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

BRIEF FOR RESPONDENT

TEAM 65

QUESTIONS PRESENTED

I. Whether the deadline for a post-judgment 50(b) motion for judgment as a matter of law runs from the initial final judgment or an amended final judgment when the motion challenges unchanged portions of the judgment.

II. Whether the First Amendment is violated by a university's adoption of a viewpoint-neutral policy of refusing to discipline students who interfere with speakers on campus.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Thirteenth Circuit issued its opinion on May 10, 2023. Petitioner McMillan timely filed a writ of certiorari, and this Court granted certiorari on October 7, 2024. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following Constitutional provisions are relevant to the decision of this case:

U.S. Const. amend. I

U.S. Const. amend. XIV

The following statutory provisions are relevant to the decision of this case:

42 U.S.C. § 1984

STATEMENT OF THE CASE

I. Statement of the Facts

The City University of Lantana (the "University") is "one of the oldest and most preeminent educational public institutions" the state of New Tejas has to offer. R. at 2a. Since 1849, the University has endeavored to educate the state's greatest minds, "including almost every governor of New Tejas." *Id.* The University has continued to expand over the years and recently added around 175 additional acres to its original 15-acre campus, providing students with "a variety of educational buildings, athletic facilities, dormitories, three on-campus dining halls, and other student-centered locations." *Id.*

The University's coeducational mission is centered around instilling in its students "academic excellence, civic engagement, and leadership for the common good," which is reflected by the school's motto "Doctrina Perpetua–'Forever Learning.'" R. at 2a–3a. Another source of pride for the University is its history of "athletic excellence." R. at 3a. The Scorpions, (the University's mascot) are well-known for being "frequent contenders" for the football national championship. *Id.* The University also values diversity of thought, evidenced by its "over 60 student organizations on campus, including arts and culture organizations, performance groups, intramural sports groups, political organizations, gender and sexuality groups, religious organizations, and social action groups." *Id.*

Mason Thatcher, a 1998 City University alum and 1998 All-American Baseball Player of the Year, was appointed as the University's Dean of Student Affairs after his career with the Arizona Cardinals ended in 2005. R. at 4a. In his role as Dean, Thatcher is responsible for overseeing the discipline of all students who violate the University's conduct policies. *Id.* Although Thatcher does not possess the academic and experiential background of a traditional

dean, he has been a well-liked and popular choice among University officials and alumni organizations. *Id.* Thatcher is well-known among students and alumni for his ability to bring people together, raise significant funds for various educational and extracurricular programs, and celebrate the school's overall success. *See id.*

Regarding student discipline, Thatcher prefers to take a more hands-off approach and let the University's academic and athletic excellence speak for itself. R. at 5a. Thatcher and the University acknowledge that while things may get a little out of hand occasionally, "the students 'work hard' and 'just need to blow off a little steam.'" *Id.* Dean Thatcher trusts that the University's smart and hardworking students just "need a good talking to" rather than any serious disciplinary measures. *Id.*

The University's Campus Security, along with other employees within the Department of Student Affairs, have followed Dean Thatcher's "hands-off approach to discipline" as well. *Id.* For example, the students have vigorously protested at a variety of events on campus, including events put on by "the Lantana Black Student Coalition," "Lantana Students for Armed Self-Defense," "the High Five Society," and an environmental organization called "Carbon 180." *Id.* In all these instances, University employees and Campus Security have remained faithful to Thatcher's disciplinary policy, as campus security did not intervene at any of these events. *Id.* Additionally, "no students involved were disciplined in any way" either. *Id.*

The incident at the center of this dispute occurred on February 8, 2020, when Dove McMillan, "a well-known vegan advocate," was invited by the Campus Vegan Alliance to speak to its members, as well as members of the student body at large. R. at 6a. McMillan testified at trial that she planned to give a speech "centered around encouraging people to abstain from consuming animal products" due to her beliefs regarding the humane treatment of animals and

the "animal agriculture industry in the United States and abroad." *Id.* She wanted to discuss how, in her view, consumerism has led to an unprecedented rise in the exploitation of animals, "and that such depraved activities need to stop to save humanity and the world." *Id.*

Around five minutes into McMillan's speech, a large group of University students entered the auditorium on campus and "gathered at the foot of the . . . stage." *Id.* "Several of the protestors carried banners and various noisemakers; some also wore animal masks and costumes." *Id.* While stationed at the bottom of the stage, the protestors made enough noise that McMillan was unable to continue her speech. *Id.* Consequently, the students ignored her pleas to be quiet or leave the auditorium. *Id.* Members of the Campus Vegan Alliance and other students who were present to hear McMillan's talk also tried to quiet the protestors, but they were also ignored. *Id.* "After about 15 minutes, McMillan left the stage and did not return." *Id.*

The protesting students dispersed from the auditorium about an hour later. *Id.* Campus security was present at the event, but they did not engage with any of the protesting students. R. at 7a. The University quickly identified the protesting students present at the event but chose "not to discipline any of [them] for their actions." *Id.*

II. Nature of the Proceedings

McMillan brought suit under 42 U.S.C. § 1983 against the Board of Regents of City University of Lantana, alleging her First Amendment rights were violated during her failed speech attempt because of the University's viewpoint-neutral disciplinary policy and failure to provide police protection. *Id.* During trial, which started on January 17th and ended on January 20th, "the University moved for judgment as a matter of law under Rule 50(a)." *Id.* The motion was denied by the District Court for the Eastern District of New Tejas, and the jury "awarded McMillan $12,487 in compensatory damages and $350,000 in punitive damages." *Id.*

On January 20, the district court issued its Final Judgment and awarded McMillan $12,487 in compensatory damages, and "stated that 'all relief not granted herein is DENIED.'" R. at 7a, 20a. Therefore, the $350,000 in punitive damages awarded by the jury were not included in the district court's initial Final Judgment. R. at 7a. On January 27th, seven days after the Final Judgment, "the district court *sua sponte"* issued an Amended Final Judgment, "which modified the judgment to include the [$350,000 in] punitive damages awarded by the jury." R. at 7a, 21a.

The University filed its renewed motion for judgment as a matter of law under Rule 50(b) "[o]n February 24, 2020, twenty-eight days from the date of the modified judgment but thirty-five days from the date of the original judgment." R. at 7a. Relying on the Second and Seventh circuits, the district court ruled the University's renewed Motion for Judgment as a Matter of Law "was untimely . . . and denied it without regard to its merits." *Id.*

The United States Court of Appeals for the Thirteenth Circuit reversed the decision of the district court and, relying on Fifth Circuit and Supreme Court precedent, held that the University's arguments were preserved under a timely 50(b) renewed motion for judgment as a matter of law. R. at 7a–10a. The appellate court then addressed the University's appeal as to the merits of the case and held that the University's viewpoint-neutral policy did not infringe upon McMillan's First Amendment rights, and that McMillan was not entitled to police protection during her speech. R. at 10a–14a.

Petitioner McMillan timely filed a writ of certiorari, and this Court granted certiorari on October 7, 2024. R. at 1. For the reasons argued below, Respondent respectfully asks this Court to affirm the decision of the Thirteenth Circuit and hold that the University's 50(b) motion was

timely, and that the University's viewpoint-neutral policy did not infringe upon McMillan's First Amendment rights.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Thirteenth Circuit and hold that the University's 50(b) Renewed Motion for Judgment as a Matter of Law was timely under Fifth Circuit and Supreme Court precedent. The Fifth Circuit held in *Cornist v. Richland Parish School Bd.* that when an amended judgment replaces a superseding judgment and "mak[es] a change of substance which disturb[s] or revise[s] legal rights and obligation," the statute of limitations for a post-judgment motion, such as a Rule 50(b) motion, should run at the enactment of the amended judgment. 479 F.2d 37, 39 (5th Cir. 1973). This rule is based on this Court's precedent involving writs of certiorari in *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211–12 (1952).

Because the Amended Final Judgment changed the substantive rights and obligations between the parties and involved issues of genuine ambiguity, this Court should affirm the decision of the Thirteenth Circuit and hold that the deadline for a post-judgment motion runs from the amended final judgment when the motion challenges unchanged portions of the judgment. Additionally, because of the undue hardship on Respondent and potential future litigants, this Court should attempt to clarify these genuine ambiguities and hold that the University's 50(b) motion was timely.

This Court should affirm the decision of the Thirteenth Circuit and hold that a reasonable jury did not possess the sufficient evidentiary basis to find that the University's viewpoint-neutral policy violated McMillan's First Amendment rights. The University's disciplinary policy is viewpoint-neutral in its purpose and application because it does not favor any speakers over others. The record contains no evidence that the policy was adopted out of discrimination or hostility towards any viewpoints.

Additionally, under the First and Fourteenth Amendments, McMillan was not entitled to government interference or police protection during her speech attempt. The University, as a government entity, was not required to provide McMillan with minimum levels of safety and security. Neither the Due Process Clause nor the First Amendment require that the University subsidize McMillan's access to freedom of speech. Essentially, private actors disrupted McMillan's speech, not the University.

Because the record lacked sufficient evidence for the jury to find that the University's policy violated McMillan's First Amendment rights, this Court should affirm the decision of the Thirteenth Circuit and grant the University's timely 50(b) renewed motion for judgment as a matter of law.

ARGUMENT

I. THE UNIVERSITY'S 50(B) RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW WAS TIMELY BECAUSE THE TIME FOR FILING A POST-JUDGMENT MOTION RUNS FROM ENTRY OF THE AMENDED FINAL JUDGMENT.

Under Federal Rule of Civil Procedure 50(a), if "a party has been fully heard on an issue during a jury trial" and the court determines that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue," the court has the discretion to "(A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." Fed. R. Civ. P. 50(a).

To preserve any arguments seeking judgment as a matter of law, a party is required to "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." Fed. R. Civ. P. 50(b). "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). This type of motion must be filed "[n]o later than 28 days after the entry of judgment." *Id.*

Rule 50(b) motions are enforced under strict deadlines. *See id.* While many procedural deadlines under the Federal Rules of Procedure may be extended "for good cause," the Rule 6(b) states that a court "must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." Fed. R. Civ. P. 6(b)(2).

For the following reasons, this Court should affirm the decision of the Thirteenth Circuit and hold that the University's Rule 50(b) Motion was timely because the deadline for a Rule 50(b) renewed motion for judgment as a matter of law is measured from the date of the amended

final judgment when there is a substantial change in the rights and responsibilities of the parties involved.

A. This Court should affirm the Thirteenth Circuit and follow the 5th Circuit's timing rule based on changes in the parties' rights and obligations.

In situations involving minor changes, the correct application of Rule 50(b) is clear under existing case law. *See Cornist,* 479 F.2d at 39. For example, if the amended judgment makes only a simple "clerical change, such as correct the names of parties or dates," then the deadline for filing post-judgment motions "runs from the date of the first judgment." *Id.*; *see Progressive Indus., Inc. v. United States*, 888 F.3d 1248, 1253 (Fed. Cir. 2018); *see Dep't of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 266–67 (1942); *see U.S. v. 1, 431.80 Acres of Land, More or Less, in Cross County, Ark.*, 466 F.2d 820, 822 (8th Cir. 1972) ("An immaterial change in a judgment previously entered does not toll the time in which review must be sought.")

Both parties before this Court agree that the change between the Final Judgment and the Amended Final Judgment did not involve a simple collateral issue or clerical error. R. at 8a. The Amended Final Judgment awards $350,000 in punitive damages to McMillan–damages that were awarded by the jury but were not granted by the district court in their initial Final Judgment. R. at 7a. This is a significant change from the original Final Judgment, which only assessed $12,487 in compensatory damages and stated that "all relief not granted herein is DENIED." R. at 8a, 20a. Because of the magnitude of change between the two judgments, the Thirteenth Circuit was correct in holding that this substantive change in the judgment awarded to McMillan "thus revised the parties' legal rights and obligations." R. at 8a.

The district court judge, following the Seventh Circuit, held that the University's 50(b) renewed motion for judgment as a matter of law was untimely because the motion was filed 35 days after the original Final Judgment, even thought it was filed within the 28 days after the

Amended Final Judgment. R. at 23a. Essentially, because the district court found that the alteration of the Final Judgment "did not affect liability–which were the sole grounds raised in the University's motion for a judgment as a matter of law–the deadline to file the motion ran from the original final judgment, not the amended judgment." R. at 8a; *see McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 521 (7th Cir. 1993); *see Tru-Art Sign Co., Inc. v. Local 137 Sheet Metal Workers Int'l Ass'n*, 852 F.3d 217, 221 (2d Cir. 2017) (When both an initial judgment and an amended judgment exist, 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 first judgment's alteration.)

The Thirteenth Circuit declined to follow the district court and instead held that the Fifth Circuit offered a "better-reasoned rule" based on the parties' rights and obligations for the measurement of post-judgment motion deadlines. R. at 9a; *see Cornist*, 479 F.2d at 38–39. When an amended judgment replaces a superseding judgment and "mak[es] a change of substance which disturb[s] or revise[s] legal rights and obligation," the statute of limitations for a post-judgment motion, such as a Rule 50(b) motion, should run at the enactment of the amended judgment. *Cornist*, 479 F.2d at 38–39. Essentially, any "order" that makes "such substantive changes is construed as a new judgment from which the 30-day appeal clock runs" for filing a post-judgment motion. *Wilmington Sav. Fund Soc'y, FSB v. Myers*, 95 F.4th 981, 982 (5th Cir. 2024).

The Fifth Circuit rule stems from this Court's decision regarding the timing of petitions for writ of certiorari. *See FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211–12 (1952). There, this Court held that the sort of alteration that restarts the timing for filings, motions, or the like is one that "changes matters of substance, or resolves a genuine ambiguity,

in a judgment previously rendered." *Minneapolis-Honeywell*, 344 U.S. at 211–12. The applicable test outlined by this Court "is a practical one," as the primary "question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.*

This Court should affirm the decision of the Thirteenth Circuit and find Respondent's 50(b) motion timely because the Amended Final Judgment altered substantive issues, contained genuine issues of ambiguity, and because punitive and compensatory damages imply inherently different rights and responsibilities.

1. The Amended Final Judgment altered substantive issues.

The Fifth Circuit employed *Honeywell's* "practical" test based on revised legal rights and obligations in *Cornist v. Richland Parish School Bd*. 479 F.2d at 39. There, the Richland Parish School Board's 59(b) motion was deemed untimely by the district court because it was not filed within the 10-day timeline (which has since been changed to a 28-day timeline) after the original final judgment, rather than the amended final judgment. *Id.* at 38–39. The Fifth Circuit held that the amended judgment in this case made more than a clerical change because "the second judgment omitted a paragraph of substance concerned with, *inter alia*, the legal rights and possible reinstatement" of one of the teachers involved in the dispute with the school board. *Id.* at 39. Therefore, the deadline for filing a 59(b) post-judgment motion ran from the filing of the amended judgment. *Id.*

The situation at hand is analogous, as the amended judgments in both *Cornist* and this case involved more than simple clerical changes or alterations. *See id.* The original judgments in each case "omitted a paragraph of substance" that were later added in by the district courts' amendments. In *Cornist*, the information regarding the teacher's reinstatement was omitted, and

here, the award of punitive damages was left out until the amendment issued seven days later. *Id.* Therefore, when the district court *sua sponte* amended its Final Judgment to include the additional $350,000 in punitive damages assessed by the jury, the district court altered a significant substantive matter and "disturbed [the] legal rights and obligations which had been plainly and properly settled" by the original judgment. R. at 9a–10a.

Under the Fifth Circuit's rule based on rights and obligations, which is drawn from this Court's timing rule in *Honeywell*, the Thirteenth Circuit was correct in holding that the timing for a 50(b) post-judgment motion runs from the amended judgment when substantive issues are involved and the rights and responsibilities of the parties have been altered. Therefore, this Court should hold that Respondent's 50(b) post-judgment motion was timely when it was filed within 28 days of the Amended Final Judgment.

2. The Amended Final Judgment involved a genuine ambiguity.

Additionally, the threshold for what constitutes a change or revision in legal rights and obligations is not always as significant as a full omission of a substantive paragraph and can include an exception for a genuine ambiguity between the two judgments. *See Wilmington,* 95 F.4th at 983. For example, in *Wilmington,* the Fifth Circuit, following the Third Circuit and the Federal Circuit, "applied *Honeywell's* 'genuine ambiguity' exception to circumstances in which there [was] 'an ambiguity as to the legal effect of a court's order'" due to the title of the original final order. *Id.* at 983 (quoting *Conway v. United States*, 326 F.3d 1268, 1276 (Fed. Cir. 2003)); *see Taylor v. Continental Grp. Change in Control Severance Pay Plan*, 933 F.2d 1227, 1231 n.2 (3d Cir. 1991). Because the "language of an order, including its title, is key to determining finality," along with the subsequent rights and obligations of the parties involved, the Fifth

Circuit held that the time frame for post-judgment motions was revised by the amended final judgment. *Wilmington*, 95 F.4th at 983.

As stated above, the specific language used an order is key to determining finality within the matter for both parties. In this case, the original Final Judgment clearly stated that "all relief not granted herein [the punitive damages] is DENIED." R. at 20a. And, because the district court *sua sponte* altered the judgment without any prior motions by the parties or judicial notice, there is a genuine ambiguity as to why the district court changed its mind seven days later regarding the jury's award of $350,000 in punitive damages. Because of this genuine ambiguity in language and responsibility, this Court should hold that the University's 50(b) motion was timely.

3. Punitive and compensatory damages carry different legal and social responsibilities.

The significant and alarming change in damages between the two Final Judgments, in both amount and type, further contributes to the change in legal responsibilities assigned to the parties, as the social and legal responsibilities assigned to Respondent under an assessment of punitive damages varies greatly from those assigned by an award of compensatory damages. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001). The two types of damages at issue, compensatory damages and punitive damages, are often assigned by courts at the same time but "serve distinct purposes." *Id.* Compensatory damages are defined as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered." DAMAGES, Black's Law Dictionary (12th ed. 2024).

In contrast, punitive damages are "[d]amages awarded in addition to [compensatory] damages when the defendant acted with recklessness, malice or deceit." *Id.* They have even "been described as 'quasi-criminal,' [and] operate as 'private fines' intended to punish the

defendant and to deter future wrongdoing." *Cooper*, 532 U.S. at 432. Assessment of punitive damages is essentially a "moral condemnation" towards the party found liable. *Id.*

The compensatory damages assessed in the original Final Judgment are only a fraction of the amount of punitive damages assessed by the amended Final Judgment. So, not only does the Amended Final Judgment significantly change the monetary responsibilities assigned to Respondent, but it also changes the legal and social responsibilities assigned to Respondent because of the significant difference in implications between compensatory and punitive damages. Assuming responsibility for an award of $12,487 in compensatory damages is a much different matter than accepting both the monetary, legal, and societal consequences that come from with the responsibility of owing $350,000 in punitive damages.

Therefore, because the rights and legal obligations of the parties were significantly altered by the amended Final Judgment, this Court should affirm the decision of the Thirteenth Circuit and hold that the deadline for the University's 50(b) motion began when the district court issued its Amended Final Judgment.

B. Because of the uncertainties surrounding the timing of post-judgment motions in cases with amended judgments, holding in favor of the Plaintiff would cause undue hardship for Respondent and other future litigants.

The Supreme Court addressed the importance of clarifying uncertainties relating to the timing of post-judgment motions in *United States v. Indrelunas*, stating that any "conflict on an issue such as this is of importance and concern to *every* litigant in a federal court, since . . . the timeliness of post-trial motions[] may turn on the question of when judgment is entered." 411 U.S. 216, 217 (1973) (emphasis added). Not only are these uncertainties confusing and frustrating for litigants, but they also stall judicial efficiency and create additional issues before the court that could be avoided with the necessary clarification.

The situation before this Court is not the first time the timing mechanisms related to 50(b) motions and other post-judgment motions have caused confusion, uncertainty, and potential undue hardship. The Advisory Committee Notes concerning the 2009 Amendment of Federal Rule of Procedure 50 explain that under the prior 10-day filing deadline for post-judgment motions, the committee found that "[e]xperience . . . proved that in many cases it [was] not possible to prepare a satisfactory post-judgment motion in 10 days, even under the formal rule that excluded intermediate Saturdays, Sundays, and legal holidays." Fed. R. Civ. P. 50 advisory committee's note (2009). Therefore, because of this uncertainty, the filing deadlines for 50(b) motions was expanded from 10 days to the current deadline of 28 days. *Id.*

The Committee's deadline amendment was clearly a helpful and necessary change, but the plain language of 50(b) still contains ambiguities that continue to cause uncertainty in post-judgment filing deadlines. *See* Fed. R. Civ. P. 50(b). The Rule states that "[n]o later than 28 days after the entry of judgment . . . the movant may file a renewed motion for judgment as a matter of law." *Id.* The use of the phrase "entry of judgment," with no further clarification as to amended judgments, is the key issue at hand. Nothing in the language of the Rule states which judgment should be used for timing purposes in cases with amended judgments.

Additionally, the district court in this case made the decision, *sua sponte*, to modify the "judgment to include the punitive damages awarded by the jury" an entire week after the original Final Judgment was entered at the close of trial. R. at 7a. When a court acts *sua sponte*, or "of one's own accord," the court acts without suggestion or motions from either party. SUA SPONTE, Black's Law Dictionary (12th ed. 2024). Therefore, Respondent had no way of knowing, from a filing of the Plaintiff or otherwise, that the punitive damages had the potential to be awarded in an amended judgment, leaving Respondent at a disadvantage. R. at 10a n.3.

Respondent understands the importance of finality and certainty regarding filing deadlines and does not seek to undermine the requirements of Rule 6(b) under well-established circumstances. *See Minneapolis-Honeywell Regulator Co.*, 344 U.S. at 213 (1952) ("we . . . encourage applicants to this Court to take heed of another principle–the principle that litigation must at some definite point be brought to an end.") However, these filing deadlines are a source of confusion and undue hardship not just for Respondent, but for other potential litigants in the same position.

Therefore, in the interest of Respondent and other potential litigants, the University respectfully asks this Court to affirm the decision of the Thirteenth Circuit and hold that the deadline for filing post-judgment motions begins with the entry of an amended judgment. Respondent further asks the court to affirm the decision of the Thirteenth Circuit and hold that Respondent's 50(b) renewed motion for judgment as a matter of law was timely, allowing this Court to reach the substantive merits of the University's motion below.

II. THE UNIVERSITY'S VIEWPOINT-NEUTRAL POLICY OF REFUSING TO DISCIPLINE STUDENTS WHO INTERFERE WITH SPEAKERS ON CAMPUS DID NOT VIOLATE MCMILLAN'S RIGHTS DURING HER FAILED SPEECH ATTEMPT.

Under Federal Rule of Procedure 50(a), a motion for judgment as a matter of law should be granted in situations where a "reasonable jury" does not possess a "legally sufficient evidentiary basis to find for [a] party on [an] issue." Fed. R. Civ. P. 50(a)(1). Decisions by the lower courts on a motion for judgment as a matter of law are reviewed *de novo*. *Perry v. City of New York*, 78 F.4th 502, 517 (2d Cir. 2023). When reviewing a denial of a motion for judgment as a matter of law, the court is required to "conside[r] the evidence in the light most favorable to the non-moving party and dra[w] all reasonable evidentiary interferences in that party's favor." *Nimely v. City of New York*, 414 F.3d 381, 390 (2d Cir. 2005)

McMillan's claims against the University arise under 42 U.S.C. § 1983, which imposes liability on all individuals acting under the color of state law who subject other individuals to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The University, as a municipality, "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 690 (1978).

The policy at the heart of a plaintiff's claim needs not be formally approved by the municipality, as "local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal

approval." *Id.* Both parties agree that the "University, which is chartered by the city of Lantana, constitutes a municipality for purposes of *Monell* liability." R. at 11a n.4.

For the following reasons, this Court should affirm the decision of the Thirteenth Circuit and hold that the jury did not possess a reasonable evidentiary basis to find that the University's viewpoint-neutral policy of refusing to discipline students who interfere with speakers on campus violated McMillan's First Amendment rights. Therefore, because the jury's evidentiary basis was insufficient, this Court should grant Respondent's 50(b) renewed motion for judgment as a matter of law and dismiss the verdict and all damages assessed against Respondent.

A. The University's disciplinary policy, in its purpose and application, is viewpoint-neutral because it does not favor any speakers over others.

"It is axiomatic," Justice Kennedy wrote in *Rosenberger v. Rector & Visitors of Univ. of Virginia*, "that the government may not regulate speech based on its substantive content or the message it conveys." 515 U.S. 819, 828 (1995); *see Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Nor may the government, in its regulation, "favor one speaker over another." *Rosenberger*, 515 U.S. at 828. Any governmental "[d]iscrimination against speech" based on "its message is presumed to be unconstitutional." *Id.*; *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641–43 (1994).

While all "[c]ontent-based regulations are presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), viewpoint-based regulations are "all the more blatant" violations of the First Amendment because they single out and silence individual viewpoints and opinions. *Rosenberger*, 515 U.S. at 829. Because viewpoint-discriminatory regulations are inherently unconstitutional, "the government must abstain from regulating speech when the specific motivating ideology. . . opinion. . . or perspective of the speaker is the rationale for the restriction." *Id.*; *see Shurtleff v. City of Boston, Massachusetts*, 596 U.S. 243, 247 (2022) ("When

the government encourages diverse expression . . . the First Amendment prevents it from discriminating against speakers based on their viewpoint.")

The applicable question before this Court, as distinguished by Judge Sinclair in the majority opinion for Thirteenth Circuit, is *not* whether the jury had a legally sufficient evidentiary basis to find that the University had a policy or custom of refusing to prevent students from disrupting speakers, as a reasonable jury could find there was such a custom or policy. R. at 1a, 11a. Instead, the correct legal question at issue here is whether the jury had a legally sufficient evidentiary basis to find whether the policy or custom itself *violated* McMillan's First Amendment rights through viewpoint discrimination. *See id.* Because McMillan did not "demonstrate,–or even allege," that the University's disciplinary rules constituted viewpoint discrimination, this Court should affirm the decision of the Thirteenth Circuit hold that the jury lacked the sufficient evidentiary basis to find for McMillan, and that University is entitled to judgment as a matter of law under Rule 50(b). *Id.*

1. There is no evidence the University's policy was adopted out of discrimination or hostility towards any specific viewpoints.

In Rosenberger, this Court addressed the concept and application of viewpoint discrimination in higher education. *Rosenberger*, 515 U.S. at 829. There, a student organization at the University of Virginia that published a newspaper with Christian viewpoints brought action against the University for violation of their First Amendment rights when the school rejected the organization's request for payment from the University's fund for reimbursement of student publication printing costs. *Id.* at 829, 845–846. This Court held that the University's denial of funds was an impermissible form of viewpoint discrimination, as the denial was "solely on the basis of [the publication's] religious editorial viewpoint." *Id.* at 827. The rejection therefore violated the students' rights to freedom of speech and freedom of the press. *Id.*

As demonstrated by *Rosenberger*, viewpoint discrimination requires that a specific viewpoint or basis of thought is singled out and discriminated against by the government. *See id.* In the situation currently before this Court, in order for the University's disciplinary policy to constitute viewpoint discrimination, the policy would need to punish students who protest only certain views as outlined by the policy or protect only certain speakers from the protesting students. But the record clearly establishes the University's disciplinary policy is entirely neutral in its purpose and application.

First, the University's disciplinary policy is neutral in its purpose because it does not single out any specific type of thought or viewpoint, including McMillan's views on veganism. *See* R. at 5a. The record lacks any evidence showing that the policy was enacted with an "impermissible motive," as the University's policy is simply based on Dean Thatcher's trust that the excellent students of New Tejas do not need to be formally disciplined over their exercise of their right to speak freely. *See id.*

McMillan testified that she planned to speak about her beliefs regarding Veganism and animal welfare. R. at 6a. There is nothing in the record that establishes even an inkling that the University had any problem with the topic of veganism, or McMillan's specific viewpoints regarding the subject. In fact, Dean Thatcher even testified that "he personally agreed with many of the sentiments expressed by McMillan," as his "wife is a vegan." R. at 12a. Therefore, there is nothing in the record that a reasonable jury could use to hold that the policy discriminated against veganism or any of the viewpoints McMillan planned to share in her speech.

Second, the record establishes that the disciplinary policy has been applied "consistently and evenhandedly" to all students who have protested on the University's campus. R. at 11a. In fact, students have protested a wide variety of subject matter and viewpoints on both sides of the

political spectrum. R. at 5a. These diverse include subjects such "institutional racism," "Second Amendment rights," "recreational marijuana," and "climate change." *Id.* And, in all these instances, the record states that the campus security, following the view-point neutral policy, did not intervene and "no students involved were disciplined in any way." *Id.* Therefore, there is no evidence that could lead a reasonable jury to determine that the disciplinary policy was applied in a viewpoint-discriminatory manner, as the subject matter of any protest did not change the application of the disciplinary policy.

The University maintains that its disciplinary policy was created out of trust in the University's excellent student body. However, even if the disciplinary policy appears indifferent in its purpose and potentially a bit unorthodox, the Thirteenth Circuit was nonetheless correct in holding that "[n]o reasonable jury could find that the University's policy arose out of anything other than intentional apathy and indolence." Therefore, this Court should affirm the decision of the Thirteenth Circuit and hold that the University's policy of not discipling protesting students was viewpoint neutral in its purpose and application.

2. The University did not deny McMillan access to the campus based on her viewpoints.

Viewpoint discrimination can also be in the form of denying access to a public forum based on the point of view of the speaker. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993). In *Lamb's Chapel*, this Court addressed the application of a school board's rule that allowed for "social, civic, and recreational uses of its schools" by third parties but excluded "use by any group for religious purposes." *Id.* at 384. An evangelical church and its pastor brought suit alleging the district's policy violated their First Amendment rights when the school district refused their request to use the school facilities for a religiously oriented film series on family values and child-rearing. *Id.* at 384–85.

This Court held that the school district violated the First Amendment by denying the church and pastor access to the premises solely because the films dealt with religious matters. Id. at 394. In excluding the films based on their religious viewpoint, the "'government [therein] regulat[ed] speech in [a way] that favor[ed] some viewpoints or ideas at the expense of others.'" *Id.* at 394 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

The policy regarding the use of school rooms in *Lamb's Chapel* is distinguishable from the University's disciplinary policy at hand. Unlike the school district's policy of excluding religious groups, the University does not prevent any speakers from coming to campus, regardless of their viewpoint. This is evidenced by the variety of speakers who have come to the University to share their message. *See* R. at 5a. The University allowed McMillan to come onto campus, use their auditorium facilities, and speak, just as it did with all the other speakers who visited campus in the past. *See id.* Therefore, the University did not commit viewpoint discrimination in blocking access from its facilities.

The scope of what is required of the University after allowing access is limited, as the University is not liable for the conduct of private actors, its students, on campus because of its viewpoint-neutral disciplinary policy. Therefore, no reasonable jury could find that the University's disciplinary policy was anything other than viewpoint-neutral in its scope and application.

B. Under the First and Fourteenth Amendments, Petitioner McMillan was not entitled to government interference or police protection during her speech attempt.

Petitioner McMillan argues that because her speech was curtailed by student protesters, the University had an affirmative duty under the Constitution to protect the exercise of her First Amendment rights by removing the protesting students. McMillan's individual rights against

governmental interference are the same rights held by all citizens of the United States under our Constitution. The fact that the State may not "deprive individuals of life, liberty, or property without 'due process of law'" is a cornerstone of our country's protection of individual rights and freedoms, and Respondent does not seek to downplay the essential nature of these rights in any way. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

However, as correctly held by the Thirteenth Circuit, these "rights against governmental interference," while fundamental in nature, are limited as they "do not guarantee any right to require that the government subsidize or support their exercise." R. at 12; *see DeShaney*, 489 U.S. at 195. The ability to exercise our First Amendment rights acts "as a limitation on the [government's] power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney*, 489 U.S. at 195. Therefore, because McMillan's speech was infringed upon by private actors, and not by the government, Petitioner McMillan was not entitled to government interference or police protection for the purpose of protecting her First Amendment rights.

1. The University is not required to provide minimum levels of safety and security.

The language of the Due Process in no way "requires the State to protect the life, liberty, and property of its citizens against invasion of private actors." *DeShaney*, 489 U.S. at 195; *see Turner v. Thomas*, 930 F.3d 640, 645 (4th Cir. 2019) ("[A]s a general matter, a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.")

DeShaney involved a tragic situation where a child and his mother brought suit under 42 U.S.C. § 1983 against a group of social workers after the government failed to remove the child from the care of his father, which led to him suffering permanent brain damage from his father's violent abuse. *DeShaney*, 489 U.S. at 191. While sympathetic to the child and his mother, this

Court held that the State had no affirmative duty to protect the child because the harm the child suffered did not occur while the child was in state custody, and instead occurred while he was in the custody of his father, who was not a state actor. *Id.* at 195–97.

Regarding the matter at hand, Circuit Judge Carson, in his concurring opinion, argued that while the Thirteenth Circuit reached the correct decision based on existing legal precedent, *DeShaney* should be overturned, as the rights guaranteed by the First and Fourteenth Amendments "should carry with them certain minimal levels of safety and security." R. at 16a. However, this would require adding a level of requirement that the language of the Due Process Clause simply does not contain. The Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *Id.* at 195.

The history of the Due Process Clause does not support this "expansive reading" either. *Id.* The Due Process Clause of the Fourteenth Amendment was created to keep the government "'from abusing [its] power, or employing it as an instrument of oppression.'" *Id.* at 196 (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)). The purpose at the heart of the Due Process Clause is "to protect the people from the State, not to ensure that the State protected them from each other." *DeShaney*, 489 U.S. at 196.

The violent outcome in *DeShaney* was no doubt tragic, as this Court acknowledged in its holding. *Id.* The University also acknowledges it is unfortunate that McMillan was unable to share her good-faith views on animal rights and veganism, as the University values diversity of thought and the importance of hearing from a variety of different viewpoints and worldviews. However, "before yielding to [the] impulse" to hold the State responsible for the conduct of private actors, "it is well to remember once again that the harm" in *DeShaney* and in the case at

hand "was not inflicted by the State of Wisconsin" or the State of New Tejas, but by private actors acting of their own accord. *Id.* at 202–03.

Because this Court's precedent clearly establishes that the University was not required to protect McMillan from acts perpetrated by private actors, this Court should affirm the decision of the Thirteenth Circuit and grant the University's motion for judgment as a matter of law.

2. Neither the Due Process Clause nor the First Amendment requires the State to Subsidize access to certain exercisable rights.

Just as the Due Process Clause does not require protection from private actors, neither does the Clause require the government to subsidize access to the ability to exercise of our rights. *See Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (Holding the Due Process Clause does not require the government to provide adequate housing); *see Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border.")

In *Harris v. McRae*, this Court rejected the notion that the "limitation on governmental power implicit in the Due Process Clause" contains "an affirmative funding obligation." *Harris v. McRae*, 488 U.S. 297, 318 (1980). Just because the State may not prohibit its citizens from certain activities, such as using contraceptives or attending private schools, the State does not then possess "an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or sent their children to private schools." *Id.*

When student protestors curtailed McMillan's speech, the University had no constitutional obligation to subsidize any police protection for McMillan in her attempt to speak about her beliefs regarding veganism. Private individuals–students on the campus–curtailed McMillan's speech, not the University. Because of the legal precedent established by this Court

in Harris, the Thirteenth Circuit was correct in holding that "[t]he University's failure to prevent private individuals from interfering with her speech did not–and could not have–violated the First Amendment." Therefore, this Court should affirm the holding of the Thirteenth Circuit and grant Respondent's renewed motion for judgment as a matter of law.

3. The state-created danger doctrine established in *DeShaney* does not apply to the facts at hand.

In *DeShaney,* this Court offered a limited number of exceptions to the general rule that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Turner v. Thomas*, 930 F.3d at 645; *see DeShaney,* 489 U.S. at 197–200; *see Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988) ("As a general rule, a government official is not liable for failing to prevent another from violating a person's constitutional rights, unless the official is charged with an affirmative duty to act.")

The first exception comes into play when there is a "special relationship" between the individual and the state, "such as a custodial relationship, that gives rise to an affirmative duty to protect." *Turner,* 930 F.3d at 645. Here, there was no custodial relationship between McMillan and the University that would assign an affirmative duty to protect.

Under the second exception, the state-created danger doctrine, "a state actor may be held liable for harm resulting from 'affirmative actions' that created or enhanced the dangerous conditions that produced the plaintiff's injury." *Id.* at 645; *see Pinder v. Johnson,* 54 F.3d 1169, 1176 (4th Cir. 1995). Under this doctrine, § 1983 liability may only be established by a showing that "the state actor created or increased the risk of private danger, and did so through affirmative acts, not merely through *inaction* or omissions." *Turner*, 930 F.3d at 645 (quoting *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015)) (emphasis added).

The burden for proving the state-created danger doctrine is high. *See Pinder*, 54 F.3d at 1172. In Pinder, the plaintiff called the police because her ex-boyfriend broke into her home and threatened to kill her and her children. *Id.* The police officer told the plaintiff the boyfriend would be detained overnight and could not be released until tomorrow morning, so she returned to work and left her children at home. *Id.* The officer ended up filing lesser charges, which allowed the boyfriend to be released from custody. *Id.* He then set her home on fire, killing her three children. *Id.* Even in this horrific situation, the exception still did not apply because the officer didn't create the danger, but rather failed to provide an adequate protection from the danger. *Id.*

The Fourth Circuit recently applied the state-created danger doctrine from *DeShaney* in *Turner v. Thomas*. 930 F.3d at 645. There, the plaintiff had attended the Unite the Right rally in Charlottesville, Virginia as a counter protestor, and was violently attacked while the police watched the scene and chose not to intervene. *Id.* at 643. The Court found that the police department's decision to order its officers to refrain from intervening during the violent rally was not "an affirmative act within the meaning of the state-created danger doctrine." *Id.* at 646.

The police's inaction in *Turner* is analogous to the University's inaction in the matter at hand. There was no affirmative act on the part of the University that led to McMillan's speech being disrupted. Rather, the University's viewpoint-neutral policy of refusing to discipline any protesting students displayed the University's "mere[] inaction," just as the police's inaction at the protest was not an affirmative action under the doctrine. *Turner*, 930 F.3d at 645.

Additionally, the record establishes that the University's students have a history of protesting essentially any speaker that come to campus, regardless of their viewpoint. R. at 5a. Therefore, McMillan knew, or should have reasonably known, that there was a significant

chance the University's campus security would not step in if protestors attempted to stop her from speaking, just as the attendants at the Unite the Right rally should have reasonably foreseen a level of violence inherent with their activities. This should have been a factor McMillan considered when choosing to speak to the University's students.

Therefore, because the state-created danger exception from *DeShaney* does not apply to McMillan's situation, this Court should affirm the decision of the Thirteenth Circuit and hold that the record was insufficient for a jury to find that University's refusal to discipline all protesting students violated McMillan's First Amendment Rights.

4. The University's Campus Police Department would not be required to protect McMillan amid violence.

The First Amendment does not "protect speech amid violence." *Balogh v. Virginia*, 120 F.4th 127, 130 (4th Cir. 2024). Additionally, the First Amendment does not "obligate police officers to protect the constitutional rights of protestors amid violence." *Id.*

In another Fourth Circuit case involving the Unite the Right rally in Charlottesville, appellant Balogh attended the rally as a protestor. *Id.* The protest quickly turned hostile, with protestors and counter protestors violently clashing. *Id.* at 131. Police refused to intervene with the violence, and "[a]s a result, the violence. . . [led] to Balogh's alleged assault by counter protestors and law enforcement." *Id.* at 132. Balogh argued that the police's refusal to intervene restricted him from "expressing specific viewpoints." *Id.*

The Court found that the "Constitution does not require that the officer go down with the speaker." In the case at hand, because there were a large number of student protestors at McMillan's speech who remained in the building for over an hour, the campus officers themselves were not required under the First Amendment to break up the crowd on behalf of McMillan. Therefore, the campus officers did not violate McMillan's First Amendment rights by

refusing to provide police protection, and this Court should affirm the decision of the Thirteenth Circuit and hold that McMillan's First Amendment rights were not violated by the University's refusal to discipline the protesting students under its viewpoint-neutral policies.

C. The University's disciplinary policy does not seek to downplay the importance of Free Speech across higher education.

"If there is a bedrock principal underlying the First Amendment," this Court wrote in *Snyder v. Phelps*, "it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 562 U.S. 433, 458 (2011). The University seeks to remind the Court that Free Speech, along with the discourse and variety of viewpoints that are inherent in the full and free exercise of speech, is highly valued by the University, Dean Thatcher, and its entire staff and student body. The City University of Lantana, with the wide variety of speakers encouraged to visit campus to speak, along with its diverse extracurricular programs, exemplifies this in both mission and practice.

Holding the University responsible for the actions of private actors would place an undue burden on the University and create dangerous and ahistorical precedent by making the State responsible for protecting individuals from the acts of all private actors. The First Amendment guarantees that the State will not and cannot suppress the speech of its constituents, but it does not "guarantee that the state will protect individuals when private parties seek to suppress it." *Kessler v. City of Charlottesville*, 411 F. Supp. 3d 277, 286–87 (W.D. Va. 2020). The University does not discriminate in who can come speak at the campus, or what they are allowed to speak about, but the University cannot, and is not required to, guarantee that private parties will not attempt to disrupt this speech.

The First Amendment does not require us to strive for silence: rather, this Court should encourage "more speech" among constituents, and "not enforced silence." *Whitney v. California*,

274 U.S. 357, 377 (1927). The University encourages free speech by giving controversial speakers from both sides of the political spectrum the opportunity to speak while also granting the opportunity to those with opposing views to speak back. To hold that more is required of the University would be against this Court's precedent, and against the language of the Constitution.

Therefore, this Court should affirm the decision of the Thirteenth Circuit and hold that McMillan's First Amendment rights were not violated by the University's viewpoint-neutral policy of refusing to discipline students who protest speakers on campus. Additionally, because there is insufficient evidence in the record for a reasonable jury to find that McMillan's First Amendment rights were violated, this Court should follow the Thirteenth Circuit and grant the University's 50(b) renewed motion for judgment as a matter of law and overturn the jury's verdict.

CONCLUSION

For these reasons, Respondent respectfully asks this Court to affirm the decision of the Thirteenth Circuit and hold that the University's 50(b) renewed motion for judgment as a matter of law was timely. Further, Respondent respectfully asks this Court to affirm the decision of the Thirteenth Circuit and hold that because the record contains insufficient evidence for the jury to hold that McMillan's First Amendment rights were violated, the University's 50(b) motion should be granted and the district court's decision vacated.

Respectfully submitted,

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