitation is necessary, as a practical matter, to prevent parties from withholding knowledge of an evidentiary deficiency in the case, gambling on the verdict, and then moving for judgment as a matter of law. *Puga*, 922 F.3d at 290–91. The limitation ensures that both the court and all parties are made aware of evidentiary deficiencies while the trial is still happening and those deficiencies can still be corrected. *Id.* It also means, though, that a Rule 50(b) motion can never raise issues not first raised in a Rule 50(a) motion. *Hanover Am. Ins. Co. v. Tattooed Millionaire Ent., LLC*, 974 F.3d 767, 786–87 (6th Cir. 2020).

b. Because of the unique purpose Rule 50 serves, a Rule 50(b) motion often will not relate to the substance of an amendment that only adjusts the amount of damages.

Because a Rule 50(b) motion cannot raise issues that were not first raised in a Rule 50(a) motion, *id.*, the subject matter of a Rule 50(b) motion will typically not be related to post-judgment amendments that affect the amount of costs, attorney's fees, or damages. One reason for this is that the Federal Rules require a party filing a motion under Rule 50(a) to list the law and facts that entitle that party to judgment as a matter of law. *Id.* at 783–84. A party can only be entitled to judgment as a matter of law under Rule 50, however, on the types of issues that a jury would ordinarily

decide at trial. *See Belk*, 679 F.3d at 160. Therefore, if the substance of an amendment is not something a jury could have decided, then it also is not the type of amendment that could be substantively connected to a Rule 50(b) motion.

Often, questions about whether certain types or amounts of damages are supported by the evidence are addressed using a Rule 50(b) motion. *See, e.g., Sociedad Espanola de Electromedicina y Calidad, S.A. v. Blue Ridge X-Ray Co.*, 226 F. Supp. 3d 520, 526 (W.D.N.C. 2016); *Lowery v. Cir. City Stores, Inc.*, 206 F.3d 431, 446 (4th Cir. 2000). For example, in *Sociedad Espanola*, a company in a patent dispute used a Rule 50(b) motion to re-assert that the evidence could not support treble damages under the applicable federal statute. 226 F. Supp. 3d at 526. Similarly, in *Lowery*, the defendants used a Rule 50(b) motion to renew claims that the evidence did not support punitive damages. 206 F.3d at 446. In both cases, the Rule 50(b) motions were linked to damages, but they focused on whether the evidence was sufficient, as a matter of law, to justify certain *types* of damages. If a post-judgment amendment in those cases had simply recalculated the *amount* of damages, then the amendment would not have invoked the type of issues that could have been raised in a Rule 50(a) motion during trial. Therefore—applying *Tru-Art*’s principles—such a post-judgment amendment would not affect the deadline by which the parties would have had to file their Rule 50(b) motions.

2. ***This case demonstrates the appropriateness of the principle that amendments to judgments should only extend the deadline for filing post-judgment motions related to the substance of the amendment.***

The case at hand demonstrates the appropriateness of the principle set forth in *Tru-Art*: When both an amended and an initial judgment exist, a post-judgment motion filed more than 28 days after the initial judgment is timely only if it pertains to the substance of the amendment. 852 F.3d at 221. Here, the University’s motion could only renew the issue that was already addressed in its pre-verdict motion: its liability under § 1983. R. at 8a. Once the jury’s verdict was rendered, the University had all the knowledge necessary to decide whether it wished to renew its Rule 50(a) motion on that issue. For one reason or another, it did not do so. Then, after an amendment unrelated to the issue of liability was entered, the University sought—after the 28 days had expired—to renew its original motion. R. at 7a.

No significant interest would be advanced by allowing motions such as the University’s to be considered timely. By waiting to renew its concerns about liability, the University deprived the court of the opportunity to promptly fix the alleged errors. Moreover, if considered timely, the University’s motion would disrupt the finality of the dispute; if the facts were different and Ms. McMillan wanted to appeal part of the decision, her timely notice of appeal would have been suspended. Fed. R. App. P. 4(a)(4). These are not results that are desirable for the judicial system. *See Budinich*, 486 U.S. at 201 (emphasizing the desirability of rules that enhance the “smooth functioning of our judicial system”). More importantly, they are not compelled by any principles of law, as cases such as *McNabola*, *Tru-Art*, and *Wilmington* reveal. This Court should follow the logic of those cases and continue to uphold the bright-line rules that bring clarity and predictability to the post-judgment process. For that

reason, the University's motion should be deemed untimely.

- a. Upon the original entry of final judgment, the University had all the information it needed to assess whether it desired to file a Rule 50(b) motion.*

By setting strict limits on the period for filing many post-judgment motions and making many post-judgment amendments, the Rules strike the correct balance between getting the judgment right and ensuring the judgment ultimately has a sense of finality. *See* Fed. R. Civ. P. 50 advisory committee's note to 2009 amendment (explaining the rule was extended to 28 days to provide parties with adequate time to file post-judgment motions); *see also* Fed. R. Civ. P. 6 advisory committee's note to 1946 amendment (explaining that the strict deadlines were based on a desire for finality). The 28-day rule ensures that all parties will alert the court promptly of any errors or deficiencies in its judgment, and it ensures that the court, too, will act promptly to address any errors in legal reasoning that may be plaguing the judgment. *Sun-Tek*, 848 F.2d at 181. And once the 28 days have expired, both the court and the parties know what to expect: If post-judgment motions have been filed, the case will not be final until those judgments have been disposed of; if not, the case is final, and either party may appeal with the confidence that no post-judgment motions will invalidate their notice. *See Budinich*, 486 U.S. at 202 ("The time of appealability . . . should above all be clear."). In this way, judicial resources are preserved, fairness is protected, and finality is achieved.

The compelling logic of the 28-day rule is evident in this case. Here, as soon as the original judgment was entered, the University had all the information it needed to decide whether to renew the issues raised in its Rule 50(a) motion. This makes the

University's position very similar to that of the plaintiffs in *Tru-Art* and *McNabola*. In those cases, post-judgment motions for prejudgment interest were considered untimely largely because the amendments revealed nothing new to the plaintiffs regarding those motions. *See Tru-Art*, 852 F.3d at 221; *McNabola*, 10 F.3d at 520. If they believed they were entitled to prejudgment interest before the amendments adjusted the amount of damages they could collect, they should have filed motions seeking those damages as soon as the original judgment was entered. So, too, here. The post-judgment amendments, in this case, did nothing to alter the University's position regarding the issue of liability.

Common sense suggests that both the plaintiffs in *Tru-Art* and *McNabola* and the University in this case filed their post-judgment motions primarily to offset the pain inflicted by the amendment to the judgment. In *Tru-Art* and *McNabola*, the parties likely wished to offset the reduction in damages by receiving additional prejudgment interest and costs; here, too, the University likely decided to offset the punitive damages applied in the amendment by arguing it was free from liability altogether. Post-judgment motions unrelated to the substance of an amendment, however, are not meant to be used to offset the effect of an amendment indirectly, and this is especially true with respect to Rule 50(b) motions, the purpose of which is to ensure that judgment can be rendered as a matter of law when the moving party is entitled to it.

- b. *Because the University failed to file a Rule 50(b) motion within 28 days of the original judgment, the appellate court is appropriately unable to review the sufficiency of the evidence upon which the jury based its verdict.*

When a party does not renew its Rule 50(a) motions with a timely Rule 50(b) motion, the appellate court cannot review the sufficiency of the evidence. *Unitherm*, 546 U.S. at 407. The appellate court may still review pure questions of law. *See Belk*, 679 F.3d at 160. But it cannot enter judgment as a matter of law or order a new trial on the basis that the evidence was insufficient. *Unitherm*, 546 U.S. at 404.

In this way, the Federal Rules of Civil Procedure and the standards of review work in tandem to promote fairness, efficiency, and finality in the judicial system. The Rules' interaction with the standards of review ensures that all parties know they must bring forth any possible evidentiary deficiencies in the case while the trial court and other parties may still address those issues or else risk losing their right to complain about the deficiencies later. *See Belk*, 679 F.3d at 156. If a party does not adhere to the strict requirements the Rules impose, then the standards of review appropriately prohibit those defects from being considered upon appeal. *Id.*

In this case, the University filed a Rule 50(a) motion addressing only the issue of liability prior to the jury's verdict. After the jury returned a verdict finding the University liable, the University had all the information it needed to know whether it desired to renew the issues it raised regarding liability in a Rule 50(b) motion. It did not do so, though, until after the 28-day window had closed. The logic of the Federal Rules dictates that the University's motion should be regarded as untimely and its challenge to the sufficiency of the evidence should be considered waived. Therefore, the only question the Thirteenth Circuit should have considered upon appeal was the purely legal question of whether a university—under any factual

circumstances—could ever be liable for violating a speaker’s First Amendment rights by adopting a custom of non-interference with respect to student hecklers. Because, for reasons explained below, the answer to that purely legal question is yes, this Court should reverse the Thirteenth Circuit.

II. THE APPELLATE COURT SHOULD BE REVERSED BECAUSE, AS A MATTER OF LAW, IT IS POSSIBLE FOR A UNIVERSITY TO VIOLATE CONSTITUTIONAL RIGHTS BY ADOPTING A POLICY OF REFUSING TO SILENCE HECKLERS AND BECAUSE THE JURY’S VERDICT IN THIS CASE WAS SUPPORTED BY SUFFICIENT EVIDENCE.

In this case, the appellate court’s review was limited to one of two options. *See Belk*, 679 F.3d at 160. If the University’s Rule 50(b) motion was timely, the appellate court could have reviewed the sufficiency of the evidence. *Id.* If not, the appellate court’s review should have been limited to pure questions of law. *Id.* Pure questions of law are those that can be answered without consideration of any disputed facts. *See Dupree*, 598 U.S. at 737. They tend not to involve considerations of what actually occurred, but rather “disputes about the substance and clarity of pre-existing law.” *Ortiz*, 562 U.S. at 190. Here, the pure legal question would not involve evidence of the University’s custom, evidence the University had notice of constitutional violations, or evidence the University’s custom caused Ms. McMillan’s rights to be violated. *See generally Gibson v. Cnty. of Washoe*, 290 F.3d 1175 (9th Cir. 2002), (showing these elements are questions of fact for a jury to decide), *overruled on other grounds by Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016). Rather, it would focus on whether a university can be liable for adopting a custom of refusing to prevent hecklers from silencing speakers in a limited public forum. Because the answer to that question is yes, and because the Rule 50(b) motion was untimely, the

Thirteenth Circuit had no basis for disturbing the jury’s verdict.

Even if this Court does not agree that the Rule 50(b) motion was untimely, the jury’s verdict should still stand because a reasonable jury could have found in favor of Ms. McMillan based on the evidence. *See Walmart Inc. v. Cuker Interactive, LLC*, 949 F.3d 1101, 1108 (8th Cir. 2020) (explaining that the appellate court should affirm the jury’s verdict unless there are no facts that would allow a reasonable jury to have found in favor of the nonmoving party). There was sufficient evidence to allow a reasonable jury to conclude that the University had a custom of refusing to prevent hecklers from silencing speakers, that its custom reflects deliberate indifference to the danger of a speaker’s constitutional rights being violated, and that its custom actually caused Ms. McMillan’s rights to be violated in this case. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012) (listing the elements that a plaintiff must prove to prevail in a *Monell* claim based on a policy of inaction). Because it cannot be said that the evidence, viewed in the light most favorable to Ms. McMillan, was insufficient to allow *any* reasonable jury to reach the verdict it reached, that verdict must be allowed to stand.

A. As a matter of law, under both *Monell* and *DeShaney*, a university can be held liable for causing constitutional violations when it refuses to prevent hecklers from silencing minority viewpoints in a limited public forum.

In *Monell*, this Court held that municipalities—a term that includes many public universities—“can be sued directly under § 1983” for policies that cause constitutional deprivations. 436 U.S. at 690. Under *Monell*, the policy need not be formal; persistent and widespread municipal “customs” can provide a basis for

liability as well. *Id.* And customs need not necessarily consist of affirmative acts. *Connick v. Thompson*, 563 U.S. 51, 61 (2011). A custom of inaction can provide a basis for liability as well if the municipality had sufficient reason to believe that its inaction would likely result in constitutional deprivations. *Id.*

In a *Monell* liability claim based on inaction, most of the elements are questions of fact for a jury to decide. *Gibson*, 290 F.3d at 1194–95 (noting the jury must decide whether the evidence supports a widespread custom, whether that custom reflects deliberate indifference towards constitutional violations, and whether the custom actually did cause a violation to occur). Therefore, the only purely legal in this case is whether a university can be liable for having a custom of refusing to prevent hecklers from silencing speakers. The answer to that question is yes, for several reasons. First, universities like Lantana are limited public forums, and it is unconstitutional to allow only certain viewpoints to be expressed in a limited public forum. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). Second, municipalities like Lantana can be liable under *Monell* for inaction when that inaction reflects deliberate indifference to the possibility of constitutional violations. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989). And third, this Court’s holding in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 201 (1989)—that the government generally has no duty to protect constitutional rights from being infringed by private actors—did not forestall all possibility of municipalities being liable when private entities actually cause the constitutional violations. *See, e.g., Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989). Therefore,

as a purely legal matter, the University could have been liable in this case, and it was up to the jury to decide whether the University actually was liable.

- 1. *A University can be held liable under Monell for adopting a custom of non-action when it is apparent that such a custom is highly likely to cause well-established constitutional rights to be violated.***

For a university to be held liable under § 1983 for an intentional failure to act, a plaintiff must show that the university's custom of inaction reflected deliberate indifference of constitutional rights being violated. *J.K.J. v. Polk Cnty.*, 960 F.3d 367, 380 (7th Cir. 2020). Deliberate indifference is most often shown either by demonstrating the defendant was aware of a pattern of constitutional violations linked to its inaction, *Fields v. City of Chicago*, 981 F.3d 534, 562 (7th Cir. 2020), or that the danger of a violation was so obvious, given the circumstances, that the decision to do nothing reflected deliberate indifference despite the lack of prior violations, *J.K.J.*, 960 F.3d at 381.

In a limited public forum, a constitutional violation occurs if certain viewpoints are allowed to be shared while others are not. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). Therefore, if a university knows that its custom of refusing to silence protestors is likely to cause minority viewpoints to be silenced and yet does nothing to change that custom, the university can be held liable under § 1983. *Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 105 (2d Cir. 2007). Moreover, because such a university—by making itself into a limited public forum and then removing protections from speakers who were brought to speak in that forum—increased the likelihood that constitutional violations would

occur, *DeShaney*'s holding would not prevent the university from being liable under *Monell*. See *Tsao*, 698 F.3d at 1144–45 (showing that a given custom may reflect greater degrees of indifference in light of an earlier policy that existed when the custom was adopted).

a. The right to speak—and to access speech—in a limited public forum is a well-established constitutional right.

Although a government body has no obligation to create a limited public forum, once it does, it must ensure that speech is not being excluded from that forum based on viewpoint. *Rosenberger*, 515 U.S. at 829. This is especially important in the context of universities, which are unique spaces in which the “robust exchange of ideas” can flourish. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). Due to universities’ unique roles, this Court has frequently had the opportunity to consider ways that viewpoint discrimination can occur on campus. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (considering whether a university can prevent religious groups from accessing spaces available to non-religious groups); *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings v. Martinez*, 561 U.S. 661, 696 (2010) (considering whether a university can require registered student groups to accept all comers for membership). Repeatedly, the principle derived from these cases has been that “the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger*, 515 U.S. at 828.

Often, First Amendment issues arise not from intentional viewpoint discrimination but because a university’s facially neutral policies have the effect of causing viewpoint discrimination. See, e.g., *Just. For All v. Faulkner*, 410 F.3d 760,

772 (5th Cir. 2005). For instance, a policy requiring flyers to state which student organization was responsible for the message being disseminated was deemed unconstitutional because some speakers are only comfortable sharing their viewpoints if they can remain anonymous. *Id.* And many universities have recently abandoned policies encouraging students to report other students to “bias intervention response teams” after claims were brought alleging such policies unconstitutionally chill speech. *See Speech First, Inc. v. Sands*, 144 S. Ct. 675, 676 n.2 (2024) (Thomas, J., dissenting) (compiling cases). These policies risk violating the First Amendment not because the universities implementing them are actually discriminating against any viewpoints, but because such policies are likely to cause unpopular ideas to go unexpressed. *See id.* at 677.

Although a policy of allowing students to decide which organizations will receive funds by vote seems neutral, such a policy has often been regarded as unconstitutional because it gives students too much discretion in deciding which voices to amplify or suppress. *See, e.g., Bd. of Regents*, 529 U.S. at 235; *Amidon*, 508 F.3d at 105. For example, in *Board of Regents of the University of Wisconsin*, this Court held that a policy allowing student organizations to be funded or defunded by majority vote was unconstitutional. 529 U.S. at 235. The Court noted that “[t]he whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views.” *Id.* It also affirmed the idea that access to a limited public forum should “not depend upon majoritarian consent.” *Id.* The Second Circuit reached the same conclusion in a similar case, *Amidon*, a nearly identical case. 508

F.3d at 105. The court noted that, under the university’s referendum policy, “any contrary or minority view is at a disadvantage because the referendum simply asks the student body whether an RSO is entitled to a certain amount of funding.” *Id.* at 101. Thus, the referendum policy was unconstitutional despite not explicitly discriminating against certain viewpoints. *Id.* at 105.

These cases show that universities can violate the First Amendment in many ways even in the absence of explicit viewpoint discrimination. A university that has created a limited public forum must ensure that certain viewpoints are not discriminated against within that forum. *Rosenberger*, 515 U.S. at 829. Therefore, if a university has a custom that causes certain viewpoints to be repressed within its forum, it can be liable, under *Monell*, for causing constitutional violations.

b. *A custom of refusing to prevent students from silencing speakers with whom they disagree is highly likely to cause constitutional rights to be violated in the context of higher education.*

Because discrimination based on viewpoint in a limited public forum causes a constitutional harm, *id.*, a university can be liable under *Monell* if it knows or should have known that its customs would cause such discrimination, *see City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (noting a *Monell* claim cannot proceed unless the harm suffered was a constitutional violation). If the custom is one of inaction, a plaintiff must also show that it reflected deliberate indifference to the danger of constitutional violations occurring. *City of Canton*, 489 U.S. at 390; *Bd. of Cnty. Comm’rs of Bryan Cnty., v. Brown*, 520 U.S. 397, 411 (1997). In a free-speech claim, this means showing the university was on notice that its custom either had been

causing First Amendment violations or was very likely to cause them in the future. *See Connick*, 563 U.S. at 71 (emphasizing the need to show the defendant was on notice that the violation was a “highly predictable” consequence of the custom). Because a custom of allowing students to silence those invited to speak in a limited public forum is almost certain to result in constitutional violations, then—as a matter of law—a university can be liable under *Monell* for adopting that custom. *Id.*

Although there is indeed no general constitutional right to police protection, a municipality’s refusal to protect those exercising their constitutional rights can, at times, impose an unconstitutional heckler’s veto. *See Forsyth Cnty., v. Nationalist Movement*, 505 U.S. 123, 140 (1992) (Rehnquist, J., dissenting); *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 254 (6th Cir. 2015). For example, in *Forsyth County*, this Court considered whether a county with a history of racial violence could tie the cost of a demonstration permit to the expected costs of providing police protection. 505 U.S. at 126–27. This Court said it could not, as the cost would then be tied to the “public’s reaction to the speech,” thus allowing adverse responses to silence unpopular viewpoints. *Id.* at 134. Similarly, in *Bible Believers*, the Sixth Circuit considered whether a city with a large Arab population acted unconstitutionally by allowing teenagers at an Arab culture celebration to silence evangelists who were carrying a pig’s head and signs stating, “Islam Is A Religion of Blood and Murder.” 805 F.3d at 238. The court concluded that it had, , *id.* at 255, and the emphasis it placed on the officers’ lack of effort to quell the protestors suggests that the police may not constitutionally sit by and watch First Amendment rights be trampled, *id.* 254 n.17

(noting the city’s responsibility “to use some small part of its police force, and the aura of authority with which a sheriff’s office is imbued, to attempt to protect the *Bible Believers* from the lawless behavior of the crowd”).

The principles behind the hecklers’ veto apply even when the state did not silence the unpopular speaker, but this is often overlooked by courts. *See, e.g., Balogh v. Virginia*, 120 F.4th 127, 136 (4th Cir. 2024). In *Balogh*, a political group called “Unite the Right” had gathered to oppose the removal of a statue of Robert E. Lee. *Id.* at 130. The group was confronted by a left-leaning political group, and a fight broke out that prevented members of Unite the Right from making additional speeches. *Id.* The police were present, but did not intervene. *Id.* A member of Unite the Right alleged that by not acting, the police allowed the mob to effectuate a heckler’s veto. *Id.* The Fourth Circuit disagreed. *Id.* at 136. Citing *DeShaney*, the court insisted there is no constitutional right to police protection and a heckler’s veto only applies when a state actor cuts off a speaker’s speech due to the crowd’s reaction. *Id.* Although that conclusion was appropriate for that case, it paints with too broad a brush and ignores the reality that the principle behind a heckler’s veto—the importance of protecting unpopular or offensive speech—often applies to situations in which a state has not taken affirmative action.

State actors can violate the First Amendment without taking affirmative steps to silence certain voices. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988). This Court recognized this in *Riley*, a case involving a statute prohibiting fundraisers from charging fees above certain amounts. *Id.* at 784–85. Although the

law applied equally to all fundraising organizations, it disproportionately affected “small or unpopular charities,” which needed to share more proceeds with professional fundraisers to work with them. *Id.* at 793. It was precisely because these organizations were less popular that they needed to spend more than the statute allowed. *Id.* Thus, the effect of the statute was to chill unpopular speech. *Id.* at 794. So, even though the statute did not discriminate against or affirmatively silence any particular views, this Court held it unconstitutional because it had the effect of causing viewpoint discrimination. *Id.*

Because public universities play a unique role in fostering our nation’s democratic values, *see Keyishian*, 385 U.S. at 603, they bear an important responsibility in protecting the constitutional rights of speakers and listeners against the possibility of a heckler’s veto. *See, e.g., Rock for Life-UMBC v. Hrabowski*, 411 F. App’x 541, 552 (4th Cir. 2010). In *Rock for Life*, an anti-abortion student organization wanted to use a university’s forum to display large graphic signs about abortion. *Id.* at 543. The group requested both access to the forum and the presence of a uniformed officer “due to ‘numerous unprovoked physical attacks from pro-abortion students’ during previous exhibitions.” *Id.* at 544. The university denied this request. *Id.* Instead, it moved the group to a location far from where student groups typically display signs. *Id.* The university was concerned that “the area would become too congested if students had to ‘flee’ from a violent altercation resulting from the display.” *Id.* at 545. The Fourth Circuit held this decision could constitute an unconstitutional heckler’s veto. *Id.* at 555. Rather than forcing the students to

relocate—and thereby infringing on their First Amendment rights—the court held that “the defendants were required by the First Amendment to address these additional safety concerns by providing a security presence at the GAP display[] or watching the event closely to determine whether security was truly necessary.” *Id.*

Public universities are state entities that foster debate and public discourse. See Erwin Chemerinsky, *Free Speech on Campus* 72–73 (2017) (“[Universities] are not arenas reserved for high-minded and approved ways of thinking. They are spaces where all ideas can be expressed and challenged.”). Recently, however, many universities struggled to promote free debate due to an increase in student protests. See Eric T. Kasper, *Public Universities and the First Amendment: Controversial Speakers, Protests, and Free Speech Policies*, 47 *Cap. U. L. Rev.* 529, 529–30 (2019) (cataloging recent incidents where speakers were drowned out by protestors); see also Charles F. Walker, *Campus Speakers and Counterspeech: A First Amendment Rationale for Continued Student Protests*, 31 *Va. J. Soc. Pol’y & L.* 84, 86–88 (2024) (same). Such protests are frequently discussed in the news. See Amanda Christy Brown & Katherine Schulten, *Trigger Warnings, Safe Spaces and Microaggressions: Discussing Questions of Freedom of Speech on Campus*, *N.Y. Times* (Sept. 14, 2016, 8:00 PM), <https://archive.nytimes.com/learning.blogs.nytimes.com/2016/09/14/trigger-warnings-safe-spaces-and-microaggressions-teaching-questions-of-freedom-of-speech-on-campus/>; Johanna Alonso, *Shouting Down Speakers Who Offend*, *Inside Higher Ed* (Apr. 13, 2023), <https://www.insidehighered.com/news/students/free-speech/2023/04/13/shouting-down-speakers-who-offend>. Thus, public

universities are aware of the danger that students might drown out controversial speakers. As the Fourth Circuit noted in *Rock for Life*, this reality imposes a duty on universities to take affirmative action to protect the rights of speakers and listeners. 411 F. App'x at 553.

Of course, this does not mean a university will always be liable under *Monell* whenever a speaker's First Amendment rights are violated. The plaintiff must still show that the university adopted a particular custom, that its custom reflected deliberate indifference to the possibility of constitutional violations, and that the custom actually did cause a violation to take place. *See Tsao*, 698 F.3d at 1143. That burden is admittedly high, and often, a plaintiff will not be able to meet it. *See, e.g., Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993) (municipal liability claim failed because a single incident was insufficient to evidence a custom). Whether it is or is not met, though, is a question for the jury. *Gibson*, 290 F.3d at 1195. As a matter of law, a university can be liable for adopting a custom of refusing to prevent hecklers from silencing speakers with whom they disagree.

2. *A municipality can be held liable, even in the wake of DeShaney, for constitutional violations caused by private actors if the municipality's actions increased the likelihood that such constitutional violations would occur.*

Although the existence of a constitutional right does not create an affirmative duty on the state to safeguard or subsidize that right, *Harris v. McRae*, 448 U.S. 297, 318 (1980), the state still must avoid increasing the likelihood of a constitutional violation occurring, *DeShaney*, 489 U.S. at 201. In due process cases, this principle is often called the “state-created danger exception.” *See, e.g., Kennedy v. City of*

Ridgefield, 439 F.3d 1055, 1062 (9th Cir. 2006) (explaining the exception and listing cases invoking it). Although the state-created danger exception has never explicitly been applied to cases involving First Amendment violations for failure to act, *see Balogh*, 120 F.4th at 135, its underlying logic is equally applicable in those cases as it is in cases involving due process claims.

In *DeShaney*, this Court indicated that a state can take on a constitutional duty to act if it takes steps that make a constitutional violation more likely to occur. 489 U.S. at 201. This principle explains why, even after *DeShaney*, some cases involving similar facts to those in *DeShaney* have come out differently. *See, e.g., Currier v. Doran*, 242 F.3d 905, 922 (10th Cir. 2001); *Lipman v. Budish*, 974 F.3d 726, 748 (6th Cir. 2020). For example, in *Currier*, the Tenth Circuit held that the estate of a three-year-old child scalded to death by his father could bring a § 1983 claim against the social workers who removed him from his mother and placed him with his father. 242 F.3d at 908–09. Similarly, in *Lipman*, the Sixth Circuit held that the estate of a six-year-old girl beaten to death could bring a *Monell* liability claim against a county executive for a custom of allowing social workers to interview children about injuries in front of their alleged abusers. 974 F.3d at 748. In both cases, the factor distinguishing *DeShaney* was the state’s affirmative action that rendered the harm more likely to occur.

A state can increase the likelihood of constitutional violations occurring by instructing officers not to intervene when intervention is called for. *Dwares*, 985 F.2d at 99; *Freeman v. Ferguson*, 911 F.2d 52, 54 (8th Cir. 1990). In *Dwares*, a man at a

rally where American flags were burned was attacked by “skinheads” while police stood by. 985 F.2d at 96. The Second Circuit, invoking the state-created danger exception, held this non-action could make the officers liable under § 1983. *Id.* at 99. Likewise, in *Freeman*, the Second Circuit held that a woman whose mother and sister were killed by the mother’s estranged husband could invoke the state-created danger exception to hold the city liable for police inaction. 911 F.2d at 53–54. The court emphasized that the Police Chief not only failed to respond but also seemed to instruct other officers not to respond. *Id.* at 54.

Although the state-created danger exception has traditionally been applied only in cases involving the Due Process clause, its logic is equally relevant to First Amendment violations. This fact is often overlooked, though. *See, e.g., Balogh*, 120 F.4th at 135. For example, in *Balogh*, the Fourth Circuit noted that the state-created danger exception had never been applied in cases involving First Amendment violations. *Id.* The court failed to recognize, however, that the logical explanation for this is not that the state-created danger doctrine does not apply in such cases; it is that *DeShaney* itself is not a perfect match for such cases. *DeShaney* involved a failure-to-protect claim brought under the Due Process Clause, and as Justice Brennan’s dissent notes, *DeShaney*’s broad dicta does not necessarily apply to all constitutional contexts. *See* 489 U.S. at 207-08 (Brennan, J., dissenting). It requires an intellectual leap to move from *DeShaney*’s analysis of the scope of the Due Process Clause to an assertion that the state has no affirmative duty to protect constitutional rights in other contexts, and this is especially apparent in cases involving limited

public forums—cases in which the state does have some obligations, after having created the forum, to ensure that viewpoint discrimination is not occurring within that forum. *See Bd. of Regents*, 529 U.S. at 235.

If *DeShaney* is going to be used to argue that there is no affirmative right to state protection of speech, its exceptions should also apply. One of those exceptions allows government entities to be liable for constitutional violations when the entity has increased the likelihood such violations will occur. *DeShaney*, 489 U.S. at 201. This principle is as applicable to First Amendment violations as it is to due process violations, and thus, the state-created danger exception should not be excluded from First Amendment claims in which *DeShaney*'s holding is being invoked.

This means that *DeShaney* does not prevent a university from being held liable for failing to safeguard constitutional rights if the university itself took steps that increased the likelihood those rights would be violated. More specifically, if a university adopts a custom of allowing hecklers to silence minority viewpoints, it is likely opening itself to liability. Such a choice effectively leaves to the student body the decision of which viewpoints are allowed to be expressed. The effect is no different than if the school had placed a group of students in charge of determining which speakers would be allowed to speak through a licensing scheme. *See Amidon*, 508 F.3d at 105. Therefore, if a university takes such steps and constitutional rights are violated due to that decision, then as a purely legal matter, under both *DeShaney* and *Monell*, that university can be liable for those violations.

In this case, the jury concluded that the evidence was sufficient to satisfy each

element of Ms. McMillan's *Monell* liability claim. R. at 7a. This means that the jury concluded the evidence was sufficient to find the University had adopted a custom of allowing hecklers to silence minority viewpoints in a limited public forum, that this custom reflected deliberate indifference to the constitutional rights of those invited to speak in the forum, and that Ms. McMillan's First Amendment rights were, indeed, violated. *See Tsao*, 698 F.3d at 1143). Because the University did not file a timely post-verdict motion for judgment as a matter of law, the appellate court was without power to review the sufficiency of the evidence. *Unitherm*, 546 U.S. at 407. It could only review the purely legal question of whether a university—regardless of the specific facts of the situation—could ever be held liable for refusing to prevent hecklers from drowning out speakers with whom they do not agree. *See Dupree*, 598 U.S. at 737. Because the answer to that question is yes, the jury's verdict must stand.

B. Even if the appellate court's review were not limited to pure questions of law, its decision should still be reversed because the evidence in this case is sufficient to allow a reasonable jury to conclude that each of the elements of a *Monell* liability claim was satisfied.

Even if the Court does not agree that the University's Rule 50(b) motion was untimely, the jury's verdict should still stand because the evidence was sufficient to allow the jury to find in Ms. McMillan's favor on each element of her *Monell* liability claim. If the University's motion was timely, the standard of review is the same as that which an appellate court applies when reviewing a denial of summary judgment: whether the evidence, viewed in a light most favorable to the non-moving party, is sufficient to allow a reasonable jury to decide the issue in that party's favor. *Anderson*, 477 U.S. at 250. This is a heavy burden. *See Acevedo-Garcia v. Monroig*,

351 F.3d 547, 565 (1st Cir. 2003) (noting that a party seeking reversal of a Rule 50(b) denial “faces an uphill battle”). Unless there is “a complete absence of evidence supporting the verdict . . . [or] such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [jurors] could not arrive at a verdict against” the movant, then the jury’s verdict must stand. *Nimely v. City of New York*, 414 F.3d 381, 390 (2d Cir. 2005). Because the evidence in this case is sufficient to allow a reasonable jury to find in Ms. McMillan’s favor, the jury’s verdict should stand even if the appellate court had the power to review the sufficiency of the evidence.

1. The University has a widespread custom of refusing to prevent hecklers from silencing speakers who are attempting to access the University’s limited public forum.

Monell allows liability to be imposed against municipalities “for constitutional deprivations visited pursuant to governmental ‘custom’ even though such custom has not received formal approval through the body’s official decisionmaking channels.” 436 U.S. at 690–91. In order to be attributable to policy-making officials, though, a plaintiff must generally provide evidence that the custom was “sufficiently widespread and persistent to support a finding that [it] constituted a custom . . . of which supervisory authorities must have been aware.” *Legg v. Ulster Cnty.*, 979 F.3d 101, 116 (2d Cir. 2020) (quoting *Jones v. Town of E. Haven*, 691 F.3d 72, 81 (2d Cir. 2012)). Whether the evidence shows that the alleged practices were sufficiently widespread to constitute a custom under *Monell* is a question for the jury. See *McNabola*, 10 F.3d at 511. And while the reasonableness of that verdict is a question of law an appellate court can review, *id.* at 510–11, the jury’s verdict has been

considered reasonable where the custom was established by the testimony of only a handful of witnesses, *see id.*; *see also Legg*, 979 F.3d at 117 (testimony from just three employees sufficient to show custom of fostering a sexualized workplace).

Here, there is ample evidence to support the jury's verdict that the University had a widespread custom of not disciplining students for behavior likely to cause constitutional violations. Since Dean Thatcher became Dean, there has been a noticeable increase in raucous behavior. R. at 5a. Students have created slip-n-slides down the stairs, released chickens in the auditorium, put a car on top of New Tejas Hall, and thrown wild and parties. R. at 3a–4a. Many students have also begun attending events where people are gathered to listen to speakers share their viewpoints. R. at 5a. At these events, some students have yelled and used noisemakers to drown out the speaker's message. *Id.* In response to this behavior, campus security officers have done nothing. R. at 3a–5a. Even when students are identifiable, campus security officers—following Dean Thatcher's lead—have taken a hands-off approach. R. at 5a. This evidence is more than sufficient to allow a reasonable jury to conclude that the University has a policy of non-interference regarding its students' actions towards others on campus.

2. *The University's custom reflects deliberate indifference to the constitutional rights of individuals seeking to share their viewpoints in a limited public forum.*

When a *Monell* liability claim is based on the intentional inaction of a municipality, the plaintiff must show that the municipality was deliberately indifferent to the likelihood of constitutional violations. *Bryan Cnty.*, 520 U.S. at 407.

This consists of showing that the municipality either knew that violations had been occurring or should have known that constitutional violations were very likely to due to its conduct. *Id.* It also requires showing that the municipality decided, in spite of that knowledge, to do nothing to prevent violations from occurring. *See J.K.J.*, 960 F.3d at 378 (“[A] ‘city’s policy of inaction’ in light of notice that its program will cause constitutional violations ‘is the functional equivalent of a decision by the city itself to violate the Constitution.’” (quoting *Connick*, 563 U.S. at 61–62 (2011))).

To show deliberate indifference, a plaintiff must provide evidence that the municipality was aware of a pattern of constitutional violations or that a reasonable actor in the municipality’s position would have known violations were likely due to its custom. *Fields*, 981 F.3d at 562. Under the judgment-as-a-matter-of-law standard, this burden is met if the evidence would allow a reasonable jury to find in favor of the plaintiff. *J.K.J.*, 960 F.3d at 381. In *J.K.J.*, the Seventh Circuit held that a county jail’s failure to discipline a guard for making sexual advances towards a female inmate, *id.* at 370, combined with widespread reports of male guards making sexual comments about female inmates, *id.* at 382, was sufficient to support the jury’s verdict that the jail was deliberately indifferent to the possibility of female inmates being raped, *see id.* at 381. Similarly, in *Fields*, the Seventh Circuit held the evidence sufficient to show the City of Chicago was deliberately indifferent to constitutional violations resulting from its use of “street files”—files that excluded certain investigative materials—when prior litigation had been brought regarding the same issue and yet the city did not change its practices. 981 F.3d at 563.

The record in this case suggests campus security officers were present but failed to intervene on four different occasions when speakers were silenced by student protestors. R. at 5a. In each instance, the silenced speakers were invited to speak by a student organization. *Id.* The Black Student Coalition invited a speaker to talk about institutionalized racism. *Id.* The High Five Society invited a speaker to discuss the legalization of marijuana. *Id.* Climate 180 invited a speaker to address climate change. *Id.* And the Students for Armed Self-Defense invited someone to speak about Second Amendment rights. *Id.* In each instance, students silenced the speakers, thus infringing upon the rights of both listeners and speakers. *Id.* Yet in each instance, campus security officers did nothing, and no students were ever disciplined. *Id.*

The evidence showing campus security failed to intervene when hecklers silenced speakers is sufficient to allow a reasonable jury to conclude the University was aware constitutional violations were occurring. Although there is no clear line demarcating what amount of evidence is sufficient, the holdings of *J.K.J.* and *Fields* indicate that even a small amount of evidence is often considered enough for the jury's verdict to be considered reasonable. If the testimony of only a few employees or the existence of one prior court case was sufficient, in those cases, to put the municipalities on notice of constitutional violations, then the knowledge that speakers had been silenced on four separate occasions was enough, in this case, to show that the University had been put on notice.

A reasonable jury would also have little difficulty concluding that the University's choice not to act, despite knowing constitutional violations were

occurring, reflected deliberate indifference to the constitutional rights of students and speakers. Dean Thatcher himself acknowledges he does not believe in punishing students, R. at 5a, even when they infringe others' rights, and it is clear that campus security's refusal to punish students is based largely on the example he chose to set. *Id.* Given the University's history of free-speech violations, a reasonable jury could conclude that this decision reflects deliberate indifference. Especially considering that the University has over sixty different student groups—many of which could be adversely affected by other students' heckler's veto—the University's choice seems especially reckless.

3. *The evidence in the record is sufficient to allow a reasonable jury to conclude that the University's custom caused the constitutional violations.*

To prevail in a *Monell* liability claim for inaction, a plaintiff must also show a causal link between the municipality's custom and the constitutional harm suffered. *Garner v. Memphis Police Dep't*, 8 F.3d 358, 365 (6th Cir. 1993). In most cases, the high degree of predictability will “also support an inference of causation—that the municipality's indifference led directly to the very consequence that was so predictable.” *Bryan Cnty.*, 520 U.S. at 410. However, it still requires the jury to ask an additional question—it “requires jurors to view evidence in its totality, draw on their life experiences and common sense, and then reach reasonable conclusions about the effects of particular action and inaction.” *J.K.J.*, 960 F.3d at 385. So long as the jury can draw a reasonable inference of a causal link between the custom and the violation, the verdict must stand. *Id.*

In this case, it is reasonable for a jury to infer a causal link between the

University's custom and the constitutional harm Ms. McMillan experienced. Ms. McMillan was invited to speak on campus by the Campus Vegan Alliance. R. at 6a. The protestors drowned out all her attempts to talk. *Id.* The students who invited Ms. McMillan repeatedly asked the protestors to be silent. *Id.* A campus security officer was present but did nothing. R. at 7a. And the students were readily identifiable yet went unpunished. *Id.* Moreover, Ms. McMillan's rights were violated after the University was put on notice that constitutional violations were occurring. *Id.* Such deliberate inaction in the face of such a predictable outcome provides more than enough support to conclude there is a causal link between the University's custom and the violation of Ms. McMillan's constitutional right to share her perspective. *Id.*

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to REVERSE the decision of the Thirteenth Circuit Court of Appeals and REMAND to the District Court for the Eastern District of New Texas with instructions to reinstate the amended judgment.

Dated: November 18, 2025

Respectfully submitted,

Team 36
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Petitioner, hereby certifies that, in compliance with Competition Rule 2.6 and Supreme Court Rule 33.1, this brief contains 13,999 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings, but excluding the Certificate of Compliance and the attached Appendix.

Dated: November 18, 2025

Respectfully submitted,

Team 36
Counsel for Petitioner

APPENDIX

CONSTITUTIONAL PROVISIONS

The First Amendment of 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.

STATUTORY PROVISIONS

Section 1983 of Title 42 of the United States Code 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[.]

42 U.S.C. § 1983.

FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure Rule 6 provides, in pertinent part:

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or

legal holiday.

...

(2) Exceptions. 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).

Federal Rule of Civil Procedure Rule 50 provides:

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.