

No. 24-0514

IN THE
Supreme Court of the United States

DOVE McMILLAN
Petitioner,
v.

BOARD OF REGENTS OF
CITY UNIVERSITY OF LANTANA,
Respondent.

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

BRIEF FOR THE PETITIONER

NOVEMBER 18, 2024

TEAM NUMBER 81
COUNSEL FOR PETITIONERS

QUESTIONS PRESENTED

1. Does the deadline to file a post-judgment motion challenging unchanged parts of an amended judgment run from the entry of the original or the amended judgment?
2. Is a University policy that instructs campus security to not discipline its students for disruptive conduct that unreasonably restricts the speech of speakers brought to campus by student groups a violation of the First Amendment?

PARTIES TO THE PROCEEDING

Petitioner Dove McMillan is a vegan advocate who was invited to speak at the City University of Lantana's campus by the University of Lantana's Campus Vegan Alliance. Petitioner McMillan was the plaintiff in this case and was the appellee in the court of appeals.

Respondent Board of Regents of the City University of Lantana, a public university in New Tejas, United States, was the defendant in this case and the appellants in the court of appeals.

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DECISIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is not reported, but is available at No. 22-0514 and reprinted at Pet. App. 1a. The District Court for the Eastern District of New Texas's decision is not reported, but is available at No. 21-cv-1285 and reprinted at Pet. App. 20a.

STATEMENT OF JURISDICTION

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

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner McMillan brought this action under 42 U.S.C. § 1983, claiming that Respondent University, acting under color of law, infringed on her First Amendment right to free speech. Section 1983 is reprinted in the Appendix.

The First Amendment 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.

INTRODUCTION

The City University of Lantana (the “University”) unconstitutionally failed to protect Petitioner Dove McMillan’s (“Petitioner McMillan”) First Amendment rights because of its policy of inaction. The University likewise failed to meet the deadline to timely file its Rule 50(b) motion challenging its liability for this constitutional violation. This exemplifies the University’s overall deficient oversight, seeking to retroactively fix failures caused by its own lack of action in a too-little-too-late suit. This Court must reverse the Thirteenth Circuit and recognize the University failed to respect both the strict deadline to file its motion and Petitioner McMillan’s constitutional rights.

STATEMENT OF THE CASE

I. THE UNIVERSITY UNCONSTITUTIONALLY INFRINGED ON PETITIONER MCMILLAN’S FIRST AMENDMENT RIGHTS.

A. Dean Thatcher’s Policy of Inaction on a Rowdy University Campus.

The University is a long-standing community institution, with an illustrious 175-year history committed to academic excellence, civic engagement, and “Forever Learning.” R. at 2a. Despite this, the University has recently fallen under the influence of the “rowdy” student body. R. at 2a–3a. In addition to regularly occurring out of control and “outrageous” parties that disrupt classes, senior pranks have resulted in property damage and significant disruptions, including 100 livestock animals in the school’s Hedge Family Auditorium (the “Auditorium”), a hazardous slip n’ slide down the central staircase and onto the front lawn, and a car on the roof of the University’s historic first building. *Id.* This conduct has also caused more than

just property damage: a student was hospitalized following a keg stand stunt at graduation where he fell and hit his head on a metal table. R. at 3a–4a. None of these incidents, nor any of the numerous others not recounted here, results in *any* formal discipline or punishment of *any* students. R. at 4a.

All of this has occurred under the auspices of the Dean of Student Affairs, Mason Thatcher. R. at 4a. As Dean of Student Affairs, Dean Thatcher bears the primary responsibility for disciplining students. *Id.* Dean Thatcher had an impressive football career as defensive team captain for the University, was the third overall draft pick in the 1998 NFL draft and played for the Arizona Cardinals for seven years. *Id.* Yet, he takes a “boys will be boys” approach to student discipline and ultimately believes that the students are “good kids” who “just need to blow off a little steam” and only “need a good talking to, not any kind of punishment.” R. at 5a. Campus security, as well as other employees within the Department of Student Affairs, have followed Dean Thatcher’s example and likewise implemented a hands-off approach to discipline. *Id.* Dean Thatcher’s own tailgate parties have become one of the most popular alumni engagement events. R. at 4a–5a. Indeed, despite not having any academic background or traditional qualifications for his role, Dean Thatcher seems to be a gifted fundraiser, as donations have risen considerably. R. at 4a.

B. The University Has Routinely Failed to Protect Free Speech Rights on Campus.

As part of the overall climate of laissez-faire discipline, students have “adopted the habit” of shouting down speakers invited to present on campus. R. at 5a. They have shouted down speakers discussing institutional racism invited by Lantana

Black Student Coalition, speakers discussing Second Amendment rights invited by Lantana Students for Armed Self-Defense, speakers discussing whether recreational marijuana should be legalized in New Texas invited by the High Five Society, and speakers addressing the current and ongoing effect of climate change invited by campus representatives of Carbon180. *Id.* At each of these incidents, campus security did not intervene, and no students were disciplined in any way. *Id.* This adheres to Dean Thatcher's hands-off policy towards discipline. *Id.*

C. The University Unconstitutionally Infringed on Petitioner McMillan's Right to Speak.

On February 8, 2020, Petitioner McMillan was scheduled to speak in the Auditorium on campus. R. at 5a–6a. Petitioner McMillan is a well-known vegan advocate and was invited to campus to speak by the Campus Vegan Alliance. R. at 6a. The night before, Petitioner attended a private dinner with members of the club. *Id.* She planned to use her speech to encourage people to abstain from consuming animal products, which she believes is the only logical conclusion for a humane-feeling person to reach after knowing the state of the animal agriculture industry. *Id.*

However, Petitioner McMillan never had the chance to reach this portion of her speech. R. at 6a. After about five minutes of speaking, Petitioner McMillan was interrupted by a large group of student protesters at the foot of the stage, several of whom carried banners and noisemakers, while others wore masks and costumes. *Id.* The protesters drowned out all of Petitioner McMillan's attempts to continue speaking. *Id.* She tried to ask the protesters to quiet down or leave, but they ignored her entirely. *Id.* Although a member of campus security watched this scene unfold

from the beginning, they did not intervene. R. at 7a. After about fifteen minutes of trying to resume her speech, Petitioner McMillan left the stage due to her inability to continue speaking. R. at 6a.

The protesters remained in the Auditorium after she left, and they broke multiple tables and chairs, damaged the auditorium podium, and stained the carpet in front of the stage. R. at 6a–7a. The campus security member still did not engage with the protesters. R. at 7a. The protesters dispersed after approximately an hour. R. at 6a. The protesters were all University students and readily identified. R. at 7a. However, in line with Dean Thatcher’s policy of inaction, the University did not discipline any of them. *Id.*

II. PETITIONER McMILLAN SUED THE UNIVERSITY FOR FAILING TO PROTECT HER FIRST AMENDMENT RIGHTS.

Petitioner McMillan sued the University in the United States District Court for the Eastern District of New Texas for depriving her of her First Amendment rights. R. at 7a. The University is subject to 42 U.S.C. § 1983 liability as a municipal institution but cannot benefit from sovereign immunity. R. at 2a, 11a. During the trial, the University sought judgment as a matter of law under Rule 50(a), arguing the evidence was insufficient to find it liable for violating Petitioner McMillan’s First Amendment rights. R. at 21a. The District Court rejected the argument and sent the issue to the jury. R. at 7a.

At the close of trial, the jury awarded Petitioner McMillan \$12,487 in compensatory damages and \$350,000 in punitive damages. *Id.* After the jury’s verdict, the District Court entered a judgment on January 20, 2022, that only

included the compensatory damages award. *Id.* Then, seven days later on January 27, 2022, the District Court amended the judgment of its own accord to include the punitive damages. *Id.* On February 24, 2022, thirty-five days after the District Court entered its original judgment, the University filed a renewed motion for judgment as a matter of law under Rule 50(b). *Id.* This motion raised the same categorical challenges to its liability that the District Court dismissed in its Rule 50(a) motion. R. at 8a.

The District Court dismissed the motion and did not consider its merits because the University submitted the motion more than twenty-eight days after the original judgment. R. at 21a (citing Fed. R. Civ. P. 50(b)). Although the District Court had amended its original judgment, it reasoned that adding the jury's punitive damages award did not change the deadline for the University to file its motion. *See* R. at 21a–24a. The District Court did so relying on Second and Seventh Circuit precedent that an amended judgment only changes the deadline to file a post-judgment motion if the motion challenges the substance of the amendment, not the original judgment. *See* R. at 23a–24a. Because the University's Rule 50(b) motion did not challenge the amended judgment's addition of punitive damages, the District Court denied the University's motion as untimely. *Id.*

The University appealed the ruling that its motion was late to the Thirteenth Circuit. R. at 1a. The Thirteenth Circuit reversed the District Court's decision and ruled the University had filed its motion on time. R. at 2a. The Thirteenth Circuit looked to Fifth Circuit precedent that moves the deadline to file a post-judgment

motion when an amended judgment makes a substantive change to the original. R. at 9a–10a. The addition of punitive damages, in its eyes, was a substantive change. *Id.* It therefore ruled the University had filed its motion on time. R. at 10a. Petitioner McMillan appealed the Thirteenth Circuit’s decision, and this Court granted certiorari. R. at 1.

SUMMARY OF ARGUMENT

The University filed its Rule 50(b) motion thirty-five days after the District Court entered its original judgment, missing the prescribed twenty-eight-day deadline. The Rules plainly state that courts cannot extend the time to file Rule 50(b) motions, and the drafters intended these deadlines to be strict. Under certain circumstances, however, courts may move the deadline when they file an amended judgment. The Circuits are split on what specific circumstances trigger this change. Circuits strictly enforcing the prohibition on deadline extensions, as the drafters intended, will only move the deadline when the motion challenges something the amendment changed. Circuits offering more flexibility will move the deadline when the amended judgment substantively changes any part of the original judgment.

Under either test, the University filed its motion too late. First, applying the stricter, motion-focused test, there is no connection between the University’s motion and what the amended judgment changed. The University’s Rule 50(b) motion challenged the sufficiency of the evidence to support finding it liable as a categorical matter. It did not contest the compensatory or punitive damages the jury awarded to Petitioner McMillan. The amended judgment only changed the damages, not the

University's ultimate liability. Without some connection between the motion's challenge and what the amendment changed, the University filed its motion after the deadline passed.

Second, applying the more flexible amendment-focused test, the University's motion was still untimely. A substantive change is one that changes the parties' legal rights and obligations from what was settled in the original judgment. A change in the amount of damages is not a substantive change because it does not actually affect the University's legal obligation to pay Petitioner McMillan for violating her First Amendment rights; it has to pay, one way or another. Thus, this was not a substantive change. Additionally, the District Court would not have been within its rights to enter a judgment that reduced the jury's damages award without first offering Petitioner McMillan the choice to move for a new trial or accept the lower amount. The District Court amended its original judgment to reflect the reality of the parties' legal obligations, not to change them. The University's Rule 50(b) motion was late under any construction of the Rules, so this Court must reverse the Thirteenth Circuit's decision that ruled it was timely.

This Court must also reverse the Thirteenth Circuit's decision because the University violated the First Amendment when it established a policy of deliberate indifference that endorsed a heckler's veto that suppressed Petitioner's right to free speech. To demonstrate the University's liability under § 1983, Petitioner McMillan shows: (i) the University was acting under color of state law, and (ii) the University deprived her of a right secured by the Constitution.

The University was acting under color of state law when it established a policy of deliberate indifference. It established this policy through a pattern of practice from the top down, originating with Dean Thatcher's belief that "boys will be boys." R. at 5a. This policy was pervasive and demonstrated deliberate indifference because it disregarded the obvious pattern of students continually suppressing the speech of campus speakers.

By establishing and following this policy, the University deprived Petitioner of her right to free speech under the First Amendment. As a threshold matter, the policy satisfies the state action requirement under § 1983 and the First Amendment. A policy that instructs an employee to refrain from acting is state action because it attempts to indirectly restrict speech when the University cannot do so directly, and because the right to receive information imparts an affirmative duty upon the University to protect Petitioner McMillan's speech. This policy was a restriction upon the right to freedom of speech because it directly suppressed Petitioner's speech. The University's policy is therefore a speech restriction to which § 1983 liability and a First Amendment analysis attaches.

Moreover, this speech restriction is unconstitutional under the First Amendment. The speech restriction operated in the University's Auditorium, which is a designated public forum, so traditional First Amendment principles that determine whether a restriction is constitutional apply. The policy restricts speech based on the content of Petitioner McMillan's and other campus speakers' speech, so it receives strict scrutiny. The policy cannot pass strict scrutiny, however, because it

discriminates against unpopular speakers and it is not narrowly tailored: that is, there are other ways the University can refrain from disciplining its students without restricting speech. Even if the restriction does not operate in a designated public forum, it remains unconstitutional because it is unreasonable, vague, overbroad, and contravenes core First Amendment values.

The University acted with indifference both when it failed to timely file its Rule 50(b) motion and when it established a policy that violated the First Amendment by endorsing a heckler's veto. Accordingly, this Court must find that the University's motion was untimely and that it violated the First Amendment by adopting a policy of refusing to discipline its students who interfere with campus speakers. The Court must reverse the judgment of the Thirteenth Circuit.

ARGUMENT

I. THE UNIVERSITY’S RULE 50(B) MOTION WAS UNTIMELY BECAUSE THE AMENDED JUDGMENT DID NOT ALTER THE DEADLINE.

Parties must file a Rule 50(b) renewed motion for judgment as a matter of law “no later than 28 days after the entry of the judgment.” Fed. R. Civ. P. 50(b). This deadline is fixed and generally unchangeable. *See* Fed. R. Civ. P. 6(b)(1)–(2); *Banister v. Davis*, 590 U.S. 504, 507–08 n.2 (2020) (construing deadline to file post-judgment motion as strict with “no possibility of an extension”). Amended judgments, however, may restart the time a party has to file a post-judgment motion. *See McNabola v. Chi. Transit Auth.*, 10 F.3d 501, 521 (7th Cir. 1993) (restarting time to file only when motion “challenge[s] the altered and not the original judgment”); *Cornist v. Richland Par. Sch. Bd.*, 479 F.2d 37, 38–39 (5th Cir. 1973) (allowing lenience in motion deadlines when amendment made substantive change).

Circuits interpreting the Federal Rules of Civil Procedure have developed two tests for modifying the motion deadline when a court issues an amended judgment: one focused on what the motion challenges, and the other on what the amendment changed. *Compare McNabola*, 10 F.3d at 521, *with Cornist*, 479 F.2d at 37. Circuits that focus on the motion have held that deadlines may be extended only if there is a link between the judgment’s amendment and the subsequent motion’s challenge. *See, e.g., McNabola*, 10 F.3d at 521. Circuits focused on the judgment’s amendment, on the other hand, allow deadline extensions when an amendment substantively changes the original judgment. *See Cornist*, 479 F.2d at 37. Because the motion-focused test better conforms to the text and purpose of Rule 50(b), this Court should

formally adopt that test. However, regardless of the test applied, the University's motion was untimely, and there are no grounds for a deadline extension to support the University's untimely motion.

The District Court entered its original judgment on January 20, 2022. R. at 7a. The deadline for the University to file its Rule 50(b) motion was February 17, 2022—twenty-eight days from the original judgment. Fed. R. Civ. P. 50(b). On January 27, 2022, the District Court amended its motion to include the jury's original award of punitive damages. R. at 7a. The University filed its Rule 50(b) motion on February 24, 2022, thirty-five days after the original judgment and seven days after the strict deadline set forth by Rule 50(b). *Id.* The University's Rule 50(b) motion challenged its liability and not the damages in the amended judgment. *See* R. at 8a. Because the University's motion does not contest the amended damages, and because it filed the motion later than twenty-eight days after the original judgment, the motion is untimely. *See* R. at 7a. As such, this Court must reverse the Thirteenth Circuit's decision and deny the University's Rule 50(b) motion.

A. The Text and Purpose of the Rules Favor a Strict Interpretation of Post-Judgment Motion Deadlines, So the University's Motion Was Untimely.

While courts may extend motion deadlines before and during a trial for good cause, “a court must not extend the time to act under Rule[] 50(b).” Fed. R. Civ. P. 6(a)–(b); *Banister*, 590 U.S. at 507–08. These strict deadlines were designed to give parties a definite endpoint to trial. *See Johnson v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 48, 52 (1952). Before this, state procedural rules controlled federal courts' ability to extend deadlines for post-judgment motions. *See id.* This led to

“prevailing confusion” about when to file these motions, and who could file them. *See id.* In turn, it was difficult to determine when judgments were final and appealable. *See* Fed. R. Civ. P. 6(b) advisory committee’s note to 1946 amendment (“[U]nless Rule 6(b) is amended to prevent [an extension] of the times specified in Rule[] 50(b), . . . no one can say when a judgment is final.”); *see also* 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1167 (4th ed. 2024) (“The 1948 amendment of Rule 6(b) was designed to clarify the scope of the rule and to eliminate the uncertainty as to when a judgment was final for purposes of appeal.”). The Rules were therefore amended to include these strict timelines, which are “an essential part of the rule, firmly grounded in principles of fairness.” *Johnson*, 344 U.S. at 53 (citing *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 217–18 (1947)).

The University now wants to revert the Rules back to a time of confusion. It seeks to strip the deadlines of the force they carry, contrary to the drafters’ explicit intent. Its interpretation of the Rules permits the late filing of post-judgment motions and cannot be squared with the text or intent of the Rules. This Court must reverse the Thirteenth Circuit’s decision that allowed the University to turn back the clock on the Rules and its motion filing deadline.

B. The University’s Motion Was Untimely Even Under Judicially Created Self-Help Doctrines for Strict Deadlines.

While the strictness of Rule 50(b) deadlines remains necessary to avoid confusion, courts have occasionally read flexibility into post-judgment motion deadlines when a final judgment is amended. *See, e.g., McNabola*, 10 F.3d at 521. Courts respecting the prohibition on deadline extensions permit a change only when

there is a link between the judgment's amendment and the motion's challenge. *Id.*; *Tru-Art Sign Co., Inc. v. Loc. 137 Sheet Metal Workers Int'l Ass'n*, 852 F.3d 217 (2d Cir. 2017). Other courts, more generously interpreting deadlines, will extend the deadline when an amendment substantively changes the original judgment. *Cornist*, 479 F.2d at 38–39. Under these judicially created self-help doctrines, modification of a Rule 50(b) deadline is only appropriate when (1) there is a link between the amendment and the challenge at issue in the motion, or (2) when an amendment substantively changes the original judgment.

The University's motion was late under both of these judicially created self-help doctrines. Under the motion-focused test's strict interpretation of the Rules, the District Court's amended judgment did not affect the University's time to file its Rule 50(b) motion because the University did not contest the addition of the jury's punitive damages. This interpretation also follows the drafters' intent, as discussed above. In the alternative, even generously interpreting the Rules to permit deadline modifications upon a substantive change to the original judgment, the University's motion was still late as the increase in damages was not a substantive change. Because the University's motion was late under any interpretation of the Rules, this Court must reverse the Thirteenth Circuit's decision and find the motion untimely.

- i. This Court should adopt the motion-focused test because the Rules favor a strictly construed judicial self-help doctrine for extending post-judgment motion deadlines.*

Although Rule 6(b) prohibits courts from extending deadlines for post-judgment motions, it may allow flexibility in cases involving amendments to a final judgment. *See, e.g., McNabola* 10 F.3d at 521; *Cornist*, 479 F.2d at 38–39. The purpose

of these strict deadlines is to eliminate confusion and give parties a definite endpoint for trial and appeal. *See Johnson*, 344 U.S. at 53. Recognizing the need for some lenience, this Court has held that extensions must be doled out cautiously to prevent the requirement of a timely filing from becoming an “idle motion.” *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 (2006).

The motion-focused test maintains these firm deadlines, while still accommodating for fairness. To move a deadline, this test requires a nexus between what a motion is challenging and what the amendment changed. *E.g., McNabola*, 10 F.3d at 521. This gives parties a chance to challenge portions of a judgment that they might not have been able to otherwise. In effect, it gives them the first bite at the appellate apple. This judicial self-help doctrine matches the drafters’ intent to maintain strict deadlines regarding issues that have already been litigated.

The amendment-focused test, on the other hand, too loosely construes the circumstances for changing a motion deadline. This test moves the deadline when an amendment makes *any* substantive change to a judgment. *See R.* at 9a–10a (citing *Cornist*, 479 F.3d at 38–39). The case here exemplifies why this test is too flexible. The University had all it needed to file its Rule 50(b) motion when the District Court entered its original judgment, and nothing in its motion turned on what the amendment changed. *See R.* at 8a (“[T]he alteration did not affect liability—which were the sole grounds raised in the University’s motion . . .”). But, applying the amendment-focused test, the Thirteenth Circuit allowed the University to file its motion late. *See R.* at 9a–10a.

Under the Rules' intended strict deadlines, the Thirteenth Circuit gave the University too much latitude. The amendment-focused test casts too wide a net for moving the deadline to file a post-judgment motion, especially considering the drafters wanted no net at all. The motion-focused test, however, follows the drafters' intent by only moving the deadline when a party has not had a chance to challenge something added in an amended judgment. This is the proper test to apply here, and this Court must resolve this disagreement in favor of the motion-focused Circuits.

ii. The University's motion bore no relation to the amendment to allow for changing the filing deadline under the proper motion-focused test.

Under the motion-focused test, the Rules allow changing the post-judgment motion filing deadline only when there is a connection between the judgment's amendment and the motion's challenge. *McNabola*, 10 F.3d at 521; *Tru-Art*, 852 F.3d at 221 (requiring motion's basis relate to court's reason for amending judgment to affect deadline); *e.g.*, *DeBose v. USF Bd. of Trustees*, 811 F. App'x 547, 559 (11th Cir. 2020) (denying deadline extension when vacated and amended judgment did not change verdict as to challenged claim). This test allows parties some reprieve while still maintaining the Rules' intended strict deadlines.

The University cannot satisfy the motion-focused test because there is no connection between the amendment's added punitive damages and the University's motion categorially challenging its liability. There is also no connection because the added punitive damages do not affect the University's remedies for a successful Rule 50(b) motion. First, the University is not challenging anything added in the amended judgment. The University's Rule 50(b) motion disputes the sufficiency of the evidence

to support its liability. *See* R. at 8a; Fed. R. Civ. P. 50(b). Its motion does not, however, challenge the jury’s award of punitive damages, the only change between the original and amended judgment. R. at 8a (“[T]he alteration did not affect liability—which were the sole grounds raised in the University’s motion . . .”). Because there is no overlap between what the amendment added and what the University’s motion is about, the amendment did not move the deadline for the University to file its motion.

Second, this amendment did not affect the University’s remedies for a successful motion. If the evidence was insufficient to find the University liable, a court may order a new trial or enter judgment as a matter of law in the University’s favor. Fed. R. Civ. P. 50(b)(1)–(2). If it were to succeed with its motion, the University would either (a) receive a new trial, or (b) be found not liable. This is because the University chose to challenge whether it could be held liable as a categorical matter; it did not contest the damages. *See* R. at 8a. The later-added punitive damages therefore have no bearing here. Without some nexus between the amendment and the motion, there are no grounds to permit the University to disregard the Rules and their intent. This Court must reverse the Thirteenth Circuit’s decision and deny the University’s motion as untimely.

iii. The District Court’s amendment did not substantively change the judgment to restart the time to file even under the amendment-focused test’s generous reading of the Rules.

More flexible interpretations of the Rules restart the time to file a post-judgment motion when a court substantively changes its judgment in any way. *E.g.*, *Cornist*, 479 F.2d at 38–39. Substantive changes modify the parties’ plainly settled rights and obligations or clarify an ambiguity as to the original judgment’s legal

effect. *See id.* (removing reference to one plaintiff's possible reinstatement modified their rights); *Conway v. United States*, 326 F.3d 1268, 1276–77 (Fed. Cir. 2003) (amending to add date clarified judgment's legal effect and restarted deadline where tax court's enabling statute required date on final judgment); *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 823 F. App'x 559, 568–69 (10th Cir. 2020) (amending judgment to revive claims reasonable person would believe barred by original judgment restarted deadline); *but see Fed. Trade Comm'n v. Minneapolis-Honeywell Regul. Co.*, 344 U.S. 206, 211–12 (1952) (changing judgment's name from “Decree” to “Final Decree” did not affect original judgment's finality). Changes to the amount of damages awarded, however, are not substantive changes because they do not fundamentally modify a party's legal obligation to pay. *Jones v. Swanson*, 512 F.3d 1045, 1049 (8th Cir. 2008) (amending damages award did not restart time to file post-judgment motion).

Even under this more flexible interpretation of the Rules, the District Court's amendment did not substantively change its original judgment. In *Jones*, for example, a debtor filed a Rule 60(b)(2) motion for relief from a judgment against him. 512 F.3d at 1049. His motion challenged the sufficiency of the evidence supporting a jury's verdict of his liability, as the University did here. *Compare id., with R.* at 8a. The debtor was originally liable for \$950,000, but an amended judgment reduced his liability by \$550,000. *Jones*, 512 F.3d at 1046, 1049. Applying the amendment-focused test, the Eighth Circuit ruled this was not a substantive change that would affect the deadline for the debtor to file a post-judgment motion. *Id.* It did so because “liability

and damages are distinct, and the amended judgment did not relieve Swanson of the obligation to pay damages.” *Id.* at 1049.

Likewise, here, the District Court’s amendment was not a substantive change. While there was a change in the amount of damages, it did not alter the parties’ rights and obligations, and it did not modify the legal effect of the original judgment: the University still owed Petitioner McMillan. Thus, it was not a substantive change. The University was obligated to pay Petitioner McMillan before and after the amended judgment, just as the *Jones* debtor was still obligated to pay the creditor before and after their amended judgment. *Compare id.*, with *R.* at 8a.

Although the amended judgment here differs from that in *Jones*, in that it added punitive damages instead of reducing compensatory damages, this does not change the analysis. To be a substantive change, an amended judgment must modify the parties’ legal rights or change the legal effect of something otherwise settled by the original judgment. *See, e.g., Cornist*, 479 F.2d at 38–39. The amended judgement here, though, did not change anything already settled by the District Court’s original judgment. The jury awarded Petitioner McMillan \$12,487 in compensatory damages and \$350,000 in punitive damages. *R.* at 7a. If the District Court wanted to reduce those damages, it had to give Petitioner McMillan the choice of a new trial or accepting the lower amount. *Hetzel v. Prince William Cnty.*, 523 U.S. 208, 211–12 (1998); *see* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2815 (3d ed. 2024) (“[T]his court has never expressed doubt in respect of

the rule, and it has been uniformly applied by the lower federal courts.”) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 483 (1935)).

The record here does not reflect any choice being given; thus, the District Court could not have reduced the damages amount. While adding \$350,000 in punitive damages is, facially, a material change, it does not affect the substance of the parties’ rights and obligations. All else being equal, the University should have known it would have to pay Petitioner McMillan the jury’s punitive damages award because it would be improper for the District Court to make that change without Petitioner McMillan’s input. The University is not entitled to a monetary or temporal windfall because of its failure to understand the legal effect of the jury’s verdict and the District Court’s original judgment. This Court must reverse the decision on appeal.

There was a time for the University to raise these arguments about its § 1983 and First Amendment liability: at trial and within twenty-eight days of the jury finding it owed Petitioner McMillan compensation for failing to protect her First Amendment rights. The University had its first bite at the apple in unsuccessfully moving for judgment as a matter of law during the trial under Rule 50(a). R. at 7a. It even had a second chance to make these arguments after trial, but it squandered that opportunity by filing its motion late. The University could have filed its motion earlier because nothing in its motion relied on what the District Court changed in its amended judgment, and because the amendment itself did not substantively change the judgment by affecting the parties’ rights, obligations, or the judgment’s legal effect. The University wants this Court to second-guess the jury’s decision after the

University failed to double-check the deadlines. This goes against the letter and spirit of the Rules. The University's motion was untimely, and this Court must reverse the Thirteenth Circuit's decision.

II. THE UNIVERSITY IS LIABLE UNDER § 1983 FOR AN UNCONSTITUTIONAL DEPRIVATION OF FIRST AMENDMENT RIGHTS BY A STATE ACTOR DUE TO ITS HECKLER'S VETO POLICY.

In a landmark case involving public education, Justice Robert H. Jackson famously wrote, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Today, this Court has the opportunity to uphold this fixed star in the public university context.

The First Amendment to the United States constitution guarantees that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. The University deprived Petitioner McMillan of her First Amendment right by restricting her ability to speak. By attempting to deliver a speech on the benefits of a vegan diet, Petitioner McMillan was attempting to exercise her First Amendment free speech rights. “[T]he right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.” *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (evaluating the constitutionality of a law that restricted “sidewalk counseling” in front of abortion clinics). That is precisely what Petitioner McMillan was attempting to do: she prepared an educational presentation for a campus

audience, urging students to abstain from consuming animal products based on ethical grounds.

Five minutes into Petitioner McMillan's speech, however, a large group of yelling student protestors gathered at the foot of the stage. R. at 6a. They made so much noise and disruption that they drowned out Petitioner McMillan's attempts to talk. *Id.* She repeatedly asked the protestors to stop. *Id.* Campus security did not intervene, and the students did not stop. R. at 6a–7a. After fifteen minutes, she left the stage and did not return, unable to give her speech. R. at 6a.

The sole reason Petitioner McMillan was unable to speak was due to the disruption—a heckler's veto—caused by the student protestors. *See* R. at 6a. The student protestors were allowed to cause such a disruption because campus security did not intervene. *See* R. at 7a. Campus security did not intervene in accordance with Dean Thatcher's and the University's lax disciplinary policy. *See* R. at 6a-7a. Accordingly, this policy of indifference directly caused Petitioner McMillan's inability to speak. This deprived her of her freedom of speech under the First Amendment.

In fact, the University is under a greater obligation to protect Petitioner McMillan's free speech rights because students apparently disagreed with her speech or wanted to drown out her speech by means of this heckler's veto. In *Terminiello v. Chicago*, this Court held that “a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” 337 U.S. 1, 4 (1949). That a speaker brought in by a

student group inspires unrest by means of a heckler's veto is not a reason for the University to simply sit back and let it happen—it is all the more reason why Petitioner McMillan's speech ought to have been protected.

Petitioner McMillan therefore sued the University under § 1983 for a violation of her First Amendment rights. R. at 7a. To state a claim for relief under § 1983, Petitioner McMillan must establish (i) the University was acting under color of state law and (ii) the University deprived her of a constitutionally guaranteed right. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). Here, the University was acting under color of state law because Dean Thatcher's stated policy and campus security's custom of inaction and lack of training was state action. The University likewise deprived Petitioner McMillan of a constitutional right because the University's policy itself is unconstitutional under the First Amendment. It is a content discriminatory, unreasonable, vague, and overbroad restriction on speech that contravenes First Amendment values. Accordingly, this Court must reverse the decision of the Thirteenth Circuit and find the University liable for violating Petitioner McMillan's First Amendment rights.

A. The University's Heckler's Veto Policy Is State Action That Is A Restriction on the First Amendment Right to Free Speech.

Section 1983 requires that the deprivation of constitutional rights be committed under color of state law. Similarly, the constitutional right at issue—Petitioner McMillan's freedom of speech—has a state action requirement. This Court has long held that the Free Speech Clause does not prohibit private abridgement of speech, only governmental abridgement of speech. *See, e.g., Manhattan Cmty. Access*

Corp. v. Halleck, 587 U.S. 802, 808 (2019) (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995)).

The parties do not dispute that the University and campus security are state actors to which § 1983 liability can attach. R. at 11a; *see also Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 690 (1978). It is likewise undisputed that the University is a “municipal institution” that does not benefit from sovereign immunity. R. at 2a. As such, Petitioner McMillan need only establish that the University deprived her of a constitutional right to have properly recovered damages under § 1983. *Rock for Life-UMBC v. Hrabowski*, 411 F. App’x 541, 546 (4th Cir. 2010) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 808–09 (1982)).

Thus, the initial issue is whether the University’s policy is state action that constitutes governmental abridgement of speech. Petitioner McMillan demonstrates this requirement as follows: (1) the University established a policy of refraining from disciplining its students; (2) this policy displayed deliberate indifference to Petitioner McMillan’s constitutional rights such that liability attaches to the entire University under § 1983; (3) this policy was also state action for the purpose of a First Amendment analysis; and (4) the University failed to protect Petitioner McMillan’s First Amendment rights when it had a duty to do so.

i. The University established a policy of deliberate indifference that encouraged hecklers vetoes.

Deprivation of a constitutional right pursuant to a municipal policy or custom satisfies the § 1983 state action requirement. *City of Okla. City v. Tuttle*, 471 U.S. 808, 818 (1985) (citing *Monell*, 436 U.S. at 694). Here, Petitioner McMillan was

deprived of her free speech rights due to *both* the policy and custom of the University. The University established a policy of not disciplining student protesters, which amounts to a policy in favor of unconstitutional heckler's vetoes. Campus security also customarily did not intervene when students shouted down campus speakers.

The University established a policy of not disciplining students for misconduct generally, and for disrupting protests specifically. R. at 3a–6a. For § 1983 purposes, a policy is “a course of action consciously chosen from among various alternatives.” *Tuttle*, 471 U.S. at 823. As Dean of Student Affairs, Dean Thatcher has both the authority and the duty to set disciplinary policy. R. at 4a. The policy of not disciplining students originated with Dean Thatcher and his “boys will be boys” approach that allows students “to blow off a little steam” without “any kind of ‘punishment.’” R. at 5a. This has resulted in injuries to students, damage to University property, and the deprivation of First Amendment rights in at least four other instances. R. at 5a. These are the direct consequences of the policy implemented by Dean Thatcher. Dean Thatcher consciously chose to institute a policy of inaction, rather than a defined disciplinary procedure.

Further, Dean Thatcher deliberately pursued a policy of inadequate training for campus security—that is, *no* training at all. R. at 5a. Dean Thatcher is aware of the value of both disciplinary procedures and training. In fact, Dean Thatcher's record as a highly successful football player and team captain demonstrates that he is intimately familiar with policies that enforce discipline and high-performance training, qualities needed to win football games as well as ensure a safe learning

environment on campus. R. at 4a. Dean Thatcher made a conscious policy choice to not discipline students for unconstitutional heckler's vetoes.

In addition, the custom of inaction by campus security was pervasive enough to constitute an official policy under which § 1983 liability attaches. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *see also Brown v. Bryan Cnty.*, 219 F.3d 450, 457 (5th Cir. 2000) (stating that an “official policy is ‘[a] persistent, widespread practice . . . , which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.’” (quoting *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir.1984) (en banc))). Here, campus security failed to intervene in four other deprivations of First Amendment rights prior to the deprivation of Petitioner McMillan's rights. R. at 5a. Dean Thatcher failed to step in to discipline either the students for their conduct or campus security for their lack of action. *Id.* This is not a single instance of conduct; it has become a “habit” for the student body to deprive speakers of their rights and for campus security and Dean Thatcher to do nothing. *Id.*

Accordingly, Dean Thatcher's lax disciplinary policy is indeed a policy for the purposes of § 1983. Moreover, it is a policy that imparts liability on the entire University because it amounts to deliberate indifference to the constitutional rights of individuals under their authority.

ii. The University can be held liable for the policy because it displays deliberate indifference to constitutional rights.

Policies, like the one created by Dean Thatcher, that inadequately train state employees, give rise to § 1983 liability when they display “deliberate indifference” to

the constitutional rights of people. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Deliberate indifference is present when “a municipal actor disregarded a known or obvious consequence of his action.” *Connick v. Thompson*, 563 U.S. 51, 61 (2011).

The University’s policy as created and stated by Dean Thatcher demonstrates deliberate indifference to the constitutional rights of individuals on campus, including students and invited speakers like Petitioner McMillan. Even discounting the official stated policy that students do not need “any kind of punishment,” Dean Thatcher’s failure to train campus security amounts to a policy of deliberate indifference as well, as the University had notice of a pattern of similar violations. R. at 5a. The University had both actual and constructive notice that its failure to train campus security to intervene caused the violation of individuals’ rights, and nevertheless chose not to change the policy. *Connick*, 563 U.S. at 61; R. at 5a. The University also had notice of a pattern of similar violations, as students had “adopted the habit” of unconstitutionally preventing the speech of at least four different speakers invited to campus by student groups. R. at 5a. Each of these speakers were subjected to a heckler’s veto, and each time campus security failed to intervene. *Id.*

Even this single incident with Petitioner McMillan can demonstrate liability, as the constitutional violation was “‘the highly predictable’ consequence of a particular failure to train.” *Davidson v. City of Stafford*, 848 F.3d 384, 397 (5th Cir. 2017), *as revised* (Mar. 31, 2017) (citing *Harris*, 489 U.S. at 390 n.10). The University’s “‘policy of inaction’ in light of notice that its program will cause constitutional violations ‘is the functional equivalent of a decision by the [University]

itself to violate the Constitution.” *Connick*, 563 U.S. at 61–62 (quoting *Harris*, 489 U.S., at 395, (O’Connor, J., concurring in part and dissenting in part)).

The University knew that Petitioner McMillan would be deprived of her rights when she was invited to speak on campus due to Dean Thatcher’s official policy refusing to discipline students, the custom of inaction by campus security, and the failure by Dean Thatcher to train campus security to intervene. Each is sufficient on its own to rise to the level of deliberate indifference and make the University liable under § 1983. Taken together, it amounts to a failure to take the minimal action necessary to ensure that individuals’ constitutional rights are not violated while on campus—which is characteristic of the University’s oversights and failures throughout this litigation.

Accordingly, the University engaged in state action for the purposes of § 1983 by developing a policy of deliberate indifference for which the University can be held liable. This policy, moreover, abridged Petitioner McMillan’s First Amendment rights because the University both imposed a speech restriction according to the First Amendment’s state action requirement, and failed to act when it had an affirmative duty to protect Petitioner McMillan’s First Amendment rights.

iii. The University’s policy is likewise state action that restricts speech under the First Amendment.

In addition to engaging in state action for the purposes of § 1983, the University engaged in state action that abridged Petitioner McMillan’s First Amendment rights. First Amendment rights are abridged when the government restricts the freedom of speech. *See Halleck*, 587 U.S. at 808. The First Amendment

applies because the University suppressed Petitioner McMillan’s speech. It did so by promulgating a policy of deliberate indifference when it decided not to discipline its students for disrupting campus speakers. As in the § 1983 context, the University’s policy is a governmental restriction of speech because the University is acting as the state for the purposes of the First Amendment.

The state action standards for § 1983 and the First Amendment are the same. This Court has applied the state action requirements of § 1983 to the Constitution itself. In *Lugar v. Edmonson Oil Co., Inc.*, this Court wrote, “in a § 1983 action brought against a state official, the statutory requirement of action ‘under color of state law’ and the ‘state action’ requirement of the Fourteenth Amendment are identical.” 457 U.S. 922, 929 (1982); *see also Lindke v. Freed*, 601 U.S. 187, 195 (2024) (quoting *Lugar*). This Fourteenth Amendment analysis applies to the First Amendment. In *Lindke v. Freed*, this Court analyzed whether the city manager of Port Huron, Michigan violated the First Amendment when he deleted the comments of and blocked a private citizen from accessing his Facebook account. *Lindke*, 601 U.S. at 190–93. In assessing whether the requisite state action existed in order for the First Amendment to apply, this Court relied on *Lugar* to apply the standard shared by § 1983 and the Fourteenth Amendment. *Id.* at 195. The state action requirements of § 1983 and the First Amendment are therefore identical. Thus, because the University’s policy is state action with respect to § 1983, as explained above, the University’s policy is state action with respect to the First Amendment.

The policy remains state action even though it instructs University employees to not do something. The difference between a policy that tells an employee to act versus refrain from acting is not meaningfully different in a First Amendment analysis. Under the First Amendment, the government cannot do indirectly what it may not do directly. *See, e.g., Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 190 (2024). For example, in *Vullo*, this Court held that the superintendent of the New York Department of Financial Services (“DFS”) violated the First Amendment when she drafted guidance letters that encouraged DFS-regulated entities, which included insurance carriers, to manage “reputational risks” associated with “the [National Rifle Association] or similar gun promotion organizations.” *Id.* at 184. This had the effect of insurance carriers withdrawing from covering the National Rifle Association because they “feared reprisal” from the DFS superintendent. *Id.* at 181–83.

The policy in *Vullo* is analogous to Dean Thatcher’s policy. In *Vullo*, the DFS secretary instructed insurance carriers to not cover an organization. Here, Dean Thatcher has instructed campus employees to not discipline University students. The case before the Court today is therefore another example of the state attempting to do indirectly what it may not do directly. The University is suppressing the speech of student group speakers, including that of Petitioner McMillan. The University, however, has not achieved this suppression directly—instead, it has chosen a more indirect route. Like the guidance letters in *Vullo*, Dean Thatcher has issued guidance to employees within the Department of Student Affairs that rowdy students are not

to be disciplined. In this way, the University Dean has indirectly suppressed speech through inaction and reliance on proven patterns of student conduct.

The University's policy, in fact, goes beyond mere inaction—it is also one that selectively denies its protective services to certain groups of people. This Court has held that “a State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.” *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989). Similarly, the University can use campus security to discipline its students. However, the University has chosen not to use its protective services on behalf of a certain class of speakers: campus visitors. Since the denial of protective services is state action that is controlled by the Fourteenth Amendment, and because the First and Fourteenth Amendments have identical state action requirements, a denial of services is therefore state action that can violate the First Amendment. Accordingly, the University engaged in state action when it set forth its policy of deliberate indifference, and therefore, the First Amendment applies.

iv. The University also engaged in state action because it failed to act when it had a duty to do so.

A failure to act, despite a duty to do so, is also state action for purposes of liability under § 1983. *Clark v. Taylor*, 710 F.2d 4, 9 (1st Cir. 1983). Because the state action requirements of § 1983 and the First Amendment are closely linked, a failure to act when there is a duty to do so can likewise be state action for the First Amendment. Consequently, the Thirteenth Circuit erred when it held that Petitioner

McMillan had no affirmative right to protection from campus security—campus security, instead, had an affirmative duty to protect her speech.

The University had this affirmative duty because the First Amendment protects not only a right to disseminate information, but also the right to receive it. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (evaluating whether the denial of entry into the United States of a Marxist scholar violated the First Amendment right to receive information of academics at a conference). The First Amendment right to receive information is grounded in the idea that the First Amendment protects “an uninhibited marketplace of ideas.” *Kleindienst*, 408 U.S. at 763 (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)). As a critical component of the marketplace of ideas, the right to receive information is particularly salient in the public university context. *See, e.g., Healy v. James*, 408 U.S. 169, 180–81 (1972) (“The college classroom with its surrounding environs is . . . the marketplace of ideas”) (internal quotations omitted).

Indeed, this Court has affirmed this right in schools, writing that the right to receive information is the corollary of two First Amendment interests: the rights of the sender and the rights of the receiver. This Court wrote: “[t]he dissemination of ideas can accomplish nothing if otherwise willing [individuals] are not free to receive and consider them More importantly, the right to receive ideas is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom.” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (holding that the First Amendment limits the

discretion of public schools to remove books from its libraries). This language suggests an affirmative duty on the part of the state: because the exercise of First Amendment rights requires an ability to receive information, the state has a duty to safeguard these marketplaces of ideas for the First Amendment to mean anything at all.

In fact, the Framers themselves recognized this duty. James Madison wrote:

A popular Government, without popular information, *or the means of acquiring it*, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

9 James Madison, *Writings of James Madison* 103 (Gaillard Hunt ed. 1910) (emphasis added). The state must protect not only information, but also “the means of acquiring it.” *Id.* Without such a protection, we cannot have a democracy at all.

The right to receive information was most recently affirmed in the public university context in *Pernell v. Fla. Bd. of Governors*, 641 F.Supp.3d 1218 (N. D. Fla. 2022). In *Pernell*, the Northern District of Florida evaluated a challenge to Florida’s recently passed Individual Freedom Act (“IFA”). *Id.* at 1231. The law, which applied to public universities in Florida, prohibited training or instruction on eight concepts regarding race, origin, and sex. *Id.* at 1231–32. University professors and college students sued, claiming that the IFA violated the First Amendment. *Id.* at 1233. The Northern District of Florida agreed, holding the law infringed upon, among other rights, the student plaintiffs’ right to receive information. *Id.* at 1243–44. In *Pernell*, the students’ right to receive information derived from their professor’s right to disseminate the information. *Id.* at 1243–44 (citing *Pico*, 457 U.S. at 867). When a

professor's speech is chilled, therefore, this abridges not only the First Amendment rights of the professor, but also the First Amendment rights of their students. *Id.*

The University's policy abridges the right to disseminate and receive information by chilling speech in a variety of directions. By not intervening in campus protests, the University chilled Petitioner McMillan's speech. By chilling Petitioner McMillan's speech, it prevented both her and the Campus Vegan Alliance, an educational club that is part of the University, from disseminating the information it wishes about the vegan diet. As the IFA did to the professors' speech in *Pernell*, the University abridged student organizations' ability to disseminate information. This, in turn, abridged the student body's right to receive that information. The policy, and the subsequent lack of intervention against the heckler's veto, restricts the free flow of ideas that is protected by the First Amendment.¹

The University therefore did not just fail Petitioner McMillan when it neglected to safeguard her free speech rights—it also failed the student body. Both the Campus Vegan Alliance's right to send information, as well as the student body's right to receive it, were abridged by the University's policy. The University had a duty to protect this marketplace of ideas, and it breached this duty by enacting its policy of deliberate indifference.

¹ In fact, this policy not only restricts the Campus Vegan Alliance's free speech rights: it also restricts the Campus Vegan Alliance's expressive association rights because the Vegan Alliance is an expressive association that attempted to engage in expression by inviting Petitioner McMillan to speak on campus. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648–50 (2000). When she was unable to speak, the Campus Vegan Alliance was rendered unable to promote its values, and therefore, its First Amendment right of association was abridged.

Accordingly, the University engaged in state action under both § 1983 and the First Amendment when it promulgated a policy of deliberate indifference that led to the pattern of widespread heckler's vetoes. This policy contravenes Petitioner McMillan's right to free speech, as well as the students' right to receive information. This policy is therefore a speech restriction under the First Amendment. It is also unconstitutional, as explained *infra* Section II.B.

B. The Restriction on Petitioner McMillan's Free Speech Rights Was Unconstitutional Under the First Amendment and Therefore Abridged Her Rights.

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The University's policy is unconstitutional because it (i) discriminates based on content within a designated public forum; (ii) restricts content in a manner unrelated to the purposes of the forum; (iii) is vague and overbroad, and (iv) contravenes First Amendment values. For all these reasons, this Court should find that the University violated the First Amendment when it imposed a policy of refusing to discipline students who interfere with campus speakers and reverse the decision of the Thirteenth Circuit.

- i. Petitioner McMillan's speech was restricted in a designated public forum, so traditional First Amendment principles apply.*

When analyzing whether a speech restriction is unconstitutional under the First Amendment, courts first look at the location in which the speech took place. The state may enforce different speech restrictions depending on the forum where the speech occurred. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 799–800 (1985). Forums recognized by this Court include traditional public forums,

designated public forums, and limited public forums. *See Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983). Traditional public forums are “places in which by long tradition or by government fiat have been devoted to assembly and debate.” *Id.* at 45. Examples of traditional public forums include public parks and sidewalks. *Id.* Designated public forums are those in which the state opens up property to the public as a place for expressive conduct. *Id.* Examples of designated public forums include university meeting facilities, school board meetings, and municipal theaters. *Id.* A limited public forum, on the other hand, is “[p]ublic property which is not by tradition or designation a forum for public communication.” *Id.* at 46. Instead, the state is operating as a “private owner of property.” *Id.*

The speech at issue before the Court took place in a designated public forum. Petitioner McMillan attempted to speak at the Hedge Family Auditorium, located in one of the oldest buildings on the campus of a coeducational institution that is open to everyone. R. at 2a. In *Widmar v. Vincent*, this Court held that a public university created a designated public forum when it generally opened its facilities for use by student groups. 454 U.S. 263, 264–65 (1981). Similarly, the University opened the Auditorium for the use of student groups—including student groups who want to bring speakers to campus. R. at 2a, 6a. The record lists five student groups that attempted to use the space for such an expressive purpose, and there are over 60 student organizations on campus who could use its auditorium. R. at 3a, 5a.

Notably, the speech did not take place in a limited public forum. Occasionally, this Court has held that some public school and university contexts can be limited

public forums. However, this typically occurs in cases like student activities funds or school mail systems *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) and *Perry*, 460 U.S. at 46. In these cases, it is clear that the University is acting as a property owner and not opening a venue for public speech. However, when the University opens facilities for broad expressive conduct by students, this is not the University acting as a property owner—this is the University designating a space for expressive conduct. Indeed, holding open spaces for speech is one of the key functions of a university itself. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (noting that speech is critical to a university because a university is part of the “marketplace of ideas”).

Accordingly, the Hedge Family Auditorium, the location in which Petitioner’s speech was restricted, is a designated public forum. Therefore, the University is bound by the same First Amendment rules as if it opened a traditional public forum. *Perry*, 460 U.S. at 46. While reasonable time, place and manner restrictions are permissible in the forum, any content-based regulation must satisfy strict scrutiny. *Id.* However, the University’s policy is neither a reasonable time, place and manner restriction, nor does it satisfy strict scrutiny. It is, instead, a content-based regulation that fails strict scrutiny.

ii. The University’s policy of indifference restricts speech based on its content.

The First Amendment is especially sensitive to restrictions that are based on the content of speech. The University’s policy is one such restriction. A speech restriction is content based when the restriction “applies to particular speech because

of the topic discussed or message expressed.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citing *Sorrell v. IMS Health*, 564 U.S. 552, 563–64 (2011)). Facially neutral laws may still be content based if the restriction “cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys.” *Reed*, 576 U.S. at 164 (citations omitted). A listener’s reaction to speech is not a content-neutral justification for a speech restriction. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Prohibiting some, but not all, speakers from speaking can also be a content-based speech restriction. *See Sorrell*, 564 U.S. at 564. The University’s policy of indifference is a content-based restriction on speech because it both restricts certain speakers from speaking and is justified based on listener’s reaction to speech.

The University’s policy is content based because it prevents a specific group of speakers from speaking, like the content-based speech restriction in *Sorrell*. In *Sorrell*, this Court analyzed a Vermont state law that provided that prescriber-identifying pharmacy record information may not be sold or disclosed to pharmaceutical manufacturers for marketing purposes. *Id.* at 557. The Court held that the Vermont law was unconstitutional content and viewpoint discrimination because the statute disfavored specific speakers: pharmaceutical manufacturers. *Id.* at 563–64. The law allowed these data to be sold to private or academic researchers, for example, but not to marketers. *Id.* at 564. In the legislative history, the state of Vermont conceded that the messages of those who promote brand-name drugs are

“often in conflict with the goals of the state.” *Id.* at 565. Accordingly, the Court found that the Vermont law was based on the content of the pharmaceutical manufacturers’ message and was therefore an example of content discrimination. *Id.*

Like the Vermont law in *Sorrell*, the University’s policy prevents certain types of speakers from engaging in speech about certain topics. The students apply their heckler’s veto to a specific class of speakers—those who are invited by student groups. R. at 5a. A speaker invited by the Lantana Black Student Coalition cannot speak on institutional racism, for example, but the students themselves or teachers presumably can. *See id.* This mirrors the issue in *Sorrell*, where educators could purchase data about prescriber practices, but marketers could not.

The policy is also content-based because it relies on listeners’ reactions to speech. This Court struck down a county parade licensing scheme because the county was allowed to charge more for the license based on how many police officers the administrator believed the parade required. *Forsyth*, 505 U.S. at 134. Under this scheme, a parade that required more police presence would be more expensive to license. *Id.* This Court concluded that the policy was justified by the listener’s reaction to the speech. *Id.* In fact, the county’s speculation about need for additional police presence was grounded in the county’s concern over a heckler’s veto. *Id.* at 142 (Rehnquist, C.J., dissenting). Therefore, the Court concluded that this justification was not content neutral. *Id.* at 134.

The University’s policy is also justified based on the listener’s reaction to speech. Like the parade in *Forsyth*, speeches that do not draw heckler’s vetoes are

less burdened than speeches that do. In fact, this speech restriction is even more severe than the speech restriction in *Forsyth*: Petitioner McMillan’s speech was not rendered more expensive because of the heckler’s veto. Instead, she was prevented from speaking at all. R. at 6a. Accordingly, like the ordinance in *Forsyth*, the University’s policy has the effect of burdening speech based on its content and is therefore a content-based speech restriction.

iii. The University’s content-based speech restriction burdens more speech than necessary and is therefore unconstitutional under the First Amendment.

Content-based speech restrictions in designated public forums receive strict scrutiny under the First Amendment. *Perry*, 460 U.S. at 46. Because the University’s policy is content based, this Court must apply strict scrutiny to determine whether it violates the First Amendment. When applying strict scrutiny, courts regard these content-based laws as “presumptively unconstitutional” and look at whether the law is “narrowly tailored to serve compelling state interests.” *Reed*, 576 U.S. at 163.

Speech restrictions, like the University’s, that disproportionately impact small or unpopular speakers fail strict scrutiny and are therefore unconstitutional under the First Amendment. *See Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 784 (1988). In *Riley*, this Court applied strict scrutiny to a content-based speech restriction on the solicitation of charitable contributions by professional fundraisers. *Id.* The restriction failed strict scrutiny because it “necessarily discriminate[d] against small or unpopular charities,” because such charities were more likely to rely on the professional fundraisers, and were therefore more likely to be compelled to make disclosures. *Id.* at 799–800.

Like the restriction in *Riley*, the University’s policy necessarily discriminates against smaller clubs or unpopular speakers. The policy enables a heckler’s veto in which students make noise to prevent speakers from speaking. R. at 5a. The heckler’s veto “drowns out” the voices of the speaker. *See* R. at 5a-6a. Smaller clubs are more prone to restrictions from heckler’s vetoes because they have fewer members with which to address the speech. Similarly, unpopular speakers are more subject to heckler’s vetoes because these speakers often draw larger crowds of hecklers who try to drown out the speech. *See, e.g., Forsyth*, 505 U.S. at 134. The University’s policy is consequently a content-based speech restriction that discriminates against smaller groups and unpopular speakers, and therefore cannot pass strict scrutiny. It is therefore unconstitutional under the First Amendment.

Even if this Court determines a lower, intermediate level of scrutiny is appropriate, the University’s policy remains unconstitutional because it burdens more speech than necessary to achieve the University’s goals. Under intermediate scrutiny, the government may impose restrictions that are “narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The University’s policy fails even this lesser test.

This Court recently applied this test in *McCullen v. Coakley*, when it analyzed the constitutionality of a Massachusetts statute that made it a crime to knowingly stand on a public way or sidewalk within thirty-five feet on an entrance to any place where abortions are performed. 573 U.S. 464, 469 (2014). In *McCullen*, the speech

restriction was not narrowly tailored because it burdened not only protests, but also the quiet communications of “sidewalk counselors.” 573 U.S. at 490–91. The government’s interests were in preventing harassment and intimidation and promoting safety. *Id.* The Court found that sidewalk counseling was not harassment, so the restriction was not narrowly tailored. *Id.*

Likewise, the University’s policy burdens more speech than is necessary to achieve the University’s interests. If the University has an interest in this speech restriction, it is that Dean Thatcher believes that “boys will be boys,” and that students at the University are “good kids” who just “need a good talking to, not any kind of punishment.” R. at 5a. Apparently, the University has put in place a speech restriction because it believes that punishing juvenile conduct is not helpful to young people. However, the University need not punish young people in order to ensure that campus club speakers may speak. For example, University police can escort hecklers out of an auditorium without making a formal writeup about the hecklers’ conduct. This policy would further the interests of the school, without burdening anyone’s speech at all. The policy is not narrowly tailored and is unconstitutional.

iv. The University’s content-based speech restriction remains unconstitutional in a limited public forum because the restriction is unreasonable.

Even if this Court finds that the University’s auditorium was a limited public forum, the speech restriction does not survive the accompanying relaxed test. When it opens a limited public forum, the government can impose speech restrictions to keep the forum focused on the reason why the government opened the forum in the first place. *Rosenberger*, 515 U.S. at 829–30. Accordingly, the government can restrict

content to the extent that this restriction is viewpoint neutral and reasonable in light of the forum’s purposes. *Id.*; *Cornelius*, 473 U.S. at 800. Not all content-based restrictions are permissible in limited public forums, however. Under this test, “reasonable” means that the restriction is capable of being applied reasonably: that is, there is a sensible and predictable basis for distinguishing permissible and impermissible speech. *Minn. Voters All. v. Mansky*, 585 U.S. 1, 16 (2018). If there is no such basis—that is, if the restriction is unreasonable—then it is impermissible in a limited public forum, and therefore unconstitutional.

For example, in *Mansky*, this Court evaluated whether a Minnesota statute that prohibited a person from wearing political apparel inside a polling place on election day was constitutional under the First Amendment. *Id.* at 5. Because the polling place was a limited public forum, the Court applied the reasonable and viewpoint neutral test. *Id.* at 12–13. The Court held that the law was not reasonable. *Id.* at 16–17. To be reasonable, the Court said, the state must be able to “articulate some sensible basis for distinguishing what may come in from what must stay out.” *Id.* at 16. Because it was difficult to determine what the term “political” meant in the Minnesota law, the Court held that the speech restriction was unreasonable, and therefore unconstitutional under the First Amendment. *Id.* at 16–17.

Like the speech restriction in *Mansky*, the University’s policy is an unreasonable content-based restriction on speech, which is impermissible in a limited public forum. Much like the meaning of “political” in *Mansky*, is not clear at the outset which speakers will be subject to the heckler’s veto. The heckler’s veto has been

applied to a wide variety of speakers, all of them speaking on radically different topics with a broad range of political perspectives. R. at 5a. The veto has been applied to speakers brought in by the Black Student Coalition, Campus Vegan Alliance, High Five Society, and other groups. *Id.* It is not clear what, if anything, unites these speakers. This is certainly not reasonably related to the purposes of the forum—in fact, it is hard to see how it is reasonable at all.

Indeed, similar speech restrictions have been held unconstitutional in the limited public forum of the American public university. For example, the Second Circuit found that the State University of New York at Albany (“SUNY-Albany”) violated the First Amendment when it used a campus-wide student referendum process to determine how student activity fee funds would be allocated to different student groups. *Amidon v. Student Ass’n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 95 (2nd Cir. 2007). The Second Circuit concluded that the pool of student activity fees was a limited public forum, and that using a referendum to decide the fee allocation was impermissible in this forum because “[t]he level of funding a group receives may serve as an expression of approval or disapproval of the group’s message.” *Id.* at 100–01.

The University’s policy of indifference is unconstitutional for the same reason as SUNY-Albany’s fee allocation procedure. A student body heckler’s veto is a version of a student body referendum. A campus speaker who is permitted to speak is one that does not receive a heckler’s veto, which may indicate that the student body approves of the speaker’s message. On the other hand, a speaker who is forced into

silence by a heckler's veto may not have been able to speak because those hecklers did not approve of the speaker's message. So, the student body endorsing or disapproving of a message motivates the speech restriction, just as the student body approving or disapproving fees in *Amidon* enabled SUNY-Albany's speech restriction. Accordingly, the University's policy remains impermissible even in a limited public forum and is therefore unconstitutional under the First Amendment.

The University's policy may also operate under concealed viewpoint discrimination, which is impermissible in a limited public forum. While Petitioner McMillan did not allege that the policy was applied in a viewpoint discriminatory manner, that does not mean that the policy itself is not viewpoint discriminatory. In *Cornelius*, this Court found that even though a policy to exclude controversial groups from a fundraising drive was "facially neutral," it may nonetheless "may conceal a bias against the viewpoint advanced by the excluded speakers." 473 U.S. at 812.

The University's policy may be viewpoint discriminatory for similar reasons. While a policy of indifference may be facially neutral, it restricts speech by means of a heckler's veto. This necessarily excludes controversial speech—the presence of a heckler's veto is indicative of controversy. By allowing these heckler's vetoes to take place, the University suppresses controversial speech, which, like the policy in *Cornelius*, may conceal a bias against the suppressed speakers. Consequently, the University's policy may not just be an example of content discrimination—it may be viewpoint discriminatory as well. Accordingly, this policy is doubly impermissible in a limited public forum, and unconstitutional under the First Amendment.

v. Alternatively, the University’s policy is vague and overbroad.

In addition to prohibiting viewpoint discrimination and unreasonable content discrimination in limited public forums, the First Amendment also prohibits speech restrictions that are vague and overbroad. *See Whitney v. California*, 247 U.S. 357, 368 (1927) (analyzing vagueness of criminal syndicalism law), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus*, 482 U.S. 569, 574–75 (1987) (analyzing overbreadth of resolution banning “First Amendment activities” in an airport). Vagueness and overbreadth are related doctrines—both address the concern that imprecise or overly-inclusive speech restriction can chill permissible speech, in violation of the First Amendment. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (stating that “[u]ncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’” in a vagueness challenge); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (stating that “litigants. . . are permitted to challenge a statute not because their own free rights . . . are violated, but because . . . the statute’s very existence may cause others . . . to refrain from . . . speech” in an overbreadth challenge). These doctrines are facial challenges, so they apply regardless of the forum at issue. *Jews for Jesus*, 482 U.S. at 573–74.

A speech restriction is overbroad when it reaches a substantial number of impermissible applications. *New York v. Ferber*, 458 U.S. 747, 771 (1982). Parties can challenge a speech restriction under the overbreadth doctrine when every application of the restriction “creates an impermissible risk of suppression of ideas,” or “penaliz[es] a substantial amount of speech that is constitutionally protected.”

Forsyth, 505 U.S. at 129–30. A speech restriction is vague, meanwhile, when a reasonable speaker would not be able to tell whether their speech is prohibited by the restriction. *Whitney*, 274 U.S. at 368.

The University’s policy is both vague and overbroad. Because it is impossible to tell which speakers will be subject to the heckler’s veto based on the policy as described by Dean Thatcher, a reasonable person cannot tell whether their speech is prohibited by the policy. *See R.* at 5a. Certainly, when the Campus Vegan Alliance invited Petitioner McMillan to campus and hosted a private dinner for her, it did not anticipate that her speech would be suppressed. *See R.* at 6a. While this has occurred to other student groups in the past, nowhere in Dean Thatcher’s policy is there any way to predict which speech will be subjected to the policy’s heckler’s veto, and which will not. *See R.* at 5a. Accordingly, the University’s policy is vague.

The University’s policy also punishes constitutionally protected speech. This Court has upheld First Amendment protections for the speech of university student groups. *E.g.*, *Rosenberger*, 515 U.S. at 830; *Vincent*, 454 U.S. at 264–65. Certainly, as members of the University community, student groups are permitted to speak on the topics that their student group is organized around. In fact, the Campus Vegan Alliance, the student group at issue in this case, is more than a mere student group: it is an expressive association because it attempted to engage in expression when it invited Petitioner McMillan to campus. *See Dale*, 530 U.S. at 648–49 (holding that the Boy Scouts of America was an expressive association engaged in expression to promote values in young people). To prohibit this speech would defeat the purpose of

a student group and would infringe on the Vegan Alliance’s expressive associational rights. Indeed, because these heckler’s vetoes apply primarily to student group speakers, it appears as though the University’s policy restricts *primarily* constitutionally protected speech—so it is overbroad.

vi. The University’s policy violates First Amendment values.

In fact, the University’s policy flies in the face of the core purposes of any American public university: education and the free exchange of ideas to support the mission of learning. Both this Court and legal scholars have recognized that free speech is critical for academic and educational institutions because it creates a “marketplace of ideas” and safeguards academic freedom. *See Keyishian*, 385 U.S. at 603. The Court has written:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Id. (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)). This Court reaffirmed this idea nearly fifty years later, writing that “given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

Given the critical importance of speech on college campuses, scholars have concluded that “[t]here must be places on campus available for speech, even if providing them imposes some costs on the university.” Erwin Chemerinsky & Howard

Gillman, *Free Speech on Campus* 130 (2017) (citing *Hague v. CIO*, 307 U.S. 496 (1939) and *Schneider v. New Jersey*, 308 U.S. 147 (1939)). Indifference is not an excuse in the speech context: for example, a university can be held liable if it is indifferent to the harassment of its students. Chemerinsky & Gillman, *supra*, at 145 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999)).

Allowing this heckler’s veto policy to stand therefore contravenes these essential First Amendment values. The heckler’s veto is a tool to stifle speech and abridge academic freedom. The Lantana Black Student Coalition should have been able to speak about institutional racism; the Lantana Students for Armed Self-Defense should have been able to speak about the Second Amendment; and Petitioner McMillan, as an invited guest of the Campus Vegan Alliance, should have been able to speak about abstaining from consuming animal products. *See R.* at 5a–6a. With this policy, there is no free exchange of ideas at the City University of Lantana—there is only chaos and disorder.

CONCLUSION

The University failed to both observe deadlines and respect Petitioner McMillan’s First Amendment rights. It failed to observe the deadline to file its Rule 50(b) motion, and now it wants to rewrite the Rules to directly contradict the drafters’ intent. The University reaches for judicially created buoys that allow for deadline extensions after a judgment is amended, but it drifts too far from even the loosest interpretation of the Rules. The University’s motion did not challenge the punitive damages—the only change in the amended judgment—and that change was not

substantive. The University filed its motion too late, and the District Court was right to dismiss the motion without considering its merits.

Even considering the merits of the University's motion, the facts show the University is liable to Petitioner McMillan under § 1983 because it failed to respect her First Amendment right to free speech. The University deliberately and persistently stuck its head in the sand when hecklers shouted down speakers that student groups brought to campus. This is a policy and a custom that runs counter to the First Amendment's directive that the State cannot restrict the right to speak freely. While this Court permits some speech restrictions, the University has gone too far. Its policy is an overbroad and unreasonable restriction that discriminates against unpopular speakers based on the content of their speech. In every way, the University has completely neglected what should be its fundamental purpose: to encourage the free exchange of ideas for the sake of learning.

Given the evidence in the Record and the clear constitutional mandate, this Court must overturn the Thirteenth Circuit's decision and find the University liable for violating Petitioner McMillan's First Amendment right to free speech. For the foregoing reasons, the judgment of the Thirteenth Circuit should be reversed.

Respectfully submitted,

/s/ Team #81

Team #81

Counsel for Petitioner

November 18, 2024

CERTIFICATE OF SERVICE

By our signature, we certify that a true and correct copy of Petitioner Dove McMillan's brief on the merits was forwarded to Respondent, City University of Lantana, through the counsel of record by certified U.S. mail, return receipt requested, on this, the 18th day of November, 2024.

/s/ Team #81

Team #81

Counsel for Petitioner

November 18, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1, the undersigned hereby certifies that the Brief of Petitioner Dove McMillan contains 13,580 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

/s/ Team #81

Team #81

Counsel for Petitioner

November 18, 2024

APPENDIX

42 U.S.C. § 1983 - Civil action for deprivation of rights.

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