

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

TEAM NUMBER 87

NOVEMBER 18, 2024

COUNSEL FOR THE PETITIONER

QUESTIONS PRESENTED

1. Whether the time to file a post-judgment motion runs from the entry of the first judgment when the motion raises arguments that relate only to the first judgment and not to any changed portions of the judgment, as entered in the second judgment?
2. Whether a University's hands-off disciplinary policy violates the right to free speech under the First Amendment when it causes campus security to refuse to discipline students who shout down and silence University-invited speakers?

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OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of New Texas denying the Respondent’s motion for summary judgment as a matter of law is unreported but can be located at No. 21-cv-1285 and is reprinted on pages 20a–24a of the Record. The opinions and dissenting statements of the United States Court of Appeals for the Thirteenth Circuit is unreported but can be located at No. 22-0514 and is reprinted on pages 1a–19a of the Record.

STATEMENT OF JURISDICTION

The Thirteenth Circuit entered its judgment on May 10, 2023. The Petitioner timely filed a petition for writ of certiorari, which this Court granted on October 7, 2024. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, specifically, the Free Speech Clause and Due Process Clause, respectively. This case also involves Federal Rules of Civil Procedure 6(b)(2) and 50(b), as well as 42 U.S.C. § 1983. Each of these provisions is reproduced in Appendix A.

STATEMENT OF THE CASE

Students at the City University of Lantana (the “University”) have developed a reputation for shouting down (silencing) speakers invited to present on campus. R. at 5a. Lantana Black Student Coalition invited speakers to discuss institutional racism—those speakers, silenced. R. at 5a. Lantana Students for Armed Self-

Defense invited speakers to discuss Second Amendment Rights—those speakers, silenced. R. at 5a. The High Five Society invited speakers to discuss the legalization of recreational marijuana in New Texas—those speakers, silenced. R. at 5a. Despite these prior incidents, Dove McMillan accepted an invitation to speak on Lantana’s campus. R. at 5a. McMillan faired no differently than the other speakers—McMillan, silenced. R. at 5a–6a. McMillan, however, did not go quietly, resulting in this case.

The “Forever Learning” City University of Lantana

The University is committed to academic excellence, civic engagement, and leadership for common good. R. at 2a. Since its inception in 1849, it has upheld its motto, *Doctrina Perpetua*, which means “forever learning.” R. at 2a–3a. Although it started small, taking up only fifteen acres of land, today it has grown to occupy almost one-hundred and ninety acres comprised of various educational buildings, athletic facilities, dining halls, and other student-centered areas. R. at 2a. More than that, the University offers over sixty student organizations, including arts and culture groups, performance groups, intramural sports groups, gender and sexuality groups, social action groups, political organizations, and religious organizations. R. at 3a. It was one of these groups, the Campus Vegan Alliance, that invited McMillan to speak on campus in the University’s Hedge Family Auditorium. R. at 6a.

McMillan and the Student (Animal) Protesters

McMillan is a well-known vegan advocate, which is why the Campus Vegan Alliance invited her to speak on campus. R. at 6a. McMillan had planned to encourage her audience to abstain from consuming animal products. R. at 6a. She wanted to inspire her listeners to reconsider the potential ethical and environmental harms of consuming animal products, hoping that her message would build a more virtuous society. R. at 6a. McMillan's message, however, was never heard. R. at 6a.

A large group of combative University-student protesters disrupted McMillan's speech when she was about five minutes in. R. at 6a. Some protesters taunted McMillan with animal masks and costumes, while others carried banners and noisemakers. R. at 6a. But the taunts were not enough; the student protesters made so much noise that they completely silenced McMillan, or, in other words, shouted her down. R. at 6a. McMillan asked the student protesters to stop or to leave, but her efforts were futile. R. at 6a. Students in the audience also asked the student protesters to stop, but their efforts, too, were futile. R. at 6a. Concluding that the student protesters were not going to permit her to give her speech, McMillan left the stage. R. at 6a.

The student protesters not only wore their costumes, but they brought their animal characters to life. About an hour later, the student protesters had broken tables and chairs, damaged the auditorium podium, and stained the carpet in front of the stage. R. at 6a–7a. Campus security was present the entire time. R. at 7a.

From the time McMillan began her speech to the destruction of the auditorium, campus security observed it all and never engaged with the student protestors. R. at 7a. The University identified all the student-protesters thereafter but did not discipline a single one of them. R. at 7a.

All Hands Off

Well, the campus security's lack of intervention, and the University's lack of discipline, are in accordance with the University's policy. R. at 5a. According to the University's Dean, "boys will be boys." R. at 5a. The Dean, Mason Thatcher, thinks discipline should be hands-off. R. at 5a. Instead of any kind of punishment, Dean Thatcher believes a "good talking to" will suffice. R. at 5a. No matter how out of hand things get—leaving one hundred chickens in the Hedge Family Auditorium, creating a slip n'slide down a central staircase, placing a car on the roof of a University Hall, putting up keg stands during a graduation event that resulted in a (currently) hospitalized student, silencing and taunting University-invited speakers—Dean Thatcher declares all hands off. R. at 3a–4a. Campus security and University employees have followed suit, also taking a hands-off approach. R. at 5a. Students and University-invited speakers, like McMillan, are left to fend for themselves. R. at 5a.

Procedural History

After the student protestors shouted down McMillan, she filed suit against the Board of Regents of the University in the United States District Court for the District of New Texas. R. at 1a, 7a. McMillan asserted a cause of action under 42

U.S.C. § 1983, alleging that the University violated her First Amendment Rights. R. at 7a. The case proceeded to trial, and during trial, the University filed a Rule 50(a) motion for judgment as a matter of law. R. at 7a. The district court denied the University’s motion, and the jury awarded McMillan \$12,487 in compensatory damages and \$350,000 in punitive damages. R. at 7a. The district court entered a final judgment awarding only compensatory damages (the “first judgment”) on January 20, 2022. Seven days later, the district court *sua sponte* amended the judgment to include the punitive damages that the jury had awarded McMillan (the “second judgment”).

The University filed a Rule 50(b) renewed motion for judgment as a matter of law on February 24, 2022. R. at 7a. The district court denied the University’s post-judgment motion and ruled that it was untimely for being outside Rule 50(b)’s 28-day time limitation. R. at 24a. The district court measured the timeliness of the University’s motion from the first judgment, reasoning that the motion did not bear a relationship to the changed part of the judgment (the punitive damage award). R. at 23a–24a. The district court explained that the time for filing the University’s motion would have run from the second judgment if it had challenged the punitive damage award (the change), but because the University challenged its liability—an issue fully resolved in the first judgment—its motion was untimely, coming thirty-five days after the first judgment. R. at 23a-24a. Because the district court found the motion untimely, it did not address the merits. R. at 24a.

The University appealed the district court's denial of its post-judgment Rule 50(b) motion. R. at 1a. The Court of Appeals for the Thirteenth Circuit reversed the denial of the University's motion and rendered judgment in favor of the University. R. at 2a. The Court of Appeals addressed both the timeliness and merits of the University's motion. As for the timeliness, it concluded that the University's motion was timely. R. at 8a. The court explained that the 28-day time limitation under Rule 50(b) runs from the second judgment when the second judgment revises the parties' legal rights and obligations. R. at 8a. Because the inclusion of the punitive damages award in the second judgment affected the University's legal rights and obligations, the Court of Appeals held that the University's post-judgment Rule 50(b) motion was timely for being within twenty-eight days of the second judgment. R. at 9a–10a.

The Court of Appeals then considered the merits of the University's motion. R. at 10a. It found that the University's hands-off policy was viewpoint-neutral because of the lack of evidence and allegations to suggest that the University had ever applied its policy inconsistently or unevenly. R. at 11a. The court also concluded that McMillan could not use her rights *against* governmental interference with her freedom of speech to require the government to *protect* her freedom of speech. R. at 12a. To support this conclusion, it relied on this Court's holding in *Deshaney* and stated that the First Amendment does not constitute an affirmative obligation on the government to ensure McMillan's exercise of her free speech rights. R. at 13a–14a.

McMillan appealed the judgment of the Thirteenth Circuit, and this Court granted certiorari. R. at 1.

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment of the Thirteenth Circuit Court of Appeals and reinstate the district court's order, which denied the University's Rule 50(b) renewed motion for judgment as a matter of law. The district court was correct; the University's Rule 50(b) motion was untimely.

Federal Rule of Civil Procedure 50(b) is clear: after the court's entry of judgment, a party has twenty-eight days to file a renewed motion for judgment as a matter of law. Fed. R. Civ. P. 50(b). Considering that in conjunction with (1) Federal Rule of Civil Procedure 6(b)(2), which strips a court of any discretion to extend the time within which a party may file such a motion, and (2) this Court's reasoning in *FTC v. Minneapolis-Honeywell*, it necessarily follows that this Court should impose a relatedness requirement when determining whether a post-judgment motion runs from a court's first or second judgment.

In *FTC v. Minneapolis-Honeywell Regulator Co.*, this Court refused to extend the time within which a party could file a petition for certiorari when the party attempted to use the occurrence of an event in the lower court to extend its time to file, but the event had nothing to do with what the Court would be reviewing. *See* 344 U.S. 206, 213 (1952). Similarly, here, the 28-day time limitation should run from the second judgment only when a party raises issues in its motion that relate to the legal changes, as entered in the second judgment, not those it could not have

raised after the first judgment—this would be an event that had nothing to do with what the court was reviewing.

If there is no relationship requirement, the mere existence of a second judgment would always extend the deadline. That is an unsound result. In fact, such a result would defeat the purpose of having a deadline by allowing parties to challenge what they could have challenged after the first judgment, circumventing the deadline. It will also create inconsistencies within the courts by giving extra time to some parties and not others (those with only one judgment and those with two).

However, should this Court choose not to impose a relatedness requirement, the University's post-judgment motion is still untimely. Entering a second judgment to adjust the amount of a damage award is not a substantive change that causes the 28-day time limitation to run from the second judgment. *See, e.g., Dep't of Banking v. Pink*, 317 U.S. 264, 266 (1942) (per curiam) (refusing to allow the party's motion to amend remittitur to extend the time within which a party could petition for certiorari when the party's motion only sought to amend remittitur and not any of the rights adjudicated). Therefore, relatedness requirement or not, the Thirteenth Circuit should have affirmed the district court's denial of the University's post-judgment motion. Accordingly, this Court should reverse the Thirteenth Circuit and reinstate the district court's order.

Nonetheless, even if this Court disagrees and finds that the University's post-judgment motion was timely, the University should lose on the merits. Its hands-off

disciplinary policy, which causes campus security not to discipline students who shout down (and silence) University-invited speakers, violates the First Amendment.

Education institutions have, in the past, provided a platform from which social, scholarly, moral, and political views were expressed and debated, promoting the First Amendment's values of democracy and finding the truth. *See McCutcheon v. FEC*, 572 U.S. 185, 236 (2014) (recognizing that the First Amendment's protection of speech is "essential to effective democracy"); *see also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market). That is perhaps why this Court has stated that the right to free speech is "nowhere more vital" than it is in educational institutions. *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972). However, that "vital" platform will vanish if this Court allows education institutions, like the University here, to have policies that permit students to silence speech and thereby prevent ideas from ever entering the marketplace.

The First Amendment protects the rights of individuals to hear and receive information, as the freedom to speak and the freedom to hear are "two sides of the same coin." *Kleindienst*, 408 U.S. at 775–76 (Marshall, J., dissenting). When the crowd shouts down a speaker, it violates the First Amendment rights of listeners to hear and receive the information that the speaker would have otherwise provided.

The First Amendment also prohibits heckler’s vetoes, which occur when enforcement officials suppress speech based on the audience’s reaction. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001). Whether enforcement officials directly silence a speaker by physically removing her or indirectly silence a speaker by following a policy that allows members of the crowd to silence her, the violation of the First Amendment is the same—the enforcement officials have suppressed speech. This Court has said over and over again—in *Edwards*, *Cox*, and again in *Gregory*—that law enforcement should protect the speaker, not the audience. *See Edwards v. South Carolina*, 372 U.S. 229, 232–33, 237–38 (1963); *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965); *Gregory v. City of Chicago*, 394 U.S. 111, 113 (1969).

Additionally, although the University’s policy appears viewpoint neutral, it is not. In fact, in effect, it is viewpoint based, violating the First Amendment in yet another way. First, the University’s policy works to only suppress the views of unpopular, minority-supported speech. Specifically, speeches about institutional racism, armed self-defense, legalizing recreational marijuana, climate change, and vegan diets have all been shouted down at the hand of the University’s hands-off policy. *See R.* at 5a–6a. Second, the University’s policy gives a significant amount of discretion to campus security to discriminate on viewpoint. If campus security likes a message, it could prohibit members of the crowd from shouting down the speaker, but if it dislikes a message, it might allow members of the crowd to shout the message down. This Court has held that the potential for enforcement officials to

engage in viewpoint discrimination is unconstitutional, and it should likewise do so here. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988).

Furthermore, while this case involves the clash of First Amendment rights—those of protestors and those of a speaker—when deciding whose rights should prevail, it should be those of the speaker. The right to free speech includes *speech*, not *disruption*. *See Startzell v. City of Philadelphia*, 533 F.3d 183, 198–99 (3d Cir. 2008). Accordingly, in choosing between a speaker who was invited to give a message and protestors who disrupt that message, the First Amendment should tilt in favor of the speaker.

Finally, regardless of whether this Court finds a First Amendment violation for the reasons above, it should overrule *DeShaney* and find that the University has an affirmative obligation to protect an individual's right to free speech. The structure and spirit of the Constitution is about *protecting* our fundamental rights and *DeShaney* stands as an obstacle to that purpose. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). Failure to impose an affirmative obligation on the government to protect the right to free speech (pursuant to this Court's decision in *DeShaney*), combined with the State of New Texas' monopoly on violence (leaving individuals without the ability to protect their right to speech), renders the right to free speech an "empty privilege." *See Kovacs v. Cooper*, 366 U.S. 77, 86 (1949). It also stands contrary to this Court's commitment, which is to "fiercely protect the individual rights secured by the U.S. Constitution." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 72 (2019) (Kavanaugh, J., concurring). This

Court should overrule *DeShaney* and come into harmony with the beat of the Constitution: protect individual rights.

Therefore, this Court should reverse the judgment of the Thirteenth Circuit.

ARGUMENT

This Court has two grounds on which it should reverse the Thirteenth Circuit. To start, the University's Rule 50(b) Renewed Motion for Summary Judgment as a matter of law was untimely. The University filed its motion thirty-five days after the district court entered judgment on its liability. R. at 20a–21a. The existence of a second judgment, which only altered the judgment to include the jury's punitive damage award, did not grant the University an automatic time extension to challenge its liability, the part of the judgment that remained unchanged in the second judgment. However, even if this Court disagrees and reaches the merits of this case, the University's hands-off disciplinary policy violates the First Amendment. Therefore, this Court should reverse the judgment of the Thirteenth Circuit.

I. The time for filing a post-judgment Rule 50(b) motion runs from the court's entry of the first judgment unless the motion raises arguments regarding the changed portions of the judgment, as entered in the second judgment.

The Federal Rules of Civil Procedure regarding post-judgment motions are strict and clear. This case confronts one of those rules—Rule 50(b)—which provides the time limitation within which a party may file a renewed motion for judgment as a matter of law. Under Rule 50(b), the movant must file “[n]o later than 28 days after the entry of the judgment.” Fed. R. Civ. P. 50(b). With respect to certain post-

judgment motions, like the Rule 50(b) renewed motion for judgment as a matter of law that the University filed here, a court has absolutely no discretion to alter the deadline to file the motion. That is because Federal Rule of Civil Procedure (6)(b)(2) explicitly excludes a court from extending the time limitation that is applicable to the post-judgment motion. *See* Fed. R. Civ. P. 6(b)(2) (a “court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b),(d), and (e), and 60(b)”).

Accordingly, when the party has filed a post-judgment motion under Rule 50(b), as the University did here, the court is strictly prohibited from extending the 28-day time limitation, even if the party potentially had good cause for its failure to file within the 28-day period. *See id.*

Because the 28-day time limitation is strict, in some cases, whether the time runs from the first or second judgment will be dispositive of whether the court grants or denies a party’s post-judgment Rule 50(b) motion. As is the case here, if the 28-day time limitation runs from the first judgment, the University’s motion is untimely; if it runs from the second judgment, the University’s motion is timely. Fortunately, this Court has painted some lines, providing whether the time should run from the first or second judgment; the circuit courts have worked to brush inside those lines.

In addressing the timeliness of a party’s petition for certiorari, this Court held that “if the court did no more by the second judgment than to restate *what it had decided* by the first one” the time to file a petition for certiorari “would start to run from the first judgment.” *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 379

(1965) (citing *FTC v. Minneapolis-Honeywell Regul. Co.*, 344 U.S. 206, 211 (1952) (emphasis added). The Second, Seventh, and Federal Circuits, adding paint to this Court's canvas, have all adopted a rule that is rooted in this Court's aforementioned holding: the timeliness of a post-judgment motion is determined from the date of the second judgment *only if* the motion bears some relationship to the court's modification of the first judgment. *Tru-Art Sign Co., Inc. v. Loc. 137 Sheet Metal Workers Int'l Ass'n*, 852 F.3d 217, 221 (2d Cir. 2017); *McNabola v. Chic. Transit Auth.*, 10 F.3d 501, 521 (7th Cir. 1993); *Progressive Indus., Inc. v. United States*, 888 F.3d 1258, 1254 (Fed. Cir. 2018). In other words, the post-judgment motion must relate to the modification itself, not the part of the judgment that was not changed.

This Court should follow the Second, Seventh, and Federal Circuits stroke and conclude that for a party's post-judgment Rule 50(b) motion to run from the second judgment, the party's motion must raise arguments that relate to the changed part of the judgment, as entered in the second judgment. First, requiring the arguments raised to have a relationship to the changed part of the judgment is consistent with this Court's precedent. Second, imposing a relatedness requirement is consistent with Rule 6(b)(2)'s prohibition on time extensions, ensures a level playing field, and fulfills the objectives of a deadline. However, even if this Court disagrees with imposing such a relatedness requirement, this Court has already determined that adjusting the amount of a damages award does not extend a Federal Rule of Civil Procedure time limitation.

As a result, this Court should reverse the Thirteenth Circuit's holding and conclude that the University's post-judgment Rule 50(b) motion was untimely, reinstating the district court's order denying the motion.

A. Under this Court's precedent, the timeliness of a post-judgment Rule 50(b) motion should be determined from the date of the first judgment unless the movant raises arguments in its motion that relate to the changed portions of the judgment, as entered in the second judgment.

It is consistent with this Court's precedent in *FTC v. Minneapolis-Honeywell Regulator Co.* and *FTC v. Colgate-Palmolive Co.* to conclude that a court must determine the timeliness of a post-judgment Rule 50(b) motion from the date of the first judgment unless the motion addressed the changed portions of the judgment, as entered in the second judgment. *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). Imposing such a relatedness requirement would mean that the parties may only address the legal rights that were disturbed or revised, not the rights that were settled with finality. Additionally, even the Fifth Circuit's rule, as adopted by the Thirteenth Circuit below, appears consistent with our reading of this Court's precedent; the Thirteenth Circuit simply misinterpreted and misapplied the rule.

1. Imposing a relatedness requirement is consistent with this Court's precedent.

This Court's precedent suggests that the post-judgment Rule 50(b) motion must bear a relationship to the changed portion of the judgment, as entered in the second judgment, for the timeliness of the motion to be determined from the second judgment. In *Minneapolis-Honeywell*, this Court concluded that the timeliness of a

petition for certiorari would run from a court's second order when the second order "disturbed or revised legal rights and obligations" that were previously "plainly and properly settled with finality." 344 U.S. at 212. In *Colgate-Palmolive*, this Court interpreted its conclusion from *Minneapolis-Honeywell*, and provided that courts must determine the timeliness of a petition for certiorari from the first judgment if the second judgment merely restated what the court had decided in the first judgment. 380 U.S. at 379.

In both of these cases, this Court necessarily meant that a post-judgment Rule 50(b) motion must challenge the *disturbance* or *revision* of the legal rights and obligations as changed in the judgment, not those that were left undisturbed, unrevised, and settled with finality. *See Minneapolis-Honeywell*, 344 U.S. at 212; *Colgate-Palmolive*, 380 U.S. at 379. Indeed, this Court basically said as much in *Minneapolis-Honeywell* when it stated that the statutes prescribing the time limitations for appeal were "not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court . . . *which is of no import to the matters to be dealt with on review.*" *Minneapolis-Honeywell*, 344 U.S. at 213 (emphasis added). Taking that language and applying it here: a court's second judgment is "not to be applied so as to" extend a party's time to file a Rule 50(b) motion when that second judgment has "no import to the matters to be dealt with on review." *See id.*

The Seventh Circuit illustrates this inference clearly. In *McNabola*, the Seventh Circuit had to determine whether McNabola's motion for prejudgment

interest was timely. *McNabola*, 10 F.3d at 520. McNabola argued his motion was timely because it was served within Rule 59(e)’s 10-day time limitation. *Id.*

However, McNabola determined the timeliness of his motion from the date of the second judgment, which the court had entered to reflect its court-ordered remittitur. *Id.* The Seventh Circuit concluded that McNabola’s motion for prejudgment interest was untimely. *Id.* at 521. It explained that McNabola did not challenge the court-ordered remittitur, which was the only change entered in the second judgment; instead, he challenged prejudgment interest, which was settled in the first judgment. *Id.* The court thus concluded that the timeliness of McNabola’s motion had to be determined from the first judgment because McNabola challenged an issue that was part of the court’s first judgment and had nothing to do with the changed part of the judgment, as entered in the second judgment. *Id.* Said differently, the court could not determine the timeliness of McNabola’s motion from the second judgment, when the second judgment contained “no import to the matters to be dealt with on review.” *See Minneapolis-Honeywell*, 344 U.S. at 213. So, McNabola could have challenged the disturbance of his legal rights (lowered damage award—the changed part of the judgment) but could not challenge what was left undisturbed (prejudgment interest—settled with finality in the first judgment).

Requiring a relationship between the party’s post-judgment motion and the *alteration* of the judgment as entered in the second judgment—the Second, Seventh, and Federal Circuits’ rule—brings life to this Court’s reasoning in *Minneapolis-*

Honeywell: if a party challenges the alteration of the judgment, then the event in the lower court has an “import to the matters to be dealt with on review.” *Id*; *Tru-Art Sign Co., Inc.*, 852 F.3d at 221 (“the timeliness of a Rule 59(e) motion is determined from the date of the amended judgment only if the motion bears some relationship to the district court’s alteration of the first judgment”); *Kraft Inc. v. United States*, 85 F.3d 602, 608 (Fed. Cir. 1996) (refusing to reopen a period for tolling motions when the issues asked to review on appeal were “wholly unaffected” by the revision in the amended judgment). Without such a relationship requirement, parties will have the ability to toll the 28-day time limitation based on an event that has nothing to do with the matters to be dealt with on review. Take this case, for example; the district court’s addition of punitive damages in the second judgment had nothing to do with whether the University was liable, which was established in the first judgment. Because the University challenges its liability, which was wholly attributed to the first judgment, the second judgment should not toll the 28-day time limitation for its post-judgment Rule 50(b) motion because the second judgment contains “no import to the matters to be dealt with on review.” *See Minneapolis-Honeywell*, 344 U.S. at 213.

Therefore, the Second, Seventh, and Federal Circuit’s rule—that the post-judgment motion must bear a relationship to the court’s alteration of the judgment for the motion’s timeliness from the second judgment—makes sense. It also follows this Court’s reasoning with respect to time limitations. *See Minneapolis-Honeywell*,

344 U.S. at 213. These three Circuits and this Court have painted on the same canvas; these Circuits have just enriched the color.

2. Imposing a relatedness requirement appears consistent with the Fifth Circuit's rule, as adopted from this Court.

The Fifth Circuit's rule is almost identical to this Court's rule mentioned above: the second judgment begins the running of the time limitation "if it is a superseding judgment making a change of substance which disturbed or revised legal rights and obligations." *Cornist v. Richland Par. Sch. Bd.*, 479 F.2d 37, 39 (5th Cir. 1973) (internal quotations omitted); see *Minneapolis-Honeywell*, 344 U.S. at 212 ("the question is whether" the court's second order "has disturbed or revised legal rights and obligations which, by" its first order, "had been plainly and properly settled with finality.") While the Fifth Circuit's rule could also enrich the color on the canvas, the way the court below interpreted its rule—much too literally—caused the Fifth Circuit's rule to brush outside the lines.

The case in which the Fifth Circuit adopted this rule, *Cornist*, contemplated an appellant who challenged the district court's denial of its Rule 59 motion for a new trial. *Cornist*, 479 F.2d at 38. The district court had denied the appellant's motion because it started the 10-day time limit for the motion from the first judgment, rendering the motion too late. *Id.* Without stating the grounds on which the appellant filed its motion for a new trial, the Fifth Circuit held that the 10-day time limitation ran from the second judgment, rendering the motion timely. *Id.* at 39. The Fifth Circuit provided two reasons for its decision: (1) the second judgment was an entirely new judgment; (2) the second judgment omitted a teacher from

being reinstated, who would have been reinstated under the first judgment. *Id.* at 39. Although the opinion is not clear, it is entirely possible that the appellant's motion for a new trial could have related to the changed portion of the judgment. Perhaps it is not explicit because it was an entirely new judgment that inherently related to the change. *See id.* The Thirteenth Circuit failed to take this into account.

Interpreting this Court and the Fifth Circuit so literally, as the Thirteenth Circuit did, is wrong. Reading this Court's holding in *Minneapolis-Honeywell* to mean that the clock should start over anytime a court makes a substantive change, regardless of whether a party's post-judgment motion relates to that change, cannot be the rule. That is true for three reasons. First, requiring the post-judgment motion to relate to the changed portion of the judgment that the court entered in the second judgment enforces Rule 6(b)(2)'s prohibition on extending the 28-day time limitation for post-judgment motions. Second, such a relatedness requirement ensures a level playing field. Third, it serves the purpose of a deadline.

B. This Court should impose a relatedness requirement for the 28-day time limitation for filing a post-judgment motion to run from the second judgment because it is consistent with Rule 6(b)(2), ensures a level playing field, and fulfills the objectives of a deadline.

Rule 6(b)(2) plainly prohibits a court from extending the deadline for a post-judgment Rule 50(b) motion. *See* Fed. R. Civ. P. 6(b)(2). For this reason, a party should not be able to extend the deadline either. Permitting a party to do so will (1) create an imbalance in the courts when it would otherwise be a level playing field, and (2) circumvent the purpose of a deadline, making the time limit a joke.

1. Rule 6(b)(2) prohibits extending time to file a post-judgment Rule 50(b) motion.

If the post-judgment motion does not bear a relationship to the changed portion of the judgment, it allows the parties to do through the backdoor what a court cannot do through the front door: extend the time to file a post-judgment Rule 50(b) motion. *See* Fed. R. Civ. P. 6(b)(2) (prohibiting the court from extending time under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)); *see, e.g., Johnston v. Borders*, No. 615CV936ORL40DCI, 2019 WL 8105895 at *3 (M.D. Fla. June 28, 2019) (acknowledging the defendant's admission that the amended judgment was an opportunity to circumvent the deadline). Rule 6(b)(2) could not be clearer: a court must not extend time for a party to file a post-judgment Rule 50(b) motion. *See id.*; R. at 21a. It necessarily follows that parties must not extend the time either.

2. A relatedness requirement ensures a level playing field.

We can all agree that if a court entered only one final judgment, the 28-day time limitation would run from that one final judgment. We can also all agree that when the 28-day period is up, a party may no longer file a post-judgment Rule 50(b) motion—the deadline is strict. *See* Fed. R. Civ. P. 6(b)(2), 50(b); *see also Progressive Indus., Inc.*, 888 F.3d at 1255 (acknowledging that Rule 6(b)(2) expressly prohibits a court from extending the time to file a post-judgment motion, *sua sponte* or otherwise). If this is the rule when there is only one judgment, the rule should not change just because there is a second judgment, at least when the party challenges the parts of the judgment it could have challenged after the first judgment—the

parts of the judgment that were unaffected by the second judgment. Instead, the rule should stay the same, ensuring a level playing field.

Using this case as an illustration: the district court below, in the first judgment, entered its decision on the University's liability. R. at 7a, 23a. Seven days later, the district court entered a second judgment to include the jury's punitive damage award. R. at 7a. Importantly, however, it left the decision about the University's liability unchanged. R. at 23a. If this Court, as we request, imposes a relatedness requirement, it will simply mean that the University only had twenty-eight days—like every party with only one judgment—to file a post-judgment Rule 50(b) motion regarding its liability (as opposed to thirty-five days, per the Respondent's request). Such a result makes sense, as the University truly only had one judgment regarding its liability; the second judgment was entirely unrelated to its liability—the challenged issue.

To be clear, the University would have had twenty-eight days from the second judgment to challenge the punitive damage award—the part of the judgment that the district court *changed*. However, because the University did not challenge the punitive damage award, its motion should be untimely. Such a conclusion makes sense, as the punitive damage award was the part of the judgment that the University previously did not have twenty-eight days to challenge. Its liability, however, could have been challenged after the first judgment, and was unaffected by the second judgment.

Failure to impose a relatedness requirement would give the University—unlike every party with only one judgment—extra time to file a post-judgment Rule 50(b) motion about issues it already had the requisite time to challenge.¹ It would mean that, regardless of whether a party challenged the changed portions of the judgment, the existence of a second judgment would always grant an automatic time-extension. If such a rule would not give an unfair advantage to some parties (parties with a second judgment) and not others (parties without a second judgment), what would?

Therefore, the University should not get extra time to challenge its liability—the portion of the judgment unchanged in the second judgment. Instead, it should only get twenty-eight days, from the date of the first judgment, just like any other party with only one judgment would get.

All McMillan asks is that this Court keep the playing field even. If a court enters a second judgment, a party should not get extra time to challenge portions of the judgment for which it already had twenty-eight days to challenge. The party had its chance. And that chance should be gone, just like it would be if a second judgment were never entered, since the second judgment was entirely unrelated to the issues raised in the post-judgment motion.

3. A relatedness requirement achieves the purpose of a deadline.

The purpose of a deadline, at least the deadline here, is to bring litigation to an end. *See, e.g., Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943) (“[t]he

¹ This assumes the presiding court did not enter a second judgment involving the issues challenged in the post-judgment Rule 50(b) motion.

purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end”). Failing to require a relationship between the changed part of the judgment and the party’s post-judgment motion will not bring litigation to an end. Rather, it will revive it. However, not only will it do that, but it will also make the time limit a “joke.” *Johnston*, 2019 WL 8105895 at *2 (citation omitted).

Just like the University did here, parties will take advantage of their overtime if they know they can challenge the unchanged portions of a judgment twenty-eight days after the court enters the second judgment. In this case, the University had twenty-eight days after the first judgment to file a motion challenging its *liability*. Meaning that the University could have filed the very same post-judgment motion after the first judgment that it did after the second judgment. Nonetheless, instead of filing its motion about its liability—which was *unchanged*—within the 28-day time limitation after the first judgment, it took advantage of the court entering a second judgment and filed twenty-eight days after that second judgment. R. at 21a, 23a; *but see Minneapolis-Honeywell*, 344 U.S. at 212 (the question is whether the legal rights disturbed had been settled with finality). In other words, even the University itself treated the first judgment as the one from which it filed its post-judgment motion.

The University is not the only one who has tried to circumvent the rules. In *Johnston v. Borders*, the defendants did too. *Johnston*, 2019 WL 8105895 at *1.

However, unlike the Thirteenth Circuit, the district court threw its yellow flag, acknowledging the personal foul.

In that case, defendants' counsel, after missing the 28-day deadline, contacted plaintiff's counsel and asked if the plaintiff would be opposed to the defendants filing a late motion for new trial. *Id.* at *1. Although the plaintiff's counsel said they would not oppose the motion, the defendants changed course and decided not to file the motion. *Id.* The court later entered an amended judgment, which the defendants agreed to, and added prejudgment interest to the plaintiff's claim. *Id.* at *1, 3. Come to find out, the defendants agreed to the amended judgment only because they thought it would allow them to file a motion for a new trial. *Id.* at *3. Indeed, they assumed the second judgment would start the 28-day time limitation over for *any* challenge they wanted to raise, not just a challenge to the prejudgment interest. *See id.* (stating that "they used the Amended Judgment, which they agreed to, as an opportunity to circumvent the deadline."). However, because the defendants' motion did not bear a relationship to the changed portion of the judgment (making no mention of prejudgment interest in the motion), the court found the motion untimely. *See id.* The court explicitly acknowledged that the defendants' motion was an "attempt to make their own untimely request for alternation of the amended judgment on a wholly independent ground" and that it was "not taken with [such] gamesmanship." *See id.*

Although this case and *Johnston* have their differences, the overarching principle is the same: parties cannot rely on the second judgment to start the 28-day

time limitation for filing a motion if they are challenging the part of the judgment that was challengeable after the first judgment. When time is up, time is up.

Surely, if Rule 6(b)(2) does not allow a court to extend the 28-day time limitation, it would not allow the parties to either. This Court should refuse to skew the level playing field. The University's Hail Mary falls short. A deadline is a deadline.

C. Even if this Court declines to impose a relatedness requirement, this Court has already established that it does not extend time for a court's "ministerial act" of adjusting the amount of a damage award.

This Court has already determined that an adjustment to a damages award does not extend time limitations under the Federal Rules of Civil Procedure. So, amending the judgment to include punitive damages, as the district court did in this case, does not extend the timeline.

In *Dep't of Banking v. Pink*, this Court concluded that a motion to amend a remittitur did not extend the time within which the party could petition for certiorari. 317 U.S. 264, 266 (1942) (per curiam). This Court stated that a motion to amend remittitur only extends the time to petition for certiorari if the motion seeks, in addition to amendment of remittitur, reconsideration of a question decided in the case. *Id.* But because remittitur was the only issue addressed in the motion, and not any of the rights adjudicated, it could not extend the time to petition for certiorari. *Id.*

That reasoning applies to this case: if a second judgment is only the "ministerial act" of entering judgment on the punitive damages award, it does not

extend the timing within which a party may file a post-judgment motion. *Id.* at 267–268. But if a second judgment reconsiders a question decided in the case, then the judgment extends the time within which a party can file a post-judgment motion. *Id.*

Here, the second judgment did no more than enter judgment on the punitive damages award. R. at 7a. The second judgment did not reconsider a question decided in the case—the University’s liability was final either way. R. at 7a. Although remittitur and punitive damages are different, they are the same in the sense that both adjust the amount of damages awarded. It would be inconsistent for this Court to adopt a rule that extends the time limitation for post-judgment motions when damages are increased but does not extend the time limitation when they are decreased. This Court should stay true to its reasoning in *Pink* and conclude that adjusting the amount of a damage award in a second judgment does not extend the time within which a party may file a post-judgment motion.

* * * * *

In conclusion, this Court should find that the University’s post-judgment Rule 50(b) motion was untimely for either of two reasons: (1) the arguments raised in the motion did not relate to the changed portion of the judgment; (2) the second judgment was merely a ministerial act of adjusting the damage award. Therefore, this Court should reverse the Thirteenth Circuit Court of Appeals and affirm the district court’s decision to deny the University’s motion.

II. Regardless of whether this Court finds that the University’s post-judgment motion was timely, the University’s hands-off disciplinary policy, which causes campus security not to discipline students who shout down University-invited speakers, violates the First Amendment.

Among our constitutional rights, the freedom of speech is one of the most unique and important. It fosters the search for truth and is essential to democracy, as it creates an open marketplace for various social, political, economic, religious, and ideological ideas to compete for public acceptance. *See Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 208 (2012) (acknowledging that the free speech clause “was to assure a society in which uninhibited, robust, and wide-open public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish”) (citation omitted) (quotations omitted; *See also Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (freedom of speech is “indispensable to the discovery and spread of political truth”). It is a fundamental principle of free speech that, regardless of the message one promotes, one must have the opportunity to reach willing listeners. *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (stating that the right of free speech guarantees every person the ability to “reach the minds of willing listeners” and an “opportunity to win their attention”). This is particularly evident in our educational institutions, where new ideas should, at the least, have the chance to be proposed, debated, and potentially accepted into the market. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“the best test of truth is the power of the thought to get itself accepted in the competition of the market). Indeed, nowhere is the freedom of

speech “more vital than in our schools and universities,” for America’s future “depends upon” students’ exposure to a variety of ideas. *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)); *Kevishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). If students are not free to debate, study, and evaluate ideas, “our civilization will stagnate and die.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

A public institution’s policy, which permits shout downs, produces a stagnate civilization. At first glance, one might think shout-downs are acceptable. This is especially true if the message shouted down is a message that one *does not* want to be spoken—pro-life, pro-choice; gun rights, gun control; death penalty, no death penalty. However, as soon as it is a message one *does* want to be spoken—build a wall, don’t build a wall; eco-friendly, non-eco-friendly; universal healthcare, private healthcare—one might take a second glance and realize that shout-downs are entirely unacceptable.

When shout-downs occur, the minority voice is swallowed by the mouth of the majority. There is no public debate, for there is only one point of view—the most popular (ironically, popular ideas were once unpopular). And college campuses become one not of flourishing ideas, subject to society and peer acceptance, but one of majoritarian and popular rule. *But see 303 Creative LLC v. Elenis*, 600 U.S. 570, 584–85 (2023) (“if there is any fixed star in our constitutional constellation, it is the principle that the government may not interfere with an uninhibited marketplace of ideas”) (citations omitted).

Surely, if the constitutional protection of speech means anything, it means protecting the minority voice and the opportunity for ideas (even unpopular ones) to be heard. *See Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 233–34 (6th Cir. 2015) (en banc) (collecting this Court’s cases) (“If the Constitution were to allow for the suppression of minority or disfavored views, the democratic process would become imperiled through the corrosion of our individual freedom”). Regardless of the popularity of the message, under the First Amendment, we should protect the right to speak it. *See id.*

Pursuant to 42 U.S.C. § 1983, municipalities, like the University², are subject to liability when, acting under color of state law or *custom*, it subjects a person “to the deprivation of any rights, privileges or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983. Here, the University’s hands-off policy, which causes campus security to refuse to prevent students from shouting down University-invited speakers, is undoubtedly a custom. *See R.* at 5a. So, the question becomes whether the policy goes so far as to violate a person’s right to free speech under the First Amendment. It does.

Free-speech claims involve a three-step inquiry: (1) whether the speech is afforded constitutional protection; (2) the nature of the forum where the speech was made; (3) whether the government’s action in shutting off the speech was legitimate under the applicable standard of review. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

² It is undisputed that the University is a municipality for purposes of Section 1983 claims. *R.* at 11a.

Step one. It is undisputed that McMillan’s speech is constitutionally protected speech, so we need not address that here.

Step two. A limited public forum is “property limited to use by certain groups or dedicated solely to the discussion of certain subjects.” *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 679 n.11 (2010). This Court has previously concluded that a public education facility that has opened up its property for a particular use created a limited public forum. *See, e.g., id.* at 679–83 (concluding that a University’s Registered Student Organization program, which was limited to use by certain groups, was a limited public forum). Here, the University, which opened up the Hedge Family Auditorium for McMillan’s speech about encouraging people not to consume animal products, is a limited public forum: it is property limited to use by the Campus Vegan Alliance to discuss a specific subject—the rationales for being vegan. R. at 6a.

Step three. In a limited public forum, the University may restrict access to certain groups or the discussion of certain topics, but it may not discriminate against speech on the basis of viewpoint. *Martinez*, 561 U.S. at 679. Meaning that the University cannot favor the rights of one private speaker over those of another. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Additionally, any restrictions on speech must be reasonable in light of the purpose served by the forum. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107

(2001).³ If the University discriminates on viewpoint or its restrictions on speech are unreasonable, it violates the First Amendment. So, the core of this case revolves around this third step—whether the University’s hands-off policy of refusing to prevent students from disrupting speakers violates the First Amendment. It unquestionably does, in more than one way.

The University’s hands-off policy violates the First Amendment: (1) it infringes on the First Amendment rights of individuals to hear and receive information; (2) it effectuates a heckler’s veto; (3) it unreasonably leaves First Amendment protection in the hands of a majoritarian mob; (4) it gives too much discretion to enforcement officials, allowing the opportunity for such officials to discriminate on viewpoint. *See Nylen v. City of Grand Rapids*, 475 F. Supp. 3d 744, 755 (W.D. Mich. 2019) (stating that a heckler’s veto occurs when law enforcement restricts or suppresses speech based on the reaction of the audience); *see also Va. State Bd. of Pharm. v. Va. Citizen Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“where a speaker exists . . . the [constitutional] protection afforded is to the communication, to its source and recipients both.”); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1211 (5th Cir. 1982) (concluding that which “silences a willing speaker . . . also works a constitutional injury against the hearer.”).

³ For purposes of Section 1983 liability, the government’s action violating the speaker’s rights need not be a formal policy; it may be a governmental custom. *Monnell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 690 (1978).

Additionally, should there be any doubts in addressing the clash of protestors' and speakers' First Amendment rights, this Court should find that the First Amendment tilts in favor of the speaker.

Finally, even if this Court disagrees with the above, it should still conclude that the University's policy is unconstitutional because it should overrule *DeShaney* and find that the right to free speech under the First Amendment includes imposing an affirmative obligation on law enforcement to protect individuals exercising their free speech rights.

A. The University's hands-off policy is a custom that subjects it to liability under 42 U.S.C. § 1983.

A custom need not be formally approved for a court to impose Section 1983 liability on a municipality. *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 690–91 (1978) (stating that a person may be sued for constitutional deprivations “pursuant to a custom even though such custom has not received formal approval”). As long as the practice is “persistent and widespread,” “permanent and well settled,” and the “moving force of the constitutional violation,” the municipality is subject to Section 1983 liability. *See id.* at 691; *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 819 (1985); *see also Fundiller v. City of Cooper City*, 777 F.2d 1436, 1442 (11th Cir. 1985).

Here, the University's hands-off policy is undeniably a custom.⁴ First, it is persistent and widespread: employees, campus security, and the Dean all take a

⁴ As the Thirteenth Circuit noted, there was “no question that a reasonable jury had a legally sufficient evidentiary basis” to conclude that the University had a policy or custom that subjected it to Section 1983 liability. R. at 11a.

hands-off approach. R. at 5a. Second, it is permanent and well-settled—the Record speaks for itself, being void of any formal discipline or punishment of any student. R. at 4a. Finally, it is the moving force of the constitutional violation at issue here: due to the hands-off policy, campus security refuse to stop students from shouting-down University-invited speakers. R. at 5a–7a.

B. The University’s hands-off policy violates the First Amendment.

The University’s hands-off policy is unconstitutional for four reasons: (1) it abridges the rights of individuals to hear and receive information; (2) it effectuates a heckler’s veto; (3) it disguises itself as being viewpoint-neutral; (4) it leaves enforcement officials with too much discretion. This Court should thus find that the University’s policy violates the First Amendment.

1. The hands-off policy abridges the First Amendment rights of individuals to hear and receive information.

The First Amendment’s right to free speech would be meaningless if it did not include the right to hear. Consequently, the First Amendment protects both. *See Basiardanes*, 682 F.2d at 1211 (“[t]he First Amendment protects the right to hear as well as to speak.”); *see also Va. State Bd. of Pharm.*, 425 U.S. at 756 (stating that where a speaker exists, the First Amendment’s protection is afforded “to the communication, its source, and its recipients.”). Indeed, “[t]he freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin.” *Kleindienst*, 408 U.S. at 775–76 (Marshall, J., dissenting).

Included in the right to hear is the right to receive information and ideas. *See Va. State Bd. of Pharmacy*, 425 U.S. at 757; *see, e.g., Thomas v. Collins*, 323 U.S.

516 (1945) (holding that a labor organizer’s right to speak and the rights of speakers to hear what he had to say were abridged by state law). The University’s hands-off policy, refusing to intervene with students who are shouting down speakers, violates this First Amendment right to hear and receive information and ideas.

The Campus Vegan Alliance invited McMillan to hear what she had to say about being vegan. R. at 6a. More than that, it reserved an auditorium on campus for other students who, too, might want to hear what McMillan had to say about being vegan. R. at 6a. Instead, the students in attendance heard noisemakers and yelling. R. at 6a. They heard precisely nothing from McMillan. R. at 6a.

The University could have done something about the disruption; after all, campus security was present. R. at 6a; *see e.g., Bible Believers*, 805 F.3d at 252 (citing *Watson v. City of Memphis*, 373 U.S. 526, 535–36 (1963)). However, campus security did nothing because of the University’s hands-off policy. R. at 5a. Certainly, a hands-off policy can be beneficial. However, when a hands-off policy causes the infringement of constitutional rights, it goes too far. A policy that leaves students to their own devices cannot include suppressing the First Amendment rights of willing listeners to hear one’s constitutionally protected message. *See Kovacs*, 336 U.S. at 87 (“[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention.”).

2. The hands-off policy effectuates a heckler's veto.

A heckler's veto occurs when enforcement officials suppress speech based on the audience's reaction. *See Good News Club*, 533 U.S. at 119; *Nylen*, 475 F. Supp. 3d at 755. As this Court recently stated, constitutionally protected speech does not "readily give way to a heckler's veto." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022). The University's hands-off policy, causing campus security to refuse to intervene when students are shouting down a University-invited speaker, effectuates a heckler's veto. It prohibits campus security from controlling a crowd that is shouting down a speaker, which, in effect, results in campus security suppressing the speech.

In most cases that address crowd-disrupted speech, courts have held that a heckler's veto occurs when the enforcement official directly silences the speaker by removing her from the forum instead of attempting to control the crowd. *See e.g., Bible Believers*, 805 F.3d at 234, 254–55 (concluding that the police officers effectuated a heckler's veto by removing the speaker instead of controlling the reckless crowd); *Phelps-Roper v. Ricketts*, 867 F.3d 883, 900–01 (8th Cir. 2017). This case is different, however, because it involves government action that *indirectly* silences the speaker. Instead of removing the physical body of the speaker from the forum, silencing her, the campus security (acting pursuant to the hands-off policy) allows students to remove the *voice* of the speaker. Allowing the shouting, importantly, still silences her: a different method, but the same result.

Nevertheless, it is the *result* that the First Amendment protects against—suppressing speech—not the *method* by which it occurs.

At least that is what this Court has suggested repeatedly in *Edwards*, *Cox*, and again in *Gregory*: law enforcement must protect the speaker, not the audience. See *Edwards v. South Carolina*, 372 U.S. 229, 232–33, 237–38 (1963) (overturning the conviction of civil rights protestors because police protection was sufficient to respond to any potential disorder); *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965) (overturning convictions, concluding that the police could have handled the crowd); *Gregory v. City of Chicago*, 394 U.S. 111, 113 (1969); *Gregory*, 394 U.S. at 121 (Black, J., concurring) (recognizing that the Court overturned the convictions of civil rights demonstrators because the law did not limit convictions to where the police made all reasonable efforts to protect the speakers). Although these three cases involved how law enforcement must respond to a violent audience (as opposed to the loud audience involved here), the central tenet is the same: law enforcement must not suppress the speaker but should protect the speaker’s right to speak.

Thus, regardless of the method by which law enforcement silences the speaker—whether indirectly by enabling an unruly crowd or directly through physical removal—the thrust of its unconstitutionality is unmistakably the same: under the Constitution, government officials may not silence a speaker instead of controlling the crowd. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939) (“uncontrolled official suppression of the privilege [of free speech] cannot be made a substitute for the duty to maintain order in connection with the exercise of the right

[to free speech]”); *see also Edwards*, 372 U.S. at 232–33, 237–38; *Cox*, 379 U.S. at 551–52; *Gregory*, 394 U.S. at 113. This Court should not allow the University to circumvent this core constitutional principle by allowing agents to do what it could not otherwise constitutionally do—suppress speech. The Constitution does not leave room for workarounds. Simply, constitutionally protected speech does not give way to a heckler’s veto. *See Bremerton Sch. Dist.*, 597 U.S. at 543 n.8 (2022).

3. The hands-off policy leaves First Amendment protection in the hands of a majoritarian mob, missing the point of viewpoint neutrality.

The University’s policy leaves the protection of the constitutional right to speak in the hands of a majoritarian mob. Yet, the right to speak on a University’s campus—a limited public forum—“does not depend upon majoritarian consent.” *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). The First Amendment exists to protect all speech, not just that of the majority. *See Bible Believers*, 805 F.3d at 243 (collecting cases).

In *Southworth*, this Court addressed the constitutionality of a mandatory fee that a university required students to pay. *Southworth*, 529 U.S. at 221. Registered student organizations were eligible to receive part of the fees the university collected by obtaining either (1) the university’s approval or (2) through a student referendum. *Id.* Some students challenged the mandatory fee, arguing it violated their First Amendment rights because some of the recipient organizations engaged in political and ideological speech. *Id.* This Court upheld the mandatory fee, reasoning that the university’s program was viewpoint neutral. *Id.* It remanded, however, the student referendum mechanism part of the program because it

appeared not to be viewpoint neutral. *Id.* It seemed to allow a majority vote of the student body to fund or defund a registered student organization, which this Court stated would undermine the constitutional protection required. *Id.* at 235. The referendum could not, constitutionally, substitute majority determination for viewpoint neutrality. *Id.* That reasoning resolves this case.

Here, the *only* time a speaker is shouted down is when a majoritarian mob silences her. The Record reflects that each time the University's students shouted down a speaker, leaving the speaker's message unheard, the speaker addressed an unpopular, minority-supported topic. R. at 17a. Specifically, institutional racism, armed self-defense, legalizing recreational marijuana, climate change, and the message at issue here, vegan diets. R. at 5a–6a. While the University's hands-off policy is, on its face, viewpoint neutral, in effect, it is viewpoint based. *Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 101 (2d Cir. 2007) (restrictions on speech may not “serve as a façade for viewpoint discrimination) citing *Cornelius*, 473 U.S. at 812. The *only* viewpoint it affects is the minority: popular speakers—heard; unpopular speakers—silenced.

Accordingly, this Court should follow *Southworth* and hold that the University's policy is unconstitutional. This Court cannot allow a public university to have a policy that effectively operates to only give voice to the majority. This Court has made it clear that majoritarian rule is viewpoint discrimination and is unconstitutional. *See Southworth*, 529 U.S. at 235–36. Because the University's hands-off policy favors majority views over minority views, leaving the

constitutional right to free speech in the hands of the majoritarian mob, it is plainly unconstitutional.

4. The hands-off policy gives campus security too much discretion to discriminate on viewpoint.

Additionally, the University's hands-off policy invites campus security to engage in viewpoint discrimination. Although the Record demonstrates that campus security has applied the policy consistently and evenhandedly, the policy leaves campus security with an enormous amount of discretion to apply it inconsistently and "oddhandedly". R. at 11a. If this Court finds the policy constitutional, it will leave the door open for campus security to engage in viewpoint-based discrimination. This Court should refuse to do so.

This Court has invalidated laws for giving governmental officials too much discretion, such that there is potential that the official may suppress speech he disfavors or dislikes. *See e.g., City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988) (holding unconstitutional a licensing scheme that gave the mayor discretion to deny permit applications because it invited viewpoint discrimination); *Forsyth Cnty., Ga., v. Nationalist Movement*, 505 U.S. 123, 130, 133 (1992) (finding a city ordinance unconstitutional because it granted discretion that had "the potential for becoming a means of suppressing a particular point of view."). Like the government officials in *Plain Dealer* and *Forsyth*, the University's campus security has unbridled discretion: what it finds hands-off in one instance may not be in another, as there are no clear standards for when the campus security should be "hands-off" or "hands-on." *See, e.g., Forsyth*, 505 U.S. at 132–133 (holding that the

city's ordinance was unconstitutional when there were not any narrowly drawn and clear standards guiding the city official). The campus security could choose, based upon whether they favor the speaker's message, when and when not to permit students to engage in shouting down a speaker. Undeniably, campus security know that they can rely on crowds to silence speech. *See R.* at 5a–6a. Such potential for viewpoint discrimination cannot be tolerated under the First Amendment.

Although this Court has not yet incorporated such a limiting-discretion requirement in contexts outside of prior restraints on speech (licensing schemes), this Court should. Whether the law operates as a prior restraint on speech or not, vesting a governmental official with too much discretionary authority may suppress viewpoints in hidden ways. *See Amidon*, 508 F.3d at 103 (this Court “prohibits unbridled discretion because it allows officials to suppress viewpoints in surreptitious ways that are difficult to detect.”). The First Amendment does not allow such a result.

In total, this Court has not one, but four reasons to find that the University's hands-off policy violates the First Amendment. Therefore, this Court should find the University's policy unconstitutional.

C. In the face of clashing First Amendment rights, the First Amendment tilts in favor of the University-invited speaker.

This case confronts clashing First Amendment rights: those of protestors and those of the speaker. *See, e.g., Ricketts*, 867 F.3d at 900–01 (recognizing a crowd as having the same First Amendment rights as the speaker). This Court has yet to give clear direction regarding whose First Amendment rights to favor when the

rights come into conflict. The Third Circuit, however, has addressed this very scenario.

In *Startzell v. City of Philadelphia*, Repent America, a group that believed homosexuality was sinful and that their duty was to warn others about the destructiveness of sin, attended OutFest, a Philly Pride event that celebrated “National Coming Out Day.” 533 F.3d 183, 189 (3d Cir. 2008). While there, Repent America, about twenty yards away from the main stage, sang loudly, played instruments, displayed large signs, and used microphones and bullhorns. *Id.* at 190–91. Once the musical program started on the main stage, the police ordered Repent America to move away, informing them that OutFest had a permit to hold its program on stage. *Id.* at 191. Repent America complied. *Id.* Then, the officers asked Repent America to move again because they were blocking access to vendor booths. *Id.* This time, Repent America refused. *Id.* The police subsequently arrested members of Repent America, and Repent America filed suit alleging that its First Amendment rights had been violated. *Id.*

In addressing the case, the Third Circuit acknowledged that both Repent America and OutFest had First Amendment rights, but it tilted the First Amendment in favor of OutFest. *Id.* at 199. It reasoned that (1) the right of free speech does not include the right to cause disruption and (2) when First Amendment rights come into conflict, they should be tilted in favor of permit-holders. *Id.* (“[W]hen protestors move from distributing literature and wearing signs

to disruption of permitted activities, the existence of a permit tilts the balance in favor of the permit-holders”).

Similarly, here, the First Amendment should tilt in favor of McMillan. McMillan was akin to a permit-holder. She had permission to speak in a particular place (on campus) about a particular message (abstain from consuming animal products), much like OutFest had permission to speak in a particular place (the street festival) about a particular message (pride). R. at 6a; *Startzell*, 533 F.3d at 189. Her speech was, in essence, covered by University invitation and permission, in the same way that a permit demonstrates invitation and permission. If the First Amendment tilts in favor of a speaker upon mere disruption (like in *Stratzell*), it should certainly tilt in favor of a speaker upon being silenced. *See Startzell*, 533 F.3d at 199.⁵

D. Even if this Court does not find a First Amendment violation for the above reasons, it should overrule *DeShaney* and conclude that the University has an affirmative obligation to protect an individual’s right to free speech.

This Court said it best seventy-five years ago in *Kovacs v. Cooper*, “[t]he right to speak one’s mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order.” 366 U.S. at 86. Yet, this Court’s holding in *DeShaney* contradicts that proposition. *See DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989) (holding that

⁵ This is not contrary to this Court’s precedent of requiring the police to control the crowd before the speaker. *See e.g., Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (recognizing that speech cannot be punished or banned “simply because it might offend a hostile mob.”); *see also Glasson v. City of Louisville*, 518 F.2d 899, 906 n.5 (6th Cir. 1975) (collecting cases) (noting that this Court had become increasingly protective of the speaker).

“nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”). Without the government protecting one’s First Amendment right to free speech, there is, in fact, no First Amendment right to free speech. This is especially true when one’s First Amendment rights are dependent upon majoritarian mob rule, as they are in this case. *See* THE FEDERALIST NO. 10 (James Madison) (“the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression”). Consequently, to the extent that *DeShaney* prevents the government from protecting the First Amendment right to free speech, it should be overruled. The First Amendment must embody a right to government protection.

DeShaney hinges its holding on the text of the Fourteenth Amendment’s Due Process Clause. *DeShaney*, 489 U.S. at 195. Because the clause is phrased as a limitation on the State’s power to act, the *DeShaney* Court stated that it cannot, in the inverse, be a guarantee of a certain level of safety and security. *Id.* However, the structure and spirit of the Constitution is not without affirmative obligations on the government. The Fourth, Fifth, and Sixth Amendments, even as incorporated through the Fourteenth Amendment’s Due Process Clause to apply against the states, all impose affirmative obligations on the government to protect our rights. The Fourth Amendment imposes an affirmative obligation on the government to get warrants before conducting searches. *See* U.S. Const. amend. IV. The Fifth Amendment imposes an affirmative obligation on the police to protect our

constitutional right against self-incrimination. *See* U.S. Const. amend. V. The Sixth Amendment imposes an affirmative obligation on the government to provide our right to counsel. *See* U.S. Const. amend. VI. Thus, when it comes to the constitutional right to free speech—incorporated to be binding on the states by reference to the term liberty in the Fourteenth Amendment’s Due Process Clause—the government should, too, have an affirmative obligation to protect our rights. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (stating that our freedom of speech and of the press rights are “among the fundamental personal rights and liberties protected by the due process clause”).

One of the central purposes of ratifying the Fourteenth Amendment was to incorporate *the right to protection* into the Federal Constitution. Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment* 41 DUKE L.J. 507, 571 (1991). The congressional debates surrounding the Fourteenth Amendment demonstrate that the ratification of the amendment was aimed at imposing a constitutional duty on states to protect their citizens’ fundamental rights. *See id.* at 544 (quoting one member, who stated that it was “the object of government . . . to protect the people in their personal liberty”). Such protection, of course, includes one’s fundamental First Amendment right to free speech. *See* U.S. Const. amend. I. However, *DeShaney* gives states a pass when they fail to protect fundamental rights. More than that, though, *DeShaney* renders the First Amendment a nullity. As Blackstone observed, when there is no method for enforcing fundamental rights, those rights are a dead letter. 1 William Blackstone,

Commentaries, at *140–41. Considering this Court’s holding in *Deshaney*—providing that there is no obligation on the government, pursuant to the Fourteenth Amendment, to enforce constitutional rights—in combination with a state’s monopoly on violence (as is the case here), individuals are left with no method to enforce their right to free speech. Thus, the effect of *Deshaney*, as Blackstone feared, is to render the First Amendment a dead letter.

Here, the State University’s hands-off policy, which allows protestors to silence speakers, prevents the exercise of the speakers’ First Amendment rights. Combine that with the State of New Texas making any force in response to verbal provocation alone an unjustified defense, and there is no method to enforce one’s First Amendment right to free speech (unless they want to break the law). *See* New Texas Penal Code § 9.31(b)(1) () (providing that using force against another is not justified “in response to verbal provocation alone”). So, through the University’s hands-off policies and the State of New Texas’ monopoly on violence, the State of New Texas deprives individuals of one of the most fundamental rights protected by the Due Process Clause, the freedom of speech. *See Gitlow*, 268 U.S. at 666. Because *DeShaney* is responsible for such an outcome, it should be overruled. And consequently, the government should have an affirmative obligation to protect the First Amendment right to free speech.

* * * * *

In sum, this Court should reverse the Thirteenth Circuit because the University’s hands-off policy violates the First Amendment in two ways. First, it abridges the rights of individuals to hear and receive information. Second, it

effectuates a heckler's veto. However, if those two reasons are incorrect, this Court should still reverse the Thirteenth Circuit because it should overrule *Deshaney and* impose an affirmative obligation on the government to protect an individual's constitutional right to free speech.

CONCLUSION

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

Respectfully submitted.

/s/ Team #87

Team #87
Counsel for the Petitioner
November 18, 2024

CERTIFICATE OF SERVICE

I certify that on the 18th day of November 2024, I electronically filed the preceding with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the Respondent.

/s/ Team #87

Team #87
Counsel for the Petitioner
November 18, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33, the undersigned hereby certifies that the Brief of Petitioner contains 12,301 words, beginning with the Statement of Jurisdiction through the end of the brief, including all headings and footnotes, but excluding the Certificate of Service, the Certificate of Compliance, and the Appendix.

/s/ Team #87

Team #87
Counsel for the Petitioner
November 18, 2024

APPENDIX

Constitutional Provisions

The First Amendment to the Constitution of the United States provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. IX, § 1.

Statutes

Section 1983 of Title 42 of the United States Code provides:

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

42 U.S.C. § 1983

Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 6(b) provides:

(b) Extending Time.

(1) *In General.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) *Exceptions.* A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

Fed. R. Civ. P. 6(b).

Federal Rule of Civil Procedure 50(b) provides:

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

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

(2) order a new trial; or

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

Fed. R. Civ. P. 50(b).