

No. []

In The
Supreme Court of the United States

DOVE McMILLIAN

Petitioner,

v.

BOARD OF REGENTS OF
CITY UNIVERSITY OF LANTANA

Respondent.

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

BRIEF FOR THE PETITIONER

TEAM #78

Counsel of Record

November 18, 2024

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QUESTIONS PRESENTED

1. When a trial judge, sua sponte, amends a final judgment by adding the damages already awarded by the jury without alteration, does the deadline for filing a renewed motion for judgment as a matter of law challenging unchanged portions of the judgment toll such that a motion untimely when measured from the unambiguous original judgment is made timely because of the unrelated amendment?
2. Does a University's undefined policy of refusing to discipline students violate the First Amendment when it creates danger and harm to invited speakers on campus, even if the refusal to discipline is ostensibly applied in a viewpoint-neutral manner?

OPINIONS BELOW

The opinion of the Thirteenth Circuit has not yet been published in the Federal Reporter, but is reprinted in the Appendix to the Petition (“Pet. App.”) at 1a. The district court opinion is reprinted at Pet. App. 20a.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are reprinted at Pet. App. 25a.

STATEMENT OF THE CASE

A. Factual Background

Dove McMillan was invited to speak by a recognized student group at the University of Lantana, a public university in New Tejas. Pet. App. 6a. Five minutes into her speech, campus security watched as protestors streamed in, chanting, carrying noisemakers, and wearing animal costumes. *Id.* The protestors stormed up to the stage and drowned out McMillan’s attempts to speak. *Id.* McMillan was forced off the stage and did not return. *Id.*

After McMillan left, campus security stood by and continued to do nothing as the protestors engaged in destructive behavior. Pet. App. 7a. The protestors broke several tables and chairs, damaged the auditorium podium, and stained the carpet. Pet. App. 6a. While the protestors were easily identifiable, the University did not discipline any of the protestors for their actions. Pet. App. 7a.

This troubling incident reflects the crisis of accountability the University of Lantana is facing under its current Dean of Student affairs, Mason Thatcher. Pet. App. 5a. Dean Thatcher adopted a policy of refusing to discipline on campus, choosing to dismiss disruptive behavior as mere “boys will be boys” antics. *Id.* This attitude has infiltrated campus culture, as school employees, including campus

security, have generally followed his lead and turned a blind eye to misconduct. *Id.*

Students at the University, emboldened by the “boys will be boys” policy, have become increasingly disruptive, leading to frequent incidents of shouting down invited speakers. *Id.* This heckler’s veto has silenced voices from a variety of minority perspectives, all while campus security, under Dean Thatcher’s directive, stands idly by. *Id.* No disciplinary action has been taken against any students who engage in these acts of suppression. *Id.*

B. Proceedings Below

McMillan sued the Board of Regents of City University of Lantana, alleging a violation of her First Amendment rights under 42 U.S.C. § 1983. The case went to trial, and the University moved for judgment as a matter of law under Rule 50(a). The district court denied the University’s motion. The jury awarded McMillan \$12,487 in compensatory damages and \$350,000 in punitive damages. The district court entered a final judgment awarding only compensatory damages on January 20, 2022. However, the district court sua sponte modified the judgment to include the punitive damages awarded by the jury seven days later. The University submitted a renewed motion for judgment as a matter of law on February 24, 2022, twenty-eight days after the modified judgment and thirty-five days after the original judgment. The district court deemed the University’s Rule 50(b) motion untimely and denied it without considering its merits. The University appealed, and on May 10, 2023, the appellate court reversed the decision of the district court and granted the University’s motion for judgment as a matter of law.

SUMMARY OF ARGUMENT

(I) Deadlines for post-verdict motions are a critical and non-negotiable element of the Federal Rules. An amended judgment does not toll these deadlines if the amendment “is of no import to the matters to be dealt with.” *FTC v. Honeywell Regul. Co.*, 344 U.S. 206, 213 (1952). Here, the University filed a Rule 50(b) renewed motion for judgment as a matter of law, which is required to be on the same grounds as the pre-verdict motion. Because the only difference between the original judgment and the amended judgment is the addition of the jury-awarded punitive damages, the amended judgment does not unsettle the finality of the initial judgment for the purposes of a Rule 50(b) motion. The specific damage amount does not change the grounds or evaluation of a

Rule 50(b) motion. A motion that hinged on the specific damages awarded would be a Rule 56 motion, which has different standards for both initial adjudication and appellate review.

Moreover, the court below created a circuit split in the way it evaluated the rules of its sister circuits. There was no ambiguity in the initial judgment, and the amended judgment did not cure any initial confusion. The district court's sua sponte timely amendment of its own judgment does not give license for litigants to extend motion practice in an untimely manner when the object of the motions is related to matters they could have filed prior to the amendment. The purposes behind the rule are best served when these deadlines are taken seriously.

Further, the addition of already awarded punitive damages to the second judgment does not unsettle the finality of the initial judgment. A judgment is final "when it terminates the litigation on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, I.M. & S. Ry. Co. v. S. Express Co.*, 108 U.S. 24, 28-29 (1883). The simple fact that more money is coming out of the defendant's pocket does not mean that the merits of the case are reopened. Because the jury is the decisionmaker with regards to punitive damages, the addition of already awarded punitive damages to the face of the judgment does not change the practical consideration of whether the merits have been fully adjudicated. The judge would not have had the power to unilaterally exclude the punitive damages without offering McMillian the option of a new trial, indicating that the amendment is best understood as correcting an error and not substantively changing the ruling of the initial judgment. The jury has been the arbiter of damages since even before the codification of the Constitution. The jury's verdict constitutes a mandate on damages and, therefore, the amendment was not a new *adjudication*. The amendment merely executed on an already given mandate, the full nature of which all litigants were fully aware of at the time of the first judgment.

(II) First Amendment rights are "fragile interests" most important to protect on college campuses. *Bates v. State Bar.*, 433 U.S. 350, 380. Yet, the University's "boys will be boys" policy unduly restricts the First Amendment rights of both speakers and students. Contrary to the erroneous decision of the lower court, the University does violate the First Amendment with its policy of refusing to discipline students. The "boys will be boys" policy is so overbroad that it invites discriminatory enforcement, which violates the First Amendment rights of both invited speakers and students. The University's policy also imposes security

costs on invited speakers, resulting in viewpoint discrimination. And the state-created danger doctrine also imposes liability upon the University for the actions of the students who shouted down McMillan. This Court should thus reverse the Thirteenth Circuit’s decision and affirm the district court’s decision.

A general refusal of any discipline constitutes an overbroad policy such that it invites discriminatory enforcement, a viewpoint-discriminatory outcome that violates the First Amendment. The lack of clear, workable standards in the policy mean that university security can inconsistently decide when to intervene, an outcome this Court has already stated is unconstitutional. Moreover, because the policy condones disruptions of speakers and provides no clear guidance on when intervention will occur, students may avoid attending events with unpopular speakers—this self-censorship chills speech, infringing upon the students’ First Amendment right to receive ideas.

The University’s “boys will be boys” policy also improperly imposes a burden on unpopular speakers by effectively requiring them to provide their own security, which constitutes viewpoint discrimination.

Finally, the University had a duty to protect McMillan due to the state-created danger doctrine. The University’s policy of refusing to discipline students constitutes an affirmative act that created the danger by condoning the heckler’s veto, and the University demonstrated deliberate indifference by ignoring the known consequences of its policy. For these reasons, this Court should reverse the decision of the Thirteenth Circuit and affirm the decision of the district court.

ARGUMENT

I. THE INITIAL JUDGMENT CONTAINED A FINAL, UNCHANGED JUDGMENT THAT REFLECTED THE JURY VERDICT, MAKING THE UNIVERSITY’S RULE 50(B) MOTION UNTIMELY.

The necessity for a Rule 50(b) motion to be timely is “an essential part of the rule, firmly grounded in principles of fairness. *Johnson v. N. Y., N.H.J. & H.R. Co.*, 344 U.S. 48, 53 (1952). The timeliness “emphasizes the importance of the legal issues” and is structured as a *renewed* motion precisely because it reframes the submission of the case to the verdict as doing so “subject to a latter determination of the right to a direct verdict if a motion for judgment notwithstanding the verdict

is made within 10 days after the reception of a verdict.” *Id.* While this deadline does not speak in jurisdictional terms, if an affected party like McMillian alerts the court to the deadline and “invokes its protection, the relevant action cannot be taken after the deadline has passed.” *McIntosh v. United States*, 601 U.S. 330, 337 (2024). A mandatory claim-processing rule, like the timeliness requirement for Rule 50(b) motions, “requir[es] that the parties take certain procedural steps at certain specified times.” *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Filing deadlines are “quintessential claim-processing rules.” *Id.* A Rule 50(b) motion must be filed “[n]o later than 28 days after the entry of judgment.” Fed. R. Civ. P. 50(b). The Federal Rules make clear that this is a fixed deadline and “must not extend the time to act under Rules 50(b)[.]” Fed. R. Civ. P. 6(b)(2).

Here, the University failed to file its Rule 50(b) motion in a timely manner. First, the initial judgment was unambiguous, making it final for the purposes of a renewed motion for judgment as a matter of law. Because such motions must be founded on the same claims made in the pre-verdict motion, the precise specifics of the punitive damages are necessarily irrelevant and could not restart the filing deadline. *Infra* Part A.1. Further, the timely sua sponte amendment cannot make an untimely motion come within the deadline, because the non-moving party cannot rely on the actions of others to bring their motions in compliance with rules. Allowing this would create massive incentive for strategic delay. *Infra* Part A.2. Second, the test for whether a judgment is final is a practical one, looking to whether all relevant issues have been settled and the merits decided. Here, the jury decided the damages; the judge’s amendment did not reopen the merits of the case. *Infra* Part B.1. The jury has long been understood to be the decisionmaker for damages, thereby making clear that the initial judgment, with the full record taken into account, was final. *Infra* Part B.2.

A. The Initial Judgment Was Unambiguous, Making It Final For The Purposes Of Evaluating A Motion To Set Aside The Jury’s Verdict And Render A Judgment As A Matter Of Law Under Rule 50(b).

- 1. The University’s renewed motion for judgment as a matter of law was untimely because the changes made in the amended judgment did not alter the grounds or evaluation of the Rule 50(b) motion.**

This Court made clear in *Honeywell* that tolling of deadlines should not occur “because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with.” *FTC v. Honeywell Regul. Co.*, 344 U.S. 206, 213 (1952). The matters to be dealt with in a Rule 50(b) motion are constrained only to “grounds advanced in the pre-verdict motion.” Fed. R. Civ. P. 50 advisory committee’s note on the 1991 amendments. The details of the punitive damages could not have been grounds in the pre-verdict motion because the punitive damages had not yet been awarded. Under Rule (a)(2) a, pre-verdict motion must specify “the law and facts upon which the moving party bases the motion.” 9 Moore’s Federal Practice - Civil § 50.02 (2024). A renewed Rule 50(b) motion must be based on grounds present in the pre-verdict motion: “[a]llowing trial courts to set aside jury verdicts on grounds not presented in pre-verdict motions has been held to constitute an impermissible re-examination of jury verdicts in violation of the Seventh Amendment.” 9 Moore’s Federal Practice - Civil § 50.43 (2024) (collecting authorities). If the University wished to challenge the damages themselves without questioning the legal sufficiency of the verdict as entered in the initial judgment, the appropriate motion would have been a Rule 59 motion for a new trial, with or without condition of remittitur. 12 Moore’s Federal Practice - Civil § 59.13 (2024) (“When the court finds that a verdict is excessive because it is not supported by the evidence . . . it may overturn the verdict and order a new trial outright, or it may order a new trial conditioned on the verdict winner’s refusal to accept a ‘remittitur.’”).

If the University’s target was the excessiveness of the punitive damages, the appropriate motion would have been a motion for a new trial. See *Browning-Ferris Indus. of Vermont, Inc v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) (“In reviewing an award of punitive damages, the role of the district court is to determine whether the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered.”),

abrog'd on other grounds by Gasperini v. Ctr. for the Humanities, Inc., 518 U.S. 415 (1996). This Court has been clear regarding the difference between a motion for a new trial and a renewed motion for judgment as a matter of law as each motion “has its own office.” *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). A motion for a judgment as a matter of law is related to the sufficiency of the evidence and it “cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant’s favor should have been directed.” *Id.* On the other hand, a “motion for a new trial may invoke the discretion of the court” and is not exclusively a matter of law: a motion for a new trial can be founded “on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving.” Specifics about excessive damages must be adjudicated through a motion for a new trial and not a motion for judgment as a matter of law.

Deadlines only toll with respect to motions that are dependent on information available from the amended judgment and not from the initial judgment. *See Honeywell*, 344 U.S. at 211–12. If all the information the University needed to make its untimely motion was in the initial judgment, there is no grounds to toll the filing deadline. Fed. R. Civ. P. 50 advisory committee’s note on the 1991 amendments; *see Honeywell*, 344 U.S. at 211–12. Here, any motion that depended on only the amount of damages in the amended judgment, without being adjudicable from the verdict and the original judgment, would not be a Rule 50(b) motion; thus, the Rule 50(b) motion does not toll. This Court has been clear: it is “[o]nly when the lower court changes matters of substance, or resolves a genuine ambiguity” that the strict deadlines related to the finality of the judgment should toll. *Honeywell*, 344 U.S. at 211; *see also McNabola v. Chi. Transit Auth.*, 10 F. 3d. 501, 521 (7th Cir. 1993) (holding that a motion “must challenge the altered and not the original judgment” to be timely). A renewed Rule 50(b) motion, dependent as it is on the pre-verdict Rule 50(b) motion, could *never* rely on a post-judgment amendment to the initial entered judgment, as long as the amended judgment was consistent with the jury’s rendered verdict. All of the required substance was unambiguous from the point of the original judgment, regardless of the addition of punitive damages.

Concern regarding the excessiveness of punitive damages does not toll the finality of the initial judgment. This Court’s precedent on remittitur makes clear that an amendment of remittitur “does not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged[.]” *Dep’t of*

Banking, Nebraska v. Pink, 317 U.S. 264, 266 (1942). This Court has repeatedly affirmed that judgments that clearly adjudicate liability and mandate remedial action are final even “prior to the formulation and entry of the precise details of the relief ordered.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 309–10 (1962).

Here, liability was final in the initial judgment. Pet. App. 20a; see *Honeywell*, 344 U.S. 206 at 212–13. There is no confusion about liability, finality, or the parties involved. Pet. App. 20a. The University, in moving to set aside the judgment as a matter of law, challenged the jury’s finding of liability clearly laid out in the initial judgment. Pet. App. 20a; see *Honeywell*, 344 U.S. 206 at 212 (“Since the one controversy between the parties related only to the matters which had been adjudicated on July 5, we cannot ascribe any significance, as far as timeliness is concerned, to the later judgment.”). Even if the amended judgment might have tolled with regard to motion that challenged the validity of the damages, that possible unmade motion would not alter whether the judgment of liability was final as of the initial motion. See *Robinson v. Sherman Fin. Grp., LLC*, 611 Fed. Appx. 300, 302 (6th Cir. 2015) (holding that an amended judgment altering a co defendant’s legal rights does not toll the deadline for the defendant whose liability was clear in the initial judgment).

The court below itself created a circuit split in its ruling by extending this Court’s decision in *Honeywell* to toll the Rule 50(b) deadline in the absence of ambiguity about liability in the initial judgment. Sister circuits consistently restrict tolling to cases in which there is a genuine ambiguity about legal effect or liability. *Conway v. United States*, 326 F.3d 1268, 1276 (Fed. Cir. 2003) (holding an amended judgment tolled deadlines when there was “ambiguity as to the legal effect of a court’s order”); *Edwards v. Ctr. Moriches Tchrs. Ass’n*, 553 F. App’x 68, 70 (2d Cir. 2014); *Taylor v. Cont’l Grp. Change in Control Severance Pay Plan*, 933 F.2d 1227, 1231 n.2 (3d Cir. 1991) (holding that the time for appeal ran from the amended order because the initial order was ambiguous as to whether it was a final judgment or an order certified for interlocutory appeal); *Wilmington Sav. Fund Soc’y, FSB v. Myers*, 95 F.4th 981, 982 (5th Cir. 2024) (holding that there was genuine ambiguity in the initial verdict due to lack of clarity about over which parties the initial judgment covered). Even in the Fifth Circuit decisions relied upon by the lower court in McMillan’s case, the motion was for a new trial; that motion, unlike a Rule 50(b) motion, challenges the entirety of the jury’s verdict. *Wilmington Sav. Fund Soc’y*, 95 F.4th at 982; *Cornist v. Richland Par. Sch. Bd.*, 479 F.2d 37, 38 (5th Cir. 1973).

Unlike in *Wilmington* and *Cornist*, here, a Rule 50(b) motion would in no way depend on the amended judgment.

However, in the absence of ambiguity, the purpose of the post-verdict motions demands balancing the ability for a district court to correct its own errors with the desire for finality in litigation. Accordingly, “[t]he purpose of the rule suggests that when a court alters its judgment, a person *aggrieved by the alteration may ask for a correction.*” *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986) (emphasis added). This does not imply that an untimely motion directed at the original judgment should be permitted when an unrelated amendment was made. Indeed, that would put the goals of these rules at cross-purposes and permit an ever-expanding motion practice as each new motion is taken as an opportunity to attempt to revisit already settled issues. The cases cited by the lower court are situations of *ambiguity*, but no ambiguity existed in the original verdict here. See *Cornist*, 479 F.2d at 38. The Fifth Circuit itself makes this clear by rejecting the tolling of an appeals deadline when the amended judgment rested on one of the two grounds the original judgment did, holding that this was untenable in light of the risk of “a party aggrieved by a judgment resting on several grounds could extend the time for appeal virtually indefinitely by filing successive motions for reconsideration challenging each of the grounds seriatim.” *Dixie Sand & Gravel Co. v. Tenn. Valley Auth.*, 631 F.2d 73, 75 (5th Cir. 1980).

2. The sua sponte amendment of the initial judgment to bring it in compliance with the jury’s verdict does not toll time on unrelated issues.

The timeline of the University’s motion runs from the initial judgment because the motion is unrelated to the amended judgment. Importantly, the University’s Rule 50(b) motion addresses challenges to the jury’s legal conclusions, not the amount of damages. Pet. App. 20a. The University’s motion is thus unrelated to the court’s sua sponte inclusion of punitive damages. A timely postjudgment motion or amendment of the judgment does not allow the non-moving party to “make its own untimely request for alteration of the judgment on wholly independent grounds.” *McNabola v. Chi. Transit Auth.*, 10 F. 3d. 501, 520 (7th Cir. 1993); see also *Tru-Art Sign Co., Inc. v. Loc. 137 Sheet Metal Workers Int’l Ass’n*, 852 F.3d 217, 221–22 (2d Cir. 2017) (“[A] party aggrieved *by the alteration* must ask for correction *of that alteration* to have the timeliness of their correction determined from the date of the altered judgment.”). Therefore, since the motion directly addresses the

original verdict, the amended judgment does not toll the Rule 50(b) filing deadline.

The moving party could have made their motion before the correction—there was no failure of notice. Pet. App. 20a. However, the University likely did not initially move to overturn the verdict because it would have been more expensive to retain its lawyers for longer than to accept the original damages. Practically speaking, it was not worth it for the University to try to get the verdict overturned until there were punitive damages. That is not a good enough reason to toll time. The test in *Honeywell* does not mean that a party can do a cost-benefit analysis, decide attorneys are not worth being paid to try to overturn a verdict, and then after damages are corrected to include punitive damages circle back and try to overturn the verdict. *See Honeywell*, 344 U.S. 206 at 213 (“Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review.”). Rather, the test in *Honeywell* supports tolling of the filing deadline only when it is equitable to do so. *Id.* Delays based on cost-benefit analyses exceed the scope of this test beyond what is equitable, instead creating a loophole that detracts from the function of procedural timelines. If parties knew that they could delay their JMOL motions until it is financially convenient or worth it for them, the procedural timelines would no longer hold weight; parties could get around the timeline with a “wait and see” approach.

To uphold the circuit court’s decision today would see this Court create a precedent of strategic delays, an outcome that goes against the principles that led to the creation of procedural deadlines in the first place. Procedural deadlines are meant to promote judicial efficiency, provide parties with a clear timeline, and uphold each party’s prerogative to a timely resolution. *See, e.g., Honeywell*, 344 U.S. 206 at 213 (“Thus, while we do not mean to encourage applications for piecemeal review by today’s decision, we do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end.”). Allowing the University’s motion to be considered timely would effectively endorse strategic delays of JMOL motions, creating a slippery slope for the future of procedural deadlines.

- B. As Finality Is A Practical Test That Takes The Full Record Into Account, Adding The Damages Already Awarded In The Jury's Verdict Did Not Reopen The Merits Of The Initial Judgment.**
- 1. The amended judgment's inclusion of the punitive damages from the jury's verdict did not change the finality of the initial judgment.**

The merits of this case were resolved in the initial judgment and with the jury's verdict. The mere fact that the calculation of damages was corrected in the second judgment with the addition of the jury-awarded punitive damages is insufficient to change that. *See Kraft, Inc. v. United States*, 85 F.3d 602, 607–08 (Fed. Cir.), *opinion modified on denial of reh'g*, 96 F.3d 1428 (Fed. Cir. 1996) (holding that a decrease of damages in an amended judgment was insufficient to toll the deadline because it was not the first adverse judgment against the moving party or change any substantive rights). A judgment is final “when it terminates the litigation on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.” *St. Louis, I.M. & S. Ry. Co. v. S. Express Co.*, 108 U.S. 24, 28–29 (1883). If a judgment “puts to rest the questions which the parties had litigated,” it is final. *Honeywell*, 344 U.S. at 213.

A change in the amount of money out of the defendant's pocket does not necessarily alter the “legal rights and obligations” in the relevant way. *See Honeywell*, 344 U.S. 206 at 212. This Court held in *White v. N.H. Dept. of Employment Security* that a request for attorney's fees did not constitute a Rule 59(e) motion to alter or amend the initial judgment. *White v. N.H. Dep't of Emp. Sec.*, 455 U.S. 445, 446 (1982); *see also Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268 (holding that a motion for the allowance of costs was not a motion touching the merits of the initial judgment).

Here, only the jury can touch the merits. The adjudication of the case was complete at the time of the verdict; the initial judgment incorporated that verdict and was made final with respect to that verdict. *See S. Express Co.*, 108 U.S. at 28–29. The amended judgment does not do anything to reconsider or reopen anything that the jury did. The Court must look “to the whole record, as [it] [is] entitled to do in determining questions of finality.” *Loc. 438 Const. & Gen. Labor. Union v. Curry*, 371 U.S. 542, 551 (1963). Because the *Honeywell* test is a

“practical one” and looks to the entirety of the record, the fact that the amended judgment is identical to the jury verdict that the University was well aware of at the time the initial judgment was entered is determinative. *See Honeywell*, 344 U.S. at 212. The “legal rights and obligations” were settled by the jury. *Id.* If there is “nothing more of substance to be decided in the trial court, the judgment [is] final.” *Loc. 438*, 371 U.S. at 551. Even though a timely post-verdict motion could have revised the verdict of the jury, that does not touch the finality of the initial judgment: “The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment.” *Mkt. St. Ry. Co. v. R.R. Comm’n of Cal.*, 324 U.S. 548, 552 (1945).

In cases where the specifics of the damages unsettle the finality of the initial judgment, it is because the damages are inextricable from the underlying legal issues at the core of the case. In eminent domain cases, for instance, the specific sum the government will pay in exchange for a particular item of property is essential for determining whether the taking was valid under the Constitution. *Caitlin v. United States*, 324 U.S. 229, 233 (1945). However, between private parties, adjustments of costs and contributions in a transfer of property action often occur post-judgment for equitable reasons, but do not impact the finality of the judgment. *See, e.g., Thomson v. Dean*, 74 U.S. 342, 343–44 (1868). Here, the University was already held liable by the jury for the underlying cause of action with both punitive and compensatory damages. Pet. App. 20a. The legality of the verdict and damages is premised on whether the jury’s judgment could be supported by the evidence at trial and existing law; nothing about the inclusion of the awarded punitive damages changes the assessment. *See supra*.

The amended judgment is just the execution of an already final judgment. Unlike a motion for discretionary prejudgment interest, which does touch the merits, the amended judgment here is not discretionary in the absence of remittitur: the jury is the decision maker who settles damages. In a motion for discretionary prejudgment interest, it is the *district court* that must examine the facts and law, as this Court stressed in *Osterneck*. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989) (emphasis added). Further, unlike the non-discretionary prejudgment interest, which was discussed in dicta in *Osterneck*, the jury, not the judge, is the one who initially added the punitive damages to the plaintiff. *Id.* at 175 n.3. Additur, where the judge adds damages independently of the jury, is unconstitutional. *Dimick v. Schiedt*, 293 U.S. 474, 486–87 (1935). But this rule is not

violated when the jury has properly determined liability and there is no valid dispute as to the amount of damages, as is recognized across the circuits. *Roman v. W. Mfg., Inc.*, 691 F.3d 686, 702, 702 n.10 (5th Cir. 2012) (collecting cases).

The jury already made the determination of damages and the judgment was already final; the amended judgment was only the execution of a mandate and not a substantive alteration. For instance, when a lower court enters a new judgment on remand from an appeals court, the deadline does not restart even though the verdict itself has changed. The lower court is merely executing the mandate as it is legally required to do so. *See Noonan v. Bradley*, 79 U.S. 121, 129 (1870) (“Rehearings are never granted where a final decree has been entered and the mandate sent down,” except in cases of fraud.). Similarly, in this case the district court gave no reason to conclude the jury was unreasonable or unlawful in the amount of damages it chose to find for McMillian, making the amendment of the judgment to include the full extent of those damages merely executing a legally required mandate. The initial judgment was unlawful to the extent that it seemed to excise part of the jury’s damages without allowing McMillian the option of a new trial. *See Hetzel v. Prince William Cnty., Va.*, 523 U.S. 208, 211 (1998) (holding that a writ of mandamus requiring a district court enter a judgment for a lesser amount than determined by the jury without allowing the option of a new trial “cannot be squared with the Seventh Amendment”). Here, while the change was not merely collateral or clerical, it is best understood as correcting an error in the initial judgment to ensure it comports with the full scope of the jury’s verdict. This is critical: “error” is not identical with “nonfinality.” *Browder v. Dir., Dept. of Corr. of Ill.*, 434 U.S. 257, 267 (1978). As a practical matter, then, the initial judgment is best read as final and the amended judgment a mere recognition of the finality of the jury’s verdict.

2. The jury’s final authority to find damages is a bedrock principle of American law dating from even prior to the Constitution.

The jury’s control over damages is an uncontested aspect of American jurisprudence, which confirms that the deadline for the University’s Rule 50(b) motion should not be tolled when the amended verdict merely brought the judgment to comply with the damages. “[I]n all cases sounding in damages these damages must be assessed by the jury and not by the court independently[.]” *Dimick*, 293 U.S. at 279; *see also Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481–83

(1933) (holding that jury findings regarding damages in a breach of contract were binding unless there was a significant legal error).

It is clear that “by the law the jury are judges of the damages.” *Lord Townshend v. Hughes* (1677), 86 Eng. Rep. 994, 994–995; 2 Mod. 150, 151. As this Court made clear, “there is overwhelming evidence that the consistent practice at common law was for juries to award damages.” *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (collecting cases). Although the exact date of the introduction of trial by jury to England is contested, the Magna Carta set forth trial by jury as one of the two essential components of democratic society in England. Magna Carta, cl. 29 (1297). The notion that factual determinations should be conducted by the community (represented by jurors) rather than judges was grounded in the belief that juries could most accurately assess the facts and render justice. See 3 W. Blackstone, *Commentaries on the Laws of England* 349–50 (8th ed. 1778) (emphasizing the importance of a “tribunal composed of twelve men good and true . . . being the equals or peers of the parties litigant”). English courts consistently reiterated the importance of deference to damages calculated by the jury, because to hold otherwise would be “a censure on the first verdict and a correction of it,” as an early state Supreme Court wrote. *McCoy v. Lemon*, 45 S.C.L. 165, 174–76 (S.C. App. L. 1856) (quoting *Smallpiece v. Bockenham*, M. 27 Car. 2 C. B. (1675)).

Early American courts repeatedly affirmed that jury verdicts are conclusive and that juries have the final say on damages. See, e.g., *Harvey v. Huggins*, 18 S.C.L. 252, 263 (S.C. App. L. & Eq. 1831) (“The only remaining question, the amount of damages, was also one exclusively for the jury.”). As case law evolved, courts continued to reinforce this finality. See, e.g., *Fairmount Glass Works*, 287 U.S. at 481–82. A jury’s lawful verdict on damages is a binding mandate, reflecting the constitutional, historical, and practical importance of the jury’s role in American civil law. This is made clear in cases assessing the validity of remittitur, which characterize the practice as constitutional to the extent that it is upholding the lawful portion of the jury’s verdict by merely excising the unlawful excess. See, e.g., *Northern Pac. R. Co. v. Herbert*, 116 U.S. 642, 646 (1886) (“In requiring the remission of what was deemed excessive [the court] did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand.”).

In McMillan’s case, the jury rendered a verdict in favor of McMillan and awarded her \$12,487 in compensatory damages and \$350,000 in punitive damages. Pet. App. 20a. There was no timely argument challenging the lawfulness of the verdict, and, when the University finally moved, it did so only on a Rule 50(b) motion that did not challenge the excessiveness of the damages but instead the imposition of liability at all. Pet. App. 21a. In that context, the jury’s verdict on damages is final. It marks the end of the substantive fact-finding on liability and damages. The University had sufficient information to move to overturn that verdict from the moment it came down. Tolling the timeline based on a procedural amendment to the judgment would undermine this finality, allowing continuous extensions and delays. It would effectively erode the jury’s authority by permitting additional challenges to the jury’s fact-based conclusions on damages.

II. THE UNIVERSITY’S POLICY OF REFUSING TO DISCIPLINE STUDENTS VIOLATES THE FIRST AMENDMENT.

Contrary to the erroneous decision of the Thirteenth Circuit, the University’s policy of refusing to discipline students violates the First Amendment. The University’s policy is overbroad—the indeterminate scope of the policy creates the possibility for viewpoint-discriminatory enforcement. The unclear standards of the “boys will be boys” policy might encourage students to avoid attending events with unpopular speakers out of fears for their own safety; such self-censorship reflects the potential chilling effect of the University’s policy on the students’ right to receive ideas. The University’s policy also disproportionately burdens unpopular speakers by effectively imposing security costs upon them, which constitutes viewpoint discrimination. And under the state-created danger doctrine, the University had a duty to protect McMillan from the actions of the students. Thus, this Court should hold the University’s policy a violation of the First Amendment and reverse the Thirteenth Circuit’s decision.

A. The University’s Policy of Refusing to Discipline Students Is Overbroad And Invites Discriminatory Enforcement In The Future.

The University’s policy is so overbroad that it invites viewpoint-discriminatory enforcement. A law that invites discriminatory enforcement may be viewpoint-discriminatory even if it is facially viewpoint-neutral. *Minn. Voters All. v. Mansky*, 585 U.S. 1, 4 (2018). An unclear regulation creates “[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.” *Board of*

Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 576 (2018). When arbitrary enforcement is vested in a governmental authority, covert forms of viewpoint discrimination may result. *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).

In *Minnesota Voters Alliance*, the Court examined a Minnesota apparel ban that prohibited the wearing of any political badges, buttons, or insignia within a polling place. The apparel ban gave election judges the discretion to decide what constituted political apparel. *Minn. Voters All.*, 585 U.S. at 21. The Court struck down the statute, reasoning that although the apparel ban was facially viewpoint-neutral, the lack of “objective, workable standards” for enforcement invited discriminatory enforcement. *Id.* at 21. The indeterminate scope of the apparel ban created line-drawing issues for election judges. *Id.* at 18. Without objective standards for enforcement, an election judge’s own politics could have influenced what the judge categorized as “political.” *Id.* at 22. Similarly, Dean Thatcher’s “boys will be boys” policy is susceptible to viewpoint-discriminatory enforcement.

Dean Thatcher’s hands-off, “boys will be boys” policy is “generally” followed but does not delineate if and when school officials should step in and discipline students. Pet. App. 5a. The policy lacks “objective, workable standards,” like the apparel ban in *Minnesota Voter Alliance*. See *Minn. Voter All.*, 585 U.S. at 21. For example, the security guards did not step in when the protestors were trashing the auditorium that McMillan tried to speak in. Pet. App. 6a–7a. Yet, if a heckler held a gun to a speaker’s head, the security guards would surely have to step in and stop the heckler. There must be a line somewhere in the policy of refusing to discipline students, but because the policy does not delineate the line, the line drawing is left to the discretion of the school’s security officers. This creates the potential for viewpoint-discriminatory enforcement of the policy; the security officer’s opinions and politics could influence when the security officer determines that a speech is too unsafe to continue. If a security guard who holds strong gun control beliefs sees a mob of angry NRA protesters, that guard may assume, based on personal beliefs about the NRA, that the NRA protesters pose a threat. A guard with strong gun control beliefs would be more likely to step in and stop the protesters than a guard who is pro-gun rights and supports the NRA. Thus, just as the apparel ban in *Minnesota Voter Alliance* invites viewpoint-discriminatory enforcement, so too does the policy of refusing to discipline students at the University.

Moreover, the University is a limited public forum so it is generally permitted to put certain restrictions on speech in place. *See Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983). If a student throws a temper tantrum that interrupts a biology exam, the professor is allowed to ask that student to leave, and very likely would ask the student to leave. Yet, the school chooses not to protect speakers who are being heckled down. Pet. App. 5a. Under the policy of refusing to discipline students, the school can choose to protect some types of speech—speech that it deems more important to protect, like a professor teaching a class or administering an exam, while choosing not to protect other types of speech. *See id.*

The University may argue that regulating speech in the context of the classroom or the administration of exams is a permissible time, place, and manner restriction. This would be true if the University had clearly outlined policies of “we’ll always protect biology class” or “we’ll never protect biology class.” *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001) (reiterating that time, place, or manner restrictions in limited public forums must not be viewpoint discriminatory). Instead, the University has a blanket policy of “no discipline.” Pet. App. 5a. This is dangerous because there are spheres of speech the University will inevitably have to protect. However, a laissez-faire policy like the University’s means that any instance of protection can be justified as a decision within the University’s discretion. *See, e.g., Cox v. Louisiana*, 379 U.S. 536, 555–58 (1965) (holding unconstitutional licensing scheme that gives broad discretion to a public official to permit speech-related activity). The “boys will be boys” policy means that the University is not punishable if it does act in violation of the First Amendment. *See id.* It could justify content-discriminatory actions by chalking it up to its discretion. *See id.* The University’s policy, although facially viewpoint-neutral, invites discriminatory enforcement because it is so overbroad that it enables the school to expand and contract its sphere of First Amendment influence at will. *See id.*

B. The Overbroad Nature Of The Policy Violates Not Only McMillan’s First Amendment Rights But Also Those Of The Students.

The University’s policy is unconstitutional because it is so overbroad that it chills the students’ right to receive ideas. McMillan has standing to assert the rights of the students based on the doctrine of overbreadth. As a general rule, a litigant may not assert the rights of

a third-party when challenging a law as unconstitutional due to third-party standing rules. *New York v. Ferber*, 458 U.S. 747, 767 (1982) (“A person to whom a statute may be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.”). However, the First Amendment overbreadth doctrine is an exception to the rule barring third-party standing. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). Under this doctrine, a party whose conduct may not be protected can still raise the constitutional rights of third parties not before the court if a law is so overbroad that it chills third parties’ First Amendment rights. *See Sec’y of State of Md. v. Munson Co.*, 467 U.S. 947, 946 (1984); *Osborne v. Ohio*, 495 U.S. 103, 112 n.8 (1990); *Ferber*, 458 U.S. at 768–69. “Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court.” *Munson Co.*, 467 U.S. at 958. The First Amendment overbreadth doctrine underscores the judiciary’s concern with the dangers of chilling free speech. *See id.* If a statute causes parties to refrain from constitutionally protected speech or expression, society is the “loser”—the free marketplace of ideas is an essential tenet of a progressive society. *See id.*; *Bates v. State Bar*, 433 U.S. 350, 380 (1977) (“First Amendment interests are fragile interests.”).

The justifications of the First Amendment overbreadth doctrine are present in *McMillan*’s case—the University student population as a whole loses due to the chilling effects of the overbroad policy of refusing to discipline students. This Court has repeatedly referred to the First Amendment right to receive ideas. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 763–64 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). The right to receive ideas is “nowhere more vital” than in schools and universities. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). In *Kleindienst*, American scholars invited a Belgian journalist to attend academic conferences in the United States. *Kleindienst*, 408 U.S. at 753. The Attorney General declined to grant the journalist a temporary visa, and the journalist, Mandel, brought action to compel the Attorney General to grant the visa. *Id.* The majority ultimately found in favor of the Attorney General for reasons unrelated to the First Amendment but recognized in dicta that the First Amendment rights of the American scholars were implicated. *Id.* at 765. The Court dismissed the Government’s contention that the scholars’ First Amendment rights were not violated because they could access Mandel’s ideas via alternative means, instead

avowing the importance of the “particular qualities inherent in sustained, face-to-face debate, discussion, and questioning.” *Id.*

Like in *Kleindienst*, the students at the University have a First Amendment right to receive ideas from speakers. All of the listed speakers at the University that have been shouted down have been from minority viewpoints. Pet. App. 5a. No recording or book or Youtube video can replace face-to-face engagement with these viewpoints. See *Kleindienst*, 408 U.S. at 765. However, the policy of refusing to discipline students is so overbroad that it may prompt self-censorship, which has a chilling effect on the students’ ability to engage with visiting speakers as is their First Amendment right. See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967). A policy is unconstitutionally overbroad or vague if it incidentally discourages legitimate free speech. See *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Keyishian*, 385 U.S. at 604.

In *Keyishian*, the Supreme Court struck down a statute that required the removal of teachers who engaged in treasonous or seditious words or acts. *Keyishian*, 385 U.S. at 597. The Court reasoned that the statute was unconstitutional because it did not clearly inform teachers what conduct was prohibited. *Id.* at 604. Instead, the teachers had to guess as to the prohibition’s scope, which meant that the law was likely to have a chilling effect on the teachers’ speech. *Id.* To avoid prosecution, teachers would likely self-censor more than necessary, which would inhibit teachers from engaging in conduct that was actually the legitimate exercise of their First Amendment rights. *Id.*

Similarly to the statute in *Keyishian*, the University’s policy of refusing to discipline students does not define what, if any, actions by student protestors are subject to discipline. See Pet. App. 5a; *Keyishian*, 385 U.S. at 604. For example, the protestors in McMillan’s case were so violent that they damaged property. Pet. App. 6a–7a. Because students are unaware of what conduct is protected by the policy, this could lead students to feel unsafe attending events with speakers who hold unpopular opinions. Students may fear that the school will allow protestors to perpetuate violence against attendees at an event because the policy of neglect does not say when schools will step in to protect student attendees from protestor violence. The fear of a lack of prosecution in McMillan’s case is just as chilling as the fear of prosecution teachers faced in *Keyishian*. See *Keyishian*, 385 U.S. at 604. In both cases, the policy on speech is so ambiguous that it is not clear

what conduct is prohibited. *See* Pet. App. 5a; *Keyishian*, 385 U.S. at 604. The University’s policy of refusing to discipline students could thus lead students to preemptively choose not to exercise their legitimate right to receive ideas from unpopular speakers, like how the statute in *Keyishian* could have encouraged teachers to preemptively refrain from discussing controversial topics. *See Keyishian*, 385 U.S. at 604. This chilling effect on the students’ right to receive ideas is an outcome contrary to the First Amendment; McMillan has standing to challenge the policy not only on her own behalf, but on behalf of the students. *See Munson*, 467 U.S. at 956–57. Accordingly, the overbroad nature of the University’s policy violates not only McMillan’s First Amendment rights but also those of the students.

C. The University’s Policy Of Refusing to Discipline Students Violates The First Amendment Because It Imposes Security Costs On Invited Speakers, Resulting In Viewpoint Discrimination.

The University’s policy violates the First Amendment because it passes the costs of security onto invited speakers, which is viewpoint nonneutral. *See Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). In *Forsyth*, a county ordinance charged speakers a fee for the use of public property. *Id.* at 123. The ordinance allowed the government to vary the fee based on the estimated security costs for each speaker. *Id.* The Court struck down the ordinance because it permitted the government to discriminate on the basis of content: “speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.” *Id.* at 134–35. The Court reasoned that the burden to speak should not be dependent on whether a speech is expected to be controversial because a “listener’s reaction to speech is not a content-neutral basis for regulation.” *Id.* at 134.

The rationale from *Forsyth* applies to McMillan’s case because the University’s policy imposes a financial burden upon unpopular speakers. *See id.* The University took the security fee ordinance in *Forsyth* a step further by stating that it is not going to provide any security at all (by refusing to discipline disruptors). *See* Pet. App. 5a; *Forsyth*, 505 U.S. at 134. The University does not stop a heckler’s veto, so if a speaker wants to speak it is the speaker’s burden to provide security. *See* Pet. App. 5a. In both cases, the government is forcing the speakers to pay a fee for security that is proportionate to the listeners’ expected reactions. *See Forsyth*, 505 U.S. at 134–35. Although the University’s “boys will be boys” policy applies to all speakers, it

necessarily discriminates against unpopular speakers, who are more likely to need security. When a heckler's veto is expected at the University, the speaker must pay for security to ensure that they can speak. *See* Pet. App. 5a. Conversely, less controversial speakers who do not expect a heckler's veto would not need to pay for security to combat the heckler's veto. *See id.* The University's policy financially burdens the speech of unpopular speakers, just like the policy in *Forsyth*. *See id.*; *Forsyth*, 505 U.S. 134–35. Accordingly, the University's policy is content-discriminatory, a constitutionally impermissible outcome.

D. The University Created A Clear Danger, Falling Under The State-Created Danger Exception and Demonstrating A General Government Duty To Protect McMillan's Rights.

Although *DeShaney* held that the government does not generally have a duty to protect an individual against private violence, the majority in *DeShaney* suggested that a government does have a duty to provide protection if the government creates the danger to the individual. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989) (“While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.”). This language triggered the advance of the state-created danger doctrine.

No Supreme Court cases have promulgated a test for the state-created danger doctrine, but ten circuits have recognized the doctrine. *Irish v. Fowler*, 970 F.3d 65 (1st Cir. 2020); *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 428 (2d Cir. 2009); *Sanford v. Siles*, 456 F.3d 298, 304–05 (3d Cir. 2006); *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015); *Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 932 (6th Cir. 2020); *D.S. v. E. Porter Cnty. Sch. Corp.*, 799 F.3d 793, 798 (7th Cir. 2015); *Fields v. Abbott*, 652 F.3d 886, 891 (8th Cir. 2011); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1066 (9th Cir. 2006); *Est. of B.I.C. v. Gillen*, 710 F.3d 1168, 1173 (10th Cir. 2013); *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001). *But see Fisher v. Moore*, 73 F.4th 367, 375 (5th Cir. 2023) (declining to adopt the state-created danger doctrine). Each circuit that recognizes the state-created danger doctrine requires (1) that the government affirmatively acted to create or exacerbate the danger to the individual or group of people harmed and (2) that the government acted with conduct above mere

negligence. *See, e.g., Pena v. DePrisco*, 432 F.3d 98, 111–112 (finding that liability could exist for a state-created danger because the police department’s condonement of the officer’s excessive drinking constituted an affirmative act and deliberate indifference). The University’s “boys will be boys” policy is an affirmative action that created the danger to McMillan’s First Amendment rights and meets the bar for deliberate indifference, so the University is liable under the state-created danger doctrine.

1. The policy of refusing to discipline students is an affirmative act that created the danger by condoning the heckler’s veto.

The University’s policy of refusing to discipline students satisfies the affirmative act requirement of the state-created danger doctrine because it functions as an endorsement of the heckler’s veto, encouraging hecklers to drown out speakers. *See Pena*, 432 F.3d at 111 (“[W]hen . . . state officials communicate to a private person that he or she will not be arrested, punished, or otherwise interfered with while engaging in misconduct that is likely to endanger the life, liberty, or property of others, those officials can be held liable under section 1983.”). The affirmative act of a government official is actionable if it “communicates, explicitly or implicitly, official sanction of private violence.” *Okin v. Vill. of Cornwall-On-Hudson Police Dep’t*, 577 F.3d 415, 429 (2d Cir. 2009).

Here, the University explicitly communicated “official sanction of private violence.” *See id.* The University proactively created a policy of “deliberate silence” such that there was “explicit permission” for the violence and disruption that harmed Petitioner’s rights. *See id.* at 111–12. By implementing a policy of refusing to discipline students and ignoring pleas from speakers to intervene, the University emboldened participants in the heckler’s veto and increased the suppression of the First Amendment rights of speakers like McMillan. *See Pet. App.* 5a; *Okin*, 577 F.3d at 429; *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990). The University assured students that they had the freedom to disrupt speakers and destroy property—a “prearranged official sanction of privately inflicted injury” that constitutes affirmative conduct. *See Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993). In contrast, *DeShaney* involved a situation where a father killed his son and the police failed to protect him. *DeShaney*, 489 U.S. at 201. It did not involve a situation where the police told the father “if you kill your son we will not arrest you.” *See id.*

“Repeated, sustained inaction by government officials” alone can also be enough to satisfy the affirmative conduct requirement of the state-created danger doctrine. *Dwares*, 985 F.2d at 99. Even if the students who disrupted McMillan were unaware of the explicitly stated policy of refusing to discipline students, the repeated inaction of University security when other speakers were disrupted by student protestors and failure to discipline those protestors is in itself sufficient to demonstrate an affirmative act—the implicit condoning of the heckler’s veto. *See Pena*, 432 F.3d at 111.

2. The University demonstrated deliberate indifference with its policy of refusing to discipline students, which meets the required state of mind to invoke liability under the state-created danger doctrine.

The University’s policy satisfies the state of mind requirement of the state-created danger doctrine because the University knew of and disregarded the risks caused by its policy of indifference. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1065 (9th Cir. 2006). The University here was more than negligent. *Compare Daniel v. Williams*, 474 U.S. 327, 334 (1986) (“Where a government official’s act causing injury to life, liberty, or property is merely negligent, “no procedure for compensation is _constitutionally_ required.”) (quoting *Parratt v. Taylor*, 451 U.S. 527, 548 (1981) (Powell, J., concurring in result) (emphasis added), *with County of Sacramento v. Lewis*, 523 U.S. 844, 846 (1998) (holding that a government can be liable if conduct “shocks the conscience” and the plaintiff demonstrates that the officers acted with the intent of causing harm to the victim). Rather, the University acted with deliberate indifference.

Deliberate indifference is a mental culpability sufficient to show liability under the state-created danger doctrine. *See Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995) (adopting a deliberate indifference standard of government liability); *Lewis v. Sacramento Cnty.*, 98 F.3d 434, 441 (9th Cir. 1996) (same); *Magdziak v. Byrd*, 96 F.3d 1045 (8th Cir. 1996) (same); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (same); *but see Williams v. Denver*, 99 F.4d 1009, 1014–15 (10th Cir. 1997) (adopting a “shocks the conscience” standard); *Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996) (same); *Fagan v. City of Vineland*, 22 F.3d 1296, 1306–07 (3d Cir. 1994) (en banc) (same); *Temkin v. Frederick Cnty. Comm’rs*, 945 F.2d 716, 720 (4th Cir. 1991) (same); *Checki v. Webb*, 785 F.2d 534, 537 (5th Cir. 1986) (same).

When public officials have time for deliberation or reflection, the deliberate indifference standard should apply. *Okin*, 577 F.3d at 432; *Est. of Smith v. Marasco*, 430 F.3d 140, pin (3d Cir. 2005); *King v. East St. Louis*, 496 F.3d 812, 819 (7th Cir. 2007). “Deliberate indifference is a ‘stringent standard of fault,’ requiring proof that a state actor ‘disregarded a known or obvious consequence of his action.’” *Gorsline v. Randall*, No. 23-15853, 2024 WL 4615742 (9th Cir. Oct. 30, 2024) (quoting *Murguia v. Langdon*, 61 F.4th 1096, 1111 (9th Cir. 2023)).

Here, there is substantial evidence that the University disregarded a known consequence because students had heckled down speakers many times before. *See* Pet. App. 5a; *McQueen v. Beecher Cmty. Schools*, 433 F.3d 460, 469–70 (6th Cir. 2006). The University saw that its policy of refusing to discipline students increased student disruptions of speakers and actively chose to do nothing about it. Pet. App. 5a. The University had time to reflect on the consequences of this policy and still chose not to change it. *See id.*; *Okin*, 577 F.3d at 432.

3. While some circuit courts include other factors beyond the affirmative act and state of mind requirements to establish liability under the state-created danger doctrine, those other factors are not dispositive upon the relevant analytical framework.

Although some circuit courts have considered additional factors under their respective state-created danger tests, only the factors of an affirmative act and a state of mind rising above mere negligence are needed. The factors of affirmative act and deliberate indifference fit within *DeShaney*’s holding and reflect good policy, but the other factors listed below do not. This section will address these discrepancies, including (1) whether a government’s affirmative act must “shock the conscience” to meet the requirements for state-created danger; (2) whether government action must create a risk of harm to a specific individual as opposed to the public at large; (3) whether a government’s affirmative act must exhaust all avenues of escape; and (4) whether the government must have actual knowledge of a danger instead of merely being liable for the conduct it creates. Ultimately, these factors go beyond what is required by *DeShaney* and create unworkable tests for the lower courts to apply.

- i. The requirement that the state action “shock the conscience” is the same standard as “deliberate indifference” and is not a higher bar for plaintiffs to establish.*

Deliberate indifference is enough to satisfy the mental culpability requirement for liability under the state-created danger doctrine. All circuits agree that negligence alone is not enough, *Daniels v. Williams*, 474 U.S. 327, 330–32 (1986), but some circuit courts have held that a government’s affirmative act must additionally “shock the conscience” to constitute a constitutional violation. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (holding that deliberate indifference during an emergency is only enough to create liability if it “shocks the conscience”). This standard does not come from *DeShaney*. Rather, the “shock the conscience” language comes from the *DeShaney* Court noting the petitioner’s brief which cited to *Rochin*. *Rochin* affirmed that what shocks the conscience can establish a due process violation. *Rochin v. California*, 342 U.S. 165, 172 (1952). But nothing in *Rochin* intimated that deliberate indifference would not be enough to “shock the conscience.”

To hold otherwise would lead to irrelevant hair-splitting. For example, the Eighth Circuit has held: “To ‘shock[] the conscience,’ the officers’ acts must at least demonstrate ‘deliberate[] indifferen[ce]’ to Gladden’s constitutional rights.” *Gladden v. Richbourg*, 759 F.3d 960, 966 (quoting *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 779 (8th Cir. 2001)). Deliberate indifference does itself shock the conscience because it reflects a conscious disregard—treating “shock the conscience” as a requirement independent of the mental culpability requirement is a fatuous distinction. “[W]hen the circumstances permit public officials the opportunity for reasoned deliberation in their decisions,” courts have held “the official’s conduct conscience shocking when it evinces a deliberate indifference to the rights of the individual.” *King v. East St. Louis*, 496 F.3d 812, 819 (7th Cir. 2007). This “culpable state of mind” meets the requirement of “conscience-shocking conduct.” *Est. of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019). The University had time to reflect on the consequences of its “boys will be boys” policy and still chose not to change it. *See Okin*, 577 F.3d at 432. Thus, treating the standards as separate is an irrelevant distinction, but even if this Court were to construe the “shock the conscience” factor as separate from deliberate indifference, the University’s deliberate indifference in this case is enough to “shock the conscience.”

- ii. *Government action does not need to pose a risk to a specific individual to lead to liability under the state-created danger doctrine.*

The state-created danger doctrine does not require the government's action to pose a risk to a specific individual. The question of whether government action must pose risk to a specific individual or the public at large to constitute state-created danger has created a circuit split. *Compare Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993) (rejecting requirement that government action must pose a risk to a specific individual), *with Kallstrom v. City of Columbus*, 139 F.3d 1055, 1066 (6th Cir. 1998) (requiring that the government actions endangered a specific individual).

However, nothing in the law requires that a specific individual must be placed in danger. *DeShaney* provides no guidance on this question, so the circuit courts that adopted this requirement created a new standard that is not established by prior precedent. *See DeShaney*, 489 U.S. at 203 (holding that government actors were not liable for a failure to protect a child from dangers created by private actors, without expressly framing the scope of state-created danger liability around acts that place specific individuals at risk). If a government actor creates the danger and knows that *someone* will be hurt, why does the specific individual have to be identifiable beforehand?

And creating a groundless standard will have adverse policy implications. A requirement that a government act must harm a specific individual to fulfill the state-created danger doctrine would narrow protections against government misconduct, leaving people vulnerable in situations where government action creates a general, but foreseeable, risk of harm. This rewards the most dangerous state actions by shielding government actors from liability when government action harms numerous people as opposed to distinct individuals—an outcome directly opposed to the intent of the state-created danger doctrine. The intent of the state-created danger doctrine is to hold government actors accountable when government conduct affirmatively places a plaintiff at risk, ensuring that the government is not able to escape responsibility in situations where its affirmative actions create the danger. *See Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (“If the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit.”). Indeed, as the Seventh Circuit held in *Reed*, “When the police create a specific danger, they need not know who in particular will be hurt. Some dangers are so evident, while their

victims are so random, that state actors can be held accountable by any injured party.” *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993). Thus, government action does not need to pose a risk to a specific individual to satisfy the state-created danger doctrine.

Even if this Court were to adopt the requirement that the government’s action posed a danger to a specific individual, McMillan would still be able to establish liability under the state-created danger doctrine. The University had adequate notice that its policy harms specific individuals—any invited speaker is targeted. In this case, McMillan was not a “member of the public in general,” because she was an invited speaker, she was a “member of a discrete class of persons” who were uniquely subject to this kind of harm. *See Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006)

iii. *Government action does not need to exhaust all avenues of escape to impose liability under the state-created danger doctrine.*

Exhausting all avenues of escape (or cutting off all outside sources of aid) is not required by *DeShaney* and conflates the principle that the plaintiff must be worse off because of the state action. Circuit courts also disagree as to whether all avenues of escape for a plaintiff must be exhausted by the government for the government to be held liable under the state-created danger doctrine. This requirement is not supported by *DeShaney*. *DeShaney* turned on the fact that returning Joshua to his father “placed him no worse position than that in which he would have been had it not acted at all.” *DeShaney*, 489 U.S. at 201. *DeShaney* does not stand for the proposition that the state must remove all sources of aid, but rather merely that the government’s action made the plaintiff worse off. *See id.* Thus, demanding a government action cut off all avenues of escape to induce the state-created danger doctrine exceeds what precedent requires.

Moreover, this issue produces an unworkable standard, as is evidenced by the intra-circuit splits in multiple circuits as to how to implement this factor. *Compare Monfils v. Taylor*, 165 F.3d 511, 517 (7th Cir. 1998) (holding that the government can be liable under state-created danger doctrine without eliminating all other avenues of aid), *with Est. of Stevens v. City of Green Bay*, 105 F.3d 1169, 1177 (7th Cir. 1997) (requiring government cut off all other avenues of aid to find liability under state-created danger doctrine). *Compare Munger v. City of Glasgow Police Dep’t*, 227 F.3d 1082, 1086 (9th Cir. 2000) (implying that all avenues of escape do not need to be closed off to find liability under state-created danger doctrine), *with Johnson v. City of Seattle*,

474 F.3d 634, 640 (9th Cir. 2007). This requirement is so steep that it would practically limit suits to those in custody. It would eviscerate the protections people have against dangers the state created by instituting an arbitrary cut-off unsupported by relevant precedent.

Still, even if this requirement were to be adopted, the University did place both speakers and students in more danger by cutting off other avenues of aid. Universities exercise some degree of control over their police force, leaving people dependent upon the university's protection. Many students live at universities; universities often have requirements that students live on campus. Moreover, a speaker cannot immediately leave a university once present. Given the large geographic area a university takes up, fleeing an outbreak of violence could take a great deal of time as students and speakers walk or run away. When a University-sanctioned group invites a speaker to campus, that speaker becomes reliant on the University's safety policies—any actions that the University then takes to eliminate opportunities for assistance place the speaker in a more vulnerable position. Thus, by withholding assistance from security guards present when a speaker like McMillan asks for help, the University has effectively cut off all avenues of aid available to the speaker.

iv. The government does not need to possess actual knowledge of a danger to be held liable under the state-created danger doctrine.

Imposing an actual knowledge factor on the state-created danger doctrine is beyond the scope of what is actually required to demonstrate liability. The circuit courts disagree as to whether the government must possess actual knowledge that a danger exists to prove the state-created danger doctrine. *Compare Mann v. Palmerton Area Sch. Dist.*, 872 F.3d 165, 171 (3d Cir. 2017) (requiring plaintiff to demonstrate government had actual knowledge); *Est. of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 492 (6th Cir. 2019) (same), *with Weiland v. Loomis*, 938 F.3d 917, pin (7th Cir. 2019) (describing state-created danger doctrine analytical framework that does not include an actual knowledge requirement). However, the actual knowledge factor misconstrues *DeShaney* and therefore should not be considered in the state-created danger analysis. *DeShaney* turned on the state's deprivation of an individual's liberty and not the state's knowledge of the danger. *DeShaney*, 489 U.S. at 200. Imposing a requirement of actual knowledge is thus outside the scope of *DeShaney*. *See id.*

Moreover, if this factor were to be adopted, it would create a perverse policy incentive. Having liability turn on subjective intent is

much less desirable than a bright-line rule that evaluates to what extent the state deprived the individual of their liberty. For one, when state action involves multiple actors, finding out exactly which actor knew of the risk is difficult. Second, requiring actual knowledge would absolve liability in situations where intent can be shown, but the state was unaware of all the consequences of its actions. Thus, requiring actual knowledge would incentivize the state not to investigate the likely consequences of its actions during planning, so that they will be shielded from liability. For instance, a state that intends to build a railroad over a river and concludes after a safety study that the risk is fairly low, but existent, would have more liability in the event of a derailment than a state that never conducted the study at all.

Still, it is undoubted in this case that the University knew of the response to their policy. There were numerous disruptions in the past and the University had actual notice that people had been disrupting speakers in impermissible ways. *See* Pet. App. 5a. Even if the Court were to adopt this factor, the University's actions are more than enough to demonstrate actual knowledge.

CONCLUSION

For these reasons, this Court should reverse the Thirteenth Circuit's decision and affirm the decision of the District Court.

TEAM #78