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 RESPONDENT

November 18, 2024

Submitted by:

TEAM NUMBER 67
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QUESTIONS PRESENTED

1. Whether and to what extent the timeliness of a Rule 50(b) motion—filed after a substantive amended final judgment altering the University's legal rights—depends on the motion's relationship to the changed portion of the judgment.

2. Whether the University's viewpoint-neutral policy regarding student discipline violates the First Amendment where the government has no affirmative obligation to provide protection for the assertion of free speech.

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STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of New Tejas had original jurisdiction pursuant to 28 U.S.C. § 1331 and entered judgment on March 29, 2022. The United States Court of Appeals for the Thirteenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and entered judgment in this case on May 10, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The central constitutional provision in this case is the First Amendment of the United States Constitution, U.S. Const. amend. I. This case also involves Section 1983 of Title 42 of the United States Code, 42 U.S.C. § 1983, and Federal Rule of Civil Procedure 50, Fed. R. Civ. P. 50. Each of these provisions is set forth in relevant part in the Appendix.

STATEMENT OF THE CASE

A. Statement of Facts

The City University of Lantana ("the University") is one of the oldest and most distinguished public educational institutions in New Tejas. R. at 2a. The University is chartered by the City of Lantana and was created to be a "coeducational institution open to everyone." R. at 2a. Since its founding in 1849, the University has added

approximately 175 additional acres to its original, fifteen-acre campus. R. at 2a. The University's first permanent building, New Tejas Hall, is home to the Hedge Family Auditorium (the "Auditorium") as well as the library and science and technology classrooms. R. at 2a. In addition to New Tejas Hall, the University boasts an assortment of educational buildings, athletic facilities, dormitories, dining halls, and student-centered areas. R. at 2a.

The University prioritizes "academic excellence, civic engagement, and leadership for the common good," all goals that are reflected in the school's motto, *Doctrina Perpetua*—"Forever Learning." R. at 2a–3a. In addition to academic excellence, the University also excels in athletics, particularly in football. R. at 3a. Students have numerous opportunities to get involved on campus, providing them with an incredibly well-rounded educational experience. R. at 3a. The University offers over sixty diverse student organizations, which include "arts and culture organizations, performance groups, intramural sports, political organizations, gender and sexuality groups, religious organizations, and social action groups." R. at 3a.

The University's students are known for being rowdy. R. at 3a. Students have taken senior pranks to outrageous levels, including putting a car on the roof of New Tejas Hall, creating a slip and slide down the main staircase and the front lawn, and leaving 100 chickens in the Auditorium. R. at 3a. Wild and unauthorized parties regularly disrupt university classes and scheduled events. R. at 3a. Students have also developed a habit of "shouting down" speakers invited to campus by a range of student groups. R. at 5a. Students have interrupted speakers discussing a variety of

topics, such as institutional racism, Second Amendment rights, the legalization of recreational marijuana, and the effects of climate change. R. at 5a.

The Dean of Student Affairs, Mason Thatcher, adopts a "hands-off" approach to student discipline. R. at 4a–5a. Dean Thatcher is a 1998 alumnus and former football player who has been largely successful in his leadership role. R. at 4a–5a. Dean Thatcher's laid-back approach to discipline is rooted in his belief that all University students are "good kids" who just "need a good talking to, not any kind of punishment." R. at 5a. According to Dean Thatcher, the University's students work hard and should be left to their own devices "[e]ven if 'things may get out of hand every now and then.'" R. at 5a. Campus security and employees within the Department of Student Affairs follow Dean Thatcher's lead and take the same hands-off approach to student discipline. R. at 5a.

The students' habit of shouting down speakers brought the current action to bear when the Campus Vegan Alliance invited well-known vegan advocate Dove McMillan to speak in the University's Hedge Family Auditorium on February 8, 2020. R. at 6a. McMillan's planned speech centered around encouraging people to abstain from consuming animal products. R. at 6a. Specifically, McMillan intended to advocate for the end of the exploitation and murder of animals for consumer purposes. R. at 6a.

McMillan began her speech but was interrupted after approximately five minutes by a large group of student protesters who gathered at the foot of the stage. R. at 6a. Some protesters carried banners and noisemakers, while others wore animal

masks and costumes. R. at 6a. The noise from the protesters drowned out McMillan's attempts to talk. R. at 6a. McMillan pleaded with the protesters to be quiet or leave, as did other students in attendance for McMillan's speech, but the protesters ignored these requests. R. at 6a. McMillan left the stage after approximately fifteen minutes and did not return. R. at 6a. The protesters dispersed after approximately one hour. R. at 6a. The protesters caused minimal damage to the Auditorium: they broke only a few chairs and tables, damaged the podium, and stained the carpet. R. at 6a–7a. A campus security officer was present at the start of McMillan's speech but—true to Dean Thatcher's hands-off disciplinary policy—did not intervene or engage with the protesters. R. at 7a. The protesters were identified but were not disciplined per standard University procedure. R. at 7a.

B. Procedural History

Pursuant to 42 U.S.C. § 1983, McMillan sued the Board of Regents of City University of Lantana in the District Court for the Eastern District of New Tejas on the theory that her First Amendment rights were violated. R. at 7a. During trial, the University filed a timely Rule 50(a) motion for judgment as a matter of law under the Federal Rules of Civil Procedure, which the district court denied. R. at 7a. The jury awarded McMillan $12,487 in compensatory damages and $350,000 in punitive damages. R. at 7a. But the district court's judgment entered on January 20, 2022, did not include the $350,000 punitive damages award; it only ordered the University to pay $12,487 in compensatory damages (in addition to interest and costs). R. at 7a. One week later, the district court *sua sponte* entered an amended judgment identical

to the first except for the addition of the $350,000 in punitive damages, raising the University's liability from $12,487 to $362,487. R. at 7a. Twenty-eight days after the amended judgment, the University renewed its motion for judgment as matter of law pursuant to Rule 50(b). R. at 7a.

Denying the University's Rule 50(b) motion on procedural grounds, the district court found that the timeliness of the University's motion ran from the original, January 20, 2022, judgment and thus was filed past the twenty-eight day deadline. R at 24a. As such, the district court did not reach the merits of the University's motion. R. at 24a. On appeal, the Thirteenth Circuit reversed the district court's procedural denial, holding that the twenty-eight day filing deadline for the University's 50(b) motion ran from the amended judgment, making the motion timely. R. at 10a. Turning to the merits, the Thirteenth Circuit held that the First Amendment does not impose an affirmative obligation on the University to ensure McMillan could exercise her free speech rights. R. at 14a. Accordingly, the Thirteenth Circuit held that the University did not as a matter of law violate the First Amendment insofar as it "fail[ed] to prevent private individuals from interfering with [McMillan's] speech." R. at 14a.

SUMMARY OF THE ARGUMENT

This Court should affirm the Thirteenth Circuit's decision that the University filed a timely Rule 50(b) renewed motion for judgment as a matter of law. Additionally, this Court should affirm the Thirteenth Circuit's decision granting

judgment as a matter of law in favor of the University because the University did not violate McMillan's First Amendment right to free speech.

The Thirteenth Circuit correctly held that the University filed a timely renewed motion for judgment as a matter of law under Rule 50(b). This Court's precedent in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, which concerned the filing window for petitions of certiorari, supports the proposition that an amended judgment changing the parties' substantive rights creates a new final judgment in place of the old, resetting the deadlines for post-judgment motions. The Fifth Circuit, and the Thirteenth Circuit, by extension, properly applied this Court's finality jurisprudence to the case at bar, finding that—because the district court's addition of punitive damages in its amended judgment revised the University's legal rights and obligations—the twenty-eight day deadline for a timely Rule 50(b) motion had reset. And because the University filed its 50(b) motion twenty-eight days after the amended judgment, the Thirteenth Circuit correctly held that the motion was timely.

Conversely, the Seventh and Second Circuit's approach adds an additional requirement: that a post-judgment motion filed in response to a substantive amended judgment bear some relationship to the change. This requirement is inconsistent with this Court's finality jurisprudence. Further, in creating a harsh result, both circuits rely on a concern that litigants will abuse post-judgment motion practice, yet the Seventh Circuit concedes that this concern is seldom implicated because substantive amendments to judgments are rare.

Even if this Court applies the "bears some relationship" requirement, the University's Rule 50(b) motion is still proper. The district court's strict application of the "bears some relationship" requirement would impose conditions impossible to follow under Rule 50(b) per the mechanics of the rule itself. A context-focused application shows the University's renewed motion for judgment as a matter of law preserved for appeal its objection to liability—an objection that increased in saliency by $337,513 following the amended judgment's addition of punitive damages. Accordingly, the University's Rule 50(b) motion was sufficiently directed at the change between the judgments.

Thus, because the district court's amended judgment constituted a substantive change, and as the University's Rule 50(b) motion satisfies both the Fifth and Seventh/Second Circuit approaches to the effect of a substantive amended judgment on post-judgment motion deadlines, this Court should affirm the Thirteenth Circuit's decision that the University filed a timely motion and preserved its arguments under Rule 50(b).

Turning to the merits of the issue, the Thirteenth Circuit correctly held that the University did not violate McMillan's First Amendment right to free speech. Courts use a three-prong test to analyze the merits of a free speech claim under the First Amendment. First, courts determine whether the speech at issue is protected by the First Amendment. Next, courts identify the nature of the forum, and lastly, based on the type of forum at issue, determine whether the government's restriction of speech satisfies the requisite standard to be applied for that particular forum.

McMillan's claim that the University violated her First Amendment right to free speech fails at all stages of the analysis.

Under the first prong, the Thirteenth Circuit correctly held that the University does not have any affirmative constitutional duty to provide protection for McMillan to assert her right to free speech. This Court's precedent in *DeShaney v. Winnebago County of Social Services* and *Harris v. McRae* emphasize that constitutional rights prohibiting government interference, such as the Due Process Clause, do not impose affirmative obligations on the government to assist with or provide resources or opportunities for an individual's assertion of those rights. Because the First Amendment is similarly phrased as a limitation on government interference rather than a requirement of state action, it would be improper for this Court to impose any affirmative obligation on the University to provide McMillan with free speech protection.

Even if this Court imposed an affirmative obligation on the University to provide free speech protection, McMillan's claim fails the remaining prongs of the analysis. Under the second prong, the forum at issue—the Auditorium—is a limited public forum. Consequently, the University succeeds under the third prong so long as its restriction on speech is viewpoint-neutral and reasonable in light of the purpose of the forum. The University's non-disciplinary policy is viewpoint-neutral because it is evenly applied across the University and does not purposefully favor majority views over minority views. The University's policy is also reasonable because it is consistent with Dean Thatcher's hands-off approach to student affairs.

Finally, the University's decision not to discipline students could not have amounted to a heckler's veto. A heckler's veto is categorically impermissible under the First Amendment and occurs when a state actor curtails public speech in an attempt to avoid a risk of public disorder. The University did not effectuate a heckler's veto here because it did not prevent McMillan from speaking in an attempt to settle the student protest; rather, McMillan voluntarily left the stage and did not return to finish her speech. Because McMillan's claim fails at all stages of the free speech analysis, this Court should affirm the Thirteenth Circuit's decision that the University did not violate McMillan's First Amendment right to free speech and grant judgment as a matter of law in favor of the University.

ARGUMENT

I. THE UNIVERSITY'S RULE 50(B) MOTION WAS TIMELY AND PRESERVED ITS ARGUMENTS ON APPEAL.

This Court should affirm the Thirteenth Circuit's decision that the University filed a timely renewed motion for judgment as a matter of law under Rule 50(b). A substantive amendment to a judgment "revises legal rights and obligations which, by [the] prior judgment, had been plainly and properly settled with finality." *Fed. Trade Comm'n v. Minneapolis-Honeywell Regul. Co.*, 344 U.S. 206, 212 (1952). The Fifth, Seventh, and Second Circuits agree that an amended judgment making a substantive change to the original creates a new judgment. *Wilmington Sav. Fund Soc'y, FSB v. Myers*, 95 F.4th 981, 982 (5th Cir. 2024); *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986); *Tru-Art Sign Co. v. Loc. 137 Sheet Metal Workers Int'l Ass'n*, 852 F.3d 217, 222 (2d Cir. 2017). With respect to the effect of the new judgment, the Fifth Circuit (and

the Thirteenth) properly recognized, based on this Court's precedent, that the new judgment supersedes the old, restarting the clock for judgment-based deadlines. *Wilmington*, 95 F.4th at 982. Here, the parties agree that the district court's amended judgment on January 27, 2022, "revised the parties' legal rights and obligations." R. at 8a. Thus, the Thirteenth Circuit correctly held that the twenty-eight day deadline to file a Rule 50(b) motion ran from January 27, making the University's February 24 motion timely.[1]

The Seventh and Second Circuit's approach errs by adding an additional requirement—that the post-judgment motion "bear some relationship to the . . . alteration of the first judgment." *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 521 (7th Cir. 1993); *Tru-Art*, 852 F.3d at 221. This approach finds no support from this Court's precedent and creates a harsh result in service of concerns only implicated rarely. *See Andrews v. E.I. Du Pont De Nemours & Co.*, 447 F.3d 510, 516 (7th Cir. 2006). Even under the flawed "bears some relationship" requirement, however, the University's Rule 50(b) motion is still proper. The district court's strict application of the requirement ignores the purpose of Rule 50(b) and imposes conditions impossible to follow—namely, that the motion raise arguments not presented in the pre-verdict 50(a) motion. In context, the motion preserved for appeal the University's objection to liability after a $337,513 increase in liability exposure, R. at 7a; it *was* directed at the change between the old judgment and the new and thus bore the requisite relationship.

[1] With respect to the standard of review, "[d]eterminations of timeliness are generally matters of statutory interpretation, which [the court] review[s] *de novo*." *Tru-Art*, 852 F.3d at 220.

A. The Thirteenth Circuit Correctly Found That the District Court's Substantive Amended Judgment Created a New Final Judgment with a New Clock for Post-Judgment Motions.

This Court's finality and appeals deadline jurisprudence supports the conclusion that a substantive change to a judgment resets the deadlines to file post-judgment motions, which are based on the existence of the judgment. The Fifth Circuit's approach to post-judgment motions, adopted by the Thirteenth Circuit, R. at 9a, properly applies this conclusion. The Seventh and Second Circuit's "bears some relationship" requirement, on the other hand, does not.

1. This Court's finality and filing deadline jurisprudence supports the finding that a substantive amended judgment replaces the old judgment and resets judgment-based deadlines.

Under this Court's precedent, when a lower court amends a judgment disturbing the finality of a judgment previously rendered, it resets the clock for litigants under judgment-based statutory filing deadlines. *See Honeywell*, 344 U.S. at 211–12. The finality question turns on the nature of the amended judgment: if it is a substantive change to the merits, it disturbs the finality of the previous judgment and resets the clock; however, if the change is collateral to the merits, it does not. *Compare Zimmern v. United States*, 298 U.S. 167, 169–70 (1936) (substantive change), *with Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Emps.*, 571 U.S. 177, 183 (2014) (collateral change).

In *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, a substantive amendment to the judgment reset the filing deadline for the Federal

Trade Commission's ("FTC") petition for certiorari. 344 U.S. at 207. The filing window was imposed by statute—a petition was required to have been filed within ninety days of the judgment. *Id.* at 210; *see also* 28 U.S.C. § 2101(c). But the lower court had entered *two* judgments, so the FTC's petition was timely only if the filing period ran from the second. *Honeywell*, 344 U.S. at 210. This Court framed the issue as "whether the lower court, in its second order, ha[d] disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.* at 211. An amended judgment disturbs the finality of the previous when it "changes matters of substance," thereby "disturb[ing] or revis[ing] legal rights and obligations" of the parties. *Id.* When such a change happens, this Court held, "the period within which an appeal must be taken or a petition for certiorari [must be] filed begin[s] to run anew." *Id.* This is because a substantive change creates a *new* judgment replacing the old. *See City of Memphis v. Brown*, 94 U.S. 715, 718 (1876) ("the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date"), *cited with approval in Honeywell*, 344 U.S. at 211, n.12.

To be sure, this Court in *Honeywell* stressed the importance of the principle that "litigation must at some definite point be brought to an end." 344 U.S. at 213. In keeping with that principle, a collateral change to a judgment does *not* constitute a new judgment with a new clock for judgment-based deadlines. *See Ray Haluch*, 571 U.S. at 185. In *Ray Haluch*, Rule 4 of the Federal Rules of Appellate Procedure required that "the notice of appeal . . . be filed . . . within 30 days after the entry of

judgment." 571 U.S. at 183 (citing Fed. R. App. P. 4(a)(1)(A)). But like in *Honeywell*, the timeliness of Haluch's appeal was predicated on which of two decisions by the lower court constituted the "judgment." *Id.* at 183. This Court again relied on finality to determine whether the lower court's second decision reset the clock. *Id*. Because the lower court limited its second judgment to the awarding of attorney's fees and costs, it did not "prevent . . . the merits judgment from becoming final." *Id.* at 179. Thus Haluch's filing—running from the first judgment—was late. *Id.* at 190; *see also Progressive Indus., Inc. v. United States*, 888 F.3d 1248, 1253 (Fed. Cir. 2018) ("The Amended Judgment altered only the collateral issue of costs and therefore did not restart the time period for filing a Rule 59(e) motion in this case.").

Here, these holdings—made in the context of statutes governing the timeliness of appeals, *see, e.g.*, *Honeywell*, 344 U.S. at 210; *Ray Haluch*, 571 U.S. at 183—similarly apply to post-judgment deadlines under the Federal Rules of Civil Procedure. Like the judgment-based filing deadlines created by 28 U.S.C. § 2101(c) and Federal Rule of Appellate Procedure 4(a)(1)(A),[2] Federal Rule of Civil Procedure 50(b) requires a renewed motion for judgment as a matter of law to be filed "no later than 28 days after the entry of *judgment*." (emphasis added). Federal Rule of Civil Procedure 54(a) defines "judgment" as "any order from which an appeal lies," making relevant this Court's focus on finality when deciding the impact of an amended

[2] To be sure, 28 U.S.C. § 2101(c) and Federal Rule of Appellate Procedure 4(a)(1)(A) both allow the Supreme Court and district courts, respectively, to "extend the time" to file, while Federal Rule of Civil Procedure 6(b)(2) explicitly prohibits extensions for certain post-judgment motions, including Rule 50(b). Compare 28 U.S.C. § 2101(c), and Fed. R. App. P. 4(a)(1)(A), with Fed. R. Civ. P. 6(b)(2). But—as this Court held in *Honeywell*—a substantive amendment to the judgment "run[s] anew" the clock to file motions. 344 U.S. at 211. There is no extension of an existing deadline running from an old judgment; it is a reset deadline running from a new judgment. *See id.*

judgment. *See* 28 U.S.C. § 1291 ("[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts"). And as this Court emphasized in *United States v. Indrelunas*, United States Supreme Court holdings about the meaning of a judgment apply broadly to statutorily-imposed deadlines premised on the existence of a judgment. 411 U.S. 216, 217–18 (1973) (emphasizing that the decision as to whether a separate document was essential to the existence of a judgment was "of importance and concern to every litigant in a federal court, since . . . the timeliness of appeals, *as well as the timeliness of post-trial motions*, may turn on the question of when judgment is entered" (emphasis added)).[3]

2. The Thirteenth Circuit correctly adopted the Fifth Circuit's approach, which faithfully applies this Court's finality and filing deadline jurisprudence to post-judgment motion deadlines.

The Fifth Circuit correctly applied this Court's aforementioned precedents to post-judgment motion deadlines. In *Cornist v. Richland Parish School Board*, the question presented was whether the lower court's issuance of an amended judgment constituted the "judgment" from which began Rule 59(b)'s ten-day limit to file a motion for a new trial. 479 F.2d 37, 38 (5th Cir. 1973). Applying this Court's "long

[3] This Court has in at least one case declined to apply its holding from *Honeywell* to post-judgment motions. *See United States v. Adams*, 383 U.S. 39, 41 (1966). In *United States v. Adams*, the respondents—relying on *Honeywell*—argued that the Government's petition for certiorari was late because the ninety-day clock ran from the Court of Claim's initial judgment, instead of the subsequent one. *Id.* But this Court distinguished *Adams* because, unlike *Honeywell*, there was no question that the finality of the court's first judgment had been suspended. *See id.* This was because the Government had filed a timely motion to amend the original judgment, and thus the ninety-day clock to file a petition for certiorari "r[an] from the date of the [court's] order overruling the motion." *Id.* As such, there was no need to decide whether one of two judgments started the clock to appeal; there was no need to apply *Honeywell*. *See id.* Here, there *is* a question of which of two judgments began the period to file a timely post-judgment motion, R. at 8a, and thus *Honeywell* applies.

line of judicial authority" about substantive amended judgments and finality to Rule 59(b)'s judgment-based deadline, the Fifth Circuit held that an amended judgment "making a change of substance which 'disturbed or revised legal rights and obligations'" is a new judgment that restarts the deadline to file a Rule 59(b) motion. *Id.* at 39 (citing *Honeywell*, 344 U.S. at 211–12); *see also Wilmington Sav. Fund Soc'y, FSB v. Myers*, 95 F.4th 981, 982 (5th Cir. 2024) ("[i]n other words, the order making such substantive changes is construed as a new judgment from which the 30-day appeal clock runs").

Here, the Thirteenth Circuit correctly recognized that the Fifth Circuit's approach faithfully applied this Court's finality and filing deadline jurisprudence to the timeliness of post-judgment motions. R. at 9a. Applying the approach to Rule 50(b), the Thirteenth Circuit held that an amended judgment restarts the clock to file a renewed motion for judgment as a matter of law if the lower court "change[d] matters of substance"—"disturb[ing] or revis[ing] legal rights and obligations." R. at 9a (citing *Honeywell*, 344 U.S. at 211–12). In this case, the district court's amendment added to the judgment the originally excluded $350,000 in punitive damages—a change "the parties *agree*[4] . . . . revised the parties' legal rights and obligations." R.

[4] Although the parties also agree "that the Court did not intentionally exclude punitive damages in the Final Judgment," they nonetheless agree that "the addition of punitive damages to the Amended Final Judgment constituted a material, non-clerical modification." R. at 2 (as clarified). Although this Court's decision in *Zimmern v. United States* suggests that a judgment correcting "an accidental slip or omission" would not be a substantive change, this Court declined to apply the theory due to a lack of evidence tending to support it. 298 U.S. 167, 169 (1936). This Court noted that the judge "did not act, so far as the record show[ed], at the instance of the defendants," "stated . . . of his own motion that changes [needed] to be made," and did not "offer a word to indicate whether he meant them to be great or little." *Id.* Similarly here, there is nothing in the Record suggesting that the parties insisted on a changed judgment—the Record states that the district court judge issued the amended judgment "s*ua*

at 7a–8a (emphasis added). So under this Court's precedent in *Honeywell*, the district court "changed matters of substance" previously "settled with finality," as correctly recognized by the Thirteenth Circuit. R. at 9a. Consequently, the deadline to file a Rule 50(b) motion reset with the substantive amended judgment—the new final judgment—entered on January 27, 2022. R. at 10a. Thus, the University's Rule 50(b) motion, filed 28 days later, was timely and preserved the issue of liability for appeal. R. at 7a, 10a.

This Court should not apply the Seventh and Second Circuit's approach [hereinafter the "bears some relationship" requirement] to determine the timeliness of the University's Rule 50(b) motion because the requirement is inconsistent with this Court's prior precedents and relies on impractical concerns about litigants continuously delaying the finality of a judgment.

The Seventh Circuit, in deciding how to treat a lower court's alteration of a judgment with respect to the timeliness of a post-judgment Rule 59(e) motion, was concerned with a litigant's ability under 59(e) to file continuous motions and delay the finality of the judgment. *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 521 (7th Cir. 1993). In *McNabola v. Chicago Transit Authority*, the petitioner argued that their Rule 59(e) motion was timely because it was filed within ten days of a court-ordered remittitur, which the petitioner further argued was a new final judgment. 10

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sponte." R. at 7a (emphasis in original). Further, nothing in the language of the Amended Judgment indicates whether the court's goal was error-correction. R. at 4 (as clarified). Thus, insofar as the parties may now agree "that the Court did not intentionally exclude punitive damages in the Final Judgment," like in *Zimmern*, nothing in the Record suggests that the parties knew this at the time the court issued its amended judgment. And, in any event, the parties nonetheless agree that "the addition of punitive damages to the Amended Final Judgment constituted a material, non-clerical modification." R. at 2 (as clarified).

F.3d at 521. After finding that the court-ordered remittitur was "not 'final' at all," the Seventh Circuit went on to hold that, even if the remittitur had constituted a new final judgment, the petitioner's Rule 59(e) motion would *still* be untimely because it did not "bear some relationship to the district court's alteration of the first judgment." *Id.* The petitioner's motion "did not address [the] harm" imposed by the remittitur and thus was "addressed to the initial and not the amended judgment." *Id.* Justifying its requirement, the Seventh Circuit emphasized that "[Rule 59(e)'s] time limit would be a joke if parties could continually file new motions, preventing the judgment from becoming final." *Id.* The Second Circuit shared these concerns and similarly adopted the Seventh Circuit's "bears some relationship" requirement. *Tru-Art*, 852 F.3d at 221.

But the concern driving the "bears some relationship" requirement—that, without it, litigants will "prevent[] the judgment from becoming final" by filing continuous motions and delaying the time to appeal, *McNabola*, 10 F.3d at 521—fails to justify its addition of a requirement not found in this Court's jurisprudence concerning substantive amended final judgments. Per Federal Rule of Appellate Procedure 4(a)(1)(A), a party has "30 days after entry of judgment" to file a notice of appeal in civil cases. Rule 4 further lists six post-judgment motions that, when timely filed, suspend the judgment (and the thirty-day clock), where "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Fed. R. App. P. (4)(a)(1)(A). The Seventh Circuit concedes that such an order will typically stop a litigant's ability to continue to file post-judgment

motions—to delay the clock. *See Andrews v. E.I. Du Pont De Nemours & Co.*, 447 F.3d 510, 516 (7th Cir. 2006). It is a "rare exception" that, like here, R. at 8a, a court's order substantively amends, and consequently creates, "a new judgment." *Id.* Thus, insofar as the "bears some relationship" requirement accepts a harsh result based on concerns that litigants will abuse the post-judgment motion system to delay the finality of the judgment, the concern is rarely implicated and cannot justify a divergence from this this Court's "long line of judicial authority, " *Cornist*, 479 F.2d at 39, which supports that a substantive change to a judgment creates a new clock for post-judgment motions. *See Honeywell*, 344 U.S. at 211–12.

B. Even If This Court Applies the "Bears Some Relationship" Requirement, the University's Rule 50(b) Motion Is Still Proper.

If this Court chooses to adopt the "bears some relationship" requirement, the University's Rule 50(b) motion satisfies the requirement and is thus timely because it was aggrieved by, and filed a motion responsive to, the change. The requirement must be applied in the context of the specific post-judgment motion at issue—a Rule 50(b) renewed motion for judgment as a matter of law—and, as such, should not impose requirements made impossible by the Federal Rules of Civil Procedure.

1. The district court's proposed application of the "bears some relationship" requirement to Rule 50(b) imposes conditions impossible to follow under the Federal Rules of Civil Procedure.

When the Seventh Circuit articulated the "bears some relationship" requirement, it did so in the context of a Rule 59(e) motion to amend the judgment. *McNabola*, 10 F.3d at 521. The mechanics of Rule 59(e) are distinct from those of Rule

50(b)—the "bears some relationship" requirement should not apply narrowly such that it would require the University to have raised the issue of punitive damages for the first time in its Rule 50(b) motion. This construction imposes conditions on litigants that cannot be satisfied under 50(b), *i.e.*, to raise new arguments in a renewed motion for judgment as a matter of law.

Under Rule 59(e), a litigant can in a new motion object to alleged errors not previously raised stemming from a substantive amended judgment. *See* Fed. R. Civ. P. 59(e). But this is not so in the context of a renewed motion for judgment as a matter of law. As the name suggests, Rule 50(b) "*renew*[*s*]" post-verdict the 50(a) motion for judgment as a matter of law filed pre-verdict. Fed. R. Civ. P. 50(b) (emphasis added). A post-verdict 50(b) motion cannot raise new arguments or legal theories not at least implied by the 50(a) pre-verdict motion. *See Campbell v. District of Columbia,* 894 F.3d 281, 286 (D.C. Cir. 2018) ("The District raised [the speech] argument for the first time in its post-verdict Rule 50(b) motion; however, Rule 50(b) permits only the 'renewing' of arguments made in prior Rule 50(a) motions."). Thus, if a post-verdict amended judgment implicates an issue not addressed in a litigant's 50(a) motion, the litigant cannot likely address the specific change in a 50(b) motion.

Relevant here, courts have held that arguments contesting punitive damages under § 1983 cannot be raised for the first time under a Rule 50(b) motion. With respect to the awarding of punitive damages under § 1983, the statute equates the standard for punitive damages with "tort common law," where punitive damages may be awarded "for conduct that is outrageous, because of the defendant's evil motive or

his reckless indifference to the rights of others." *Smith v. Wade*, 461 U.S. 30, 46–47 (1983). In *Laymon v. Lobby House, Inc.*, the movant in their Rule 50(a) motion only raised the sufficiency of the evidence with respect to liability—there, for hostile work environment—without raising the issue of punitive damages until the post-verdict Rule 50(b) motion. 613 F. Supp. 2d 504, 511 (D. Del. 2009). The court held that "[w]hen the issues involve different elements of proof, a general Rule 50(a) motion is insufficient and ambiguous because it fails to delineate what claims are being contested." *Id.* at 512. As such, the movant could not in their Rule 50(b) motion raise the issue of punitive damages for the first time. *Id.*

Here, the University raised liability as the sole grounds for judgment as a matter of law in the 50(a) motion filed pre-verdict. R. at 8a. The district court, operating under a narrow construction of the "bears some relationship" requirement, faulted the University for failing to raise the specific issue of punitive damages in its renewed motion for judgment as a matter of law under Rule 50(b). R. at 23a ("Under these principles, there is no question that the University could have filed timely post-judgments motions challenging the award of punitive damages in the Amended Final Judgment."). The district court neglected to consider the original context of the "bears some relationship" requirement: a 59(e) motion to amend the judgment, under which a litigant is not limited by pre-verdict motions. Here, in the context of Rule 50, the University did not raise punitive damages in its pre-verdict 50(a) motion and consequently could not have raised the issue for the first time in its renewed motion under Rule 50(b). *See* Fed. R. Civ. P. Rule 50(b); *Laymon*, 613 F. Supp. 2d at 512. The

"bears some relationship" requirement is thus incompatible with Rule 50(b) as applied by the district court in this case. Accordingly, should this Court adopt the "bears some relationship" requirement, it should apply it broadly and in the context of Rule 50(b)'s purpose to preserve issues for appeal.

2. The University's motion "bears some relationship" to the substantive amended judgment because it served the purpose of preserving for appeal the University's objection to liability after a $337,513 increase in liability exposure.

When the Seventh Circuit articulated the "bears some relationship" requirement, the court noted that the purpose of Rule 59(e) is to "allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings." *McNabola*, 10 F.3d at 521. As such, "the purpose of the rule suggests that when a court *alters* its judgment, *a person aggrieved by the alteration may ask for correction*." *Id.* (emphasis in original). Stated differently, because a substantive amended judgment raises the possibility for new errors, an affected litigant must be able to raise those new potential errors and move for the court to amend. *See id.* As such, when the aggrieved litigant's 59(e) motion raises those errors, it bears the requisite relationship to the amended judgment; it is sufficiently "directed to the difference." *Branion v. Gramly*, 855 F.2d 1256, 1259 (7th Cir. 1988).

The purpose of Rule 59(e) is distinct from that of a Rule 50(b) renewed motion for judgment as a matter of law. With respect to purpose, Rule 50(b) serves many purposes relevant to a litigant's decision and ability to appeal the judgment. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400–01 (2006). Without

the filing of a Rule 50(b) motion, a court of review is "without power" to "direct the District Court to enter judgment contrary to the one it had permitted to stand," or "to order the entry of judgment in favor of that party where the district court directed the jury's verdict." *Id.* at 400–01. Further, a Rule 50(b) motion is necessary to the "[d]etermination of whether a new trial should be granted." *Id.*

Here, the district court's substantive amended judgment bears a relationship to the University's decision to appeal, and, by extension, bears a relationship to the University's decision to preserve its objection to liability by filing a Rule 50(b) motion. The district court's original judgment awarded McMillan $12,487 in compensatory damages. R. at 7a. As stated, there is no evidence in the Record to suggest that the parties were aware at that moment that the district court "unintentionally," R. at 2 (as clarified), excluded punitive damages. So, from January 20–26, 2022, the University's decision regarding whether to file a 50(b) renewed motion for judgment as a matter of law—*i.e.*, to preserve the liability issue for appeal—was predicated on $12,487 in compensatory damages. R. at 7a. Then, on January 27, 2022, the University "revised the parties' legal rights and obligations," R. at 8a, by $337,513 when the district court amended the judgment to add punitive damages. R. at 7a. Following this $337,513 increase in liability exposure, the University preserved its objection to liability by filing its 50(b) motion. R. at 7a–8a. Thus, in context, the University's 50(b) motion challenging liability does "bear some relationship," *McNabola*, 10 F.3d at 521, to the amended judgment. The motion *is* "directed to the difference." *Branion*, 855 F.2d at 1259.

Further, as the Seventh Circuit concedes, "when portions of a judgment are related, an alteration of one portion restarts the time with respect to all portions." *Charles v. Daley*, 799 F.2d 343, 34(7th Cir. 1986) (citing *United States v. Adams,* 383 U.S. 39, 41–42 (1966). Returning to *Adams*, this Court further dismissed the respondents' argument (that the Government's petition for certiorari was late because it was filed more than ninety days after the first of two judgments) because "the Government's liability was inextricably linked with the alleged contract action which was not determined until the latter judgment." *Adams*, 383 U.S. at 41–42. Specifically, the court's first judgment determined the Government had infringed on a valid patent, but not until the second judgment did the court determine the existence of a valid contract implicating the Government's obligation to "pay compensation." *Id.* at 41. Similarly here, not until the district court's second judgment was the University's obligation to pay damages fully realized, when the amended judgment added punitive damages. R. at 7a. As such, per this Court's precedent acknowledged by the Seventh Circuit, the alteration of damages "restart[ed] the time with respect to all portions" of the judgment, *Charles*, 799 F.2d at 348 (citing *Adams,* 383 U.S. at 41–42), including liability.

Thus, this Court should affirm the Thirteenth Circuit's decision that the University's Rule 50(b) motion was timely because—per the Fifth Circuit's correct approach—the deadline to file reset from the date of the substantive amended judgment. Even if this Court adopts the additional criteria from the Seventh and

Second Circuits, it should still nonetheless affirm that the University's motion is timely because it bears the requisite relationship to the amended judgment.

II. THE UNIVERSITY DID NOT INTERFERE WITH MCMILLAN'S FIRST AMENDMENT RIGHT TO FREE SPEECH.

This Court should affirm the Thirteenth Circuit's decision granting judgment as a matter of law in favor of the University because the University did not infringe on McMillan's First Amendment right to free speech. Judgment as a matter of law is proper when "a reasonable jury would not have a legally sufficient evidentiary basis to find for [a] party on [an] issue." Fed. R. Civ. P. 50(a)(1).[5] The University is entitled to judgment as a matter of law because the University had no affirmative obligation under the First Amendment to provide any measures for McMillan to assert her right to free speech. Even if such an obligation existed, the University is still entitled to judgment as a matter of law because the University's non-disciplinary policy was viewpoint-neutral and reasonable in light of the purpose of the forum such that it does not violate the First Amendment. Moreover, the University did not effectuate an unconstitutional heckler's veto in violation of the First Amendment because it did not cut off McMillan during her speech.

McMillan's First Amendment claim arises under Section 1983 of the United States Code, which imposes liability on any person who, under color of state law, deprives another of "any rights, privileges, or immunities secured by the

[5] This Court reviews *de novo* the denial of a motion for judgment as a matter of law. *Nimely v. City of N.Y.*, 414 F.3d 381, 389–90 (2d Cir. 2005). This Court must consider "the evidence in the light most favorable to the non-moving party and dra[w] all reasonable evidentiary inferences in that party's favor." *Id.* at 391.

Constitution." 42 U.S.C. § 1983.[6] Courts use a three-prong test to analyze § 1983 claims alleging a violation of the First Amendment right to free speech. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985); *Turco v. City of Englewood*, 935 F.3d 155, 161 (3d Cir. 2019). Under the first prong, courts determine whether the speech at issue is protected by the First Amendment. *Cornelius*, 473 U.S. at 797. Once speech is deemed to be constitutionally protected, courts identify the "nature of the forum" under the second prong, which informs the appropriate standard for analyzing a particular restriction of speech in the third prong. *Id.* After identifying the forum at issue, courts lastly determine "whether the government's justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.*

McMillan's claim fails at all stages of the free speech analysis. As to the first prong, there is no constitutional basis for McMillan's First Amendment claim because the Constitution does not impose an affirmative obligation on the University to provide protection for McMillan to assert her right to free speech. Even if this Court finds that the First Amendment imposes such an obligation on the University—thus, providing a constitutional basis under the first prong of the free speech analysis—the University is still entitled to judgment as a matter of law because McMillan's claim fails the remaining prongs. The University's non-disciplinary policy is viewpoint-neutral and reasonable in light of the purpose of the limited public forum, the

[6] The parties agree the University may be sued directly under § 1983 because it constitutes a municipality for purposes of *Monell* liability, as it is a public institution chartered by the City of Lantana. R. at 11a, n.4.

Auditorium. Accordingly, the University did not violate McMillan's First Amendment right to free speech in any capacity. This Court should therefore affirm the Thirteenth Circuit's decision and grant judgment as a matter of law in the University's favor.

A. The Thirteenth Circuit Correctly Held the University Has No Affirmative Obligation to Ensure McMillan Can Assert Her Right to Free Speech Because the First Amendment Merely Prohibits the University from Interfering with Free Speech.

This Court should affirm the Thirteenth Circuit's decision granting judgment as a matter of law in favor of the University because the University did not violate McMillan's right to free speech under the First Amendment. The First Amendment, applied to the states through the Fourteenth Amendment, prohibits laws and regulations that "abridge[e] the freedom of speech." U.S. Const. amend. I; *see Pomicter v. Luzerne Cty. Convention Ctr. Auth.*, 939 F.3d 534, 539 (3d Cir. 2019). This Court's precedent under the Due Process Clause of the Fourteenth Amendment and other clauses of the First Amendment compel the decision reached by the Thirteenth Circuit in favor of the University. R. at 14a. The First Amendment simply does not carry with it an affirmative duty to provide free speech protection because the First Amendment is phrased as a limitation on the government's ability to act against an individual's constitutional right to freedom of speech and does not entitle an individual to government resources to protect that freedom. U.S. Const. amend. I.

1. The First Amendment is phrased as a pure limitation on the government's power to act and thus does not require the government to provide protection for an individual's exercise of free speech.

The government is not obligated to provide protection for individuals exercising their constitutional rights where the Constitution merely prohibits the

government from infringing on those rights, as is the case with the First Amendment. This Court has held that negative constitutional rights prohibiting government interference, such as the Due Process Clause of the Fourteenth Amendment, do not impose additional duties on the government to affirmatively protect an individual's constitutional rights. For example, the government is not required to provide law enforcement protection for the assertion of constitutional liberties. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). Additionally, the government is not obligated to provide funding or resources to an individual who seeks to assert a constitutional right, such as the right to have an abortion. *Harris v. McRae*, 448 U.S. 297, 318 (1980). Because the First Amendment is similarly phrased as a negative right and solely protects an individual from government interference with the constitutional right to free speech, U.S. Const. amend. I, the government has no additional duty to provide protection for any assertion of free speech.

The First Amendment does not impose an affirmative obligation on the University to provide McMillan with measures to protect her right to free speech because the First Amendment is merely a limitation on the government's power to act. *DeShaney*, 489 U.S. at 195. There is no general right to police protection under the Fourteenth Amendment Due Process Clause, which prohibits the government from infringing on an individual's constitutional rights and liberties. *Id.* In *DeShaney v. Winnebago County Department of Social Services*, a child sustained permanent brain injuries after he was severely beaten by his father. *Id.* at 191. Social workers investigated the situation, but did not take any action to remove the child from his

father's custody. *Id.* at 192–93. This Court held the state had no affirmative duty to protect the child, and therefore, the state's failure to intervene did not violate the Due Process Clause. *Id.* at 202. This Court found that "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." *Id.* at 195. Because the Due Process Clause was phrased as a "limitation on the [s]tate's power to act," rather than as a constitutional guarantee of safety and security, the Clause could not be extended to impose an affirmative duty on the state to ensure an individual's interests were not harmed by other private actors. *Id.* The purpose of the Due Process Clause was strictly "to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196.

Because both the First and Fourteenth Amendments prohibit government interference rather than require government action, this Court's holding in *DeShaney* is applicable to the First Amendment claim at issue. The Free Speech Clause of the First Amendment is structurally similar to the Due Process Clause of the Fourteenth Amendment because it "merely guarantees that the state will not suppress one's speech." *Kessler v. City of Charlottesville*, 441 F. Supp. 3d 277, 286–87 (W.D. Va. 2020). Just as the Fourteenth Amendment did not impose an obligation on the government to provide police protection, *DeShaney*, 489 U.S. at 195, the First Amendment does not "guarantee that the state will protect individuals when private parties seek to suppress" free speech. *Id.* The First Amendment is purely a "limitation on the government's power to act." R. at 14a; *DeShaney*, 489 U.S. at 195. Accordingly,

the First Amendment's protection against government interference cannot be extended to impose any affirmative duty on the state. Here, just as the Due Process Clause of the Fourteenth Amendment does not guarantee the right to police protection, the First Amendment does not require the University to provide any free speech protection to McMillan.

Free speech claims arising under the First Amendment have applied this Court's reasoning in *DeShaney* to hold that the government has no obligation to provide free speech protection for public speakers in situations even more violent and disorderly than the student protest at issue. In *Kessler v. City of Charlottesville*, the plaintiffs, a set of "Unite the Right" rally members, alleged that the defendants, the City of Charlottesville and various city representatives, violated their First Amendment right to free speech by shutting down their rally in response to hostile interactions with counter-protestors. *Kessler*, 441 F. Supp. 3d at 280. There, the plaintiff speaker planned to oppose the Charlottesville City Council's proposal to take down a Confederate statute. *Id.* at 282. A group of Antifa counter-protesters arrived at the rally, and significant violence between the protesters ensued: demonstrators and counter-protestors threw debris, attacked each other with sticks, and sprayed pepper spray. *Id.* at 283. The Charlottesville police were ordered to stand down and, as a result, did not engage with the crowd. *Id.* at 284. One plaintiff was barred from entering the designated speaker's area by a blockade of state police troopers. *Id.*

In *Kessler*, the Virginia Western District Court denied the plaintiffs' allegation that the state had an affirmative duty to protect their right to free speech. *Id.* at 290.

The court applied the reasoning of *DeShaney* to the facts and analogized the text of the First Amendment to the Fourteenth Amendment. *Id.* at 287 (finding that "both the First Amendment and the Fourteenth Amendment embody negative—as opposed to positive—rights"). The court found the *DeShaney* decision and related precedent highly persuasive. *Id.* at 287. Because there is "no constitutional due process right to state protection of life, liberty or property, . . . a comparable claim to state protection of one's speech must fail as well." *Id.* The court held that the First Amendment does not impose an affirmative duty on the government to safeguard the assertion of free speech. *Id.* While the defendants were constitutionally barred from restricting the plaintiffs' free speech in response to possible hostility from protesters, the defendants had "no constitutional obligation to *prevent* that public hostility." *Id.* at 289 (emphasis in original).

Here, McMillan's speech was similarly interrupted by protesters who gathered in the Auditorium while she was speaking. R. at 6a. Unlike the plaintiff in *Kessler*, however, who was entirely unable to approach the area in which he was designated to speak, McMillan was able to enter the Auditorium and speak for five minutes before protesters arrived. R. at 6a. McMillan then voluntarily left the stage after a few minutes of trying to speak over the protesters. R. at 6a. As opposed to the violent, full-blown fights involving pepper spray, sticks, and debris in *Kessler*, the protesting students in this case were noisy and caused general disruption. R. at 6a. After McMillan left the stage, the students stained the Auditorium rug and damaged the podium and a few tables and chairs. R. at 6a. The *Kessler* court declined to impose

affirmative obligations on the government in an even more violent and disruptive setting than the facts at issue. *Kessler*, 441 F. Supp. 3d at 287. This Court should similarly decline to impose any obligations on the University. To now hold that the First Amendment—a "limitation on the state's power to act"—imposes an affirmative obligation on the government to provide protection for free speech would be contrary to existing law. *DeShaney*, 489 U.S. at 195.

2. The First Amendment's prohibition against government interference does not entitle an individual to resources or opportunities to exercise their right to free speech.

The First Amendment imposes no affirmative obligation on the University to provide McMillan with free speech protection because the right to be free from government interference does not create a corresponding right to provide resources or opportunities to assert that right. This Court has held that the Due Process Clause of the Fifth Amendment does not entitle an individual to funding for the exercise of constitutional rights. *Harris*, 448 U.S. at 317. Just as the Fifth Amendment does not obligate the government to provide resources for the assertion of constitutional liberties, the First Amendment similarly does not obligate the government to provide measures to protect the assertion of free speech.

This Court declined to impose an affirmative obligation on the government to provide funding for abortions under the federal Medicaid program in *Harris v. McRae*, 448 U.S. at 318. The plaintiffs in *Harris* challenged the "Hyde Amendment," a congressional funding restriction prohibiting the use of federal Medicaid funds to reimburse abortion costs, on the grounds that it violated the First, Fourth, Fifth, and Ninth Amendments. *Id.* at 302. This Court found that while a woman was free to

choose whether to have an abortion under *Roe v. Wade*, she was not constitutionally entitled to receive financial assistance from the government to support that decision. *Id.* at 316. The Fifth Amendment Due Process Clause's protection against government interference did not "confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.*

In holding that the Hyde Amendment did not encroach on a woman's right to choose, *Harris*, 448 U.S. at 318, this Court analogized to precedent in *Griswold v. Connecticut,* 381 U.S. 479 (1965) and *Pierce v. Society of Sisters*, 286 U.S. 510 (1925). In these cases, the government could not prohibit the use of contraceptives or prevent parents from sending their child to private school under the Due Process Clause. *Harris*, 448 U.S. at 318. These constitutional protections against government interference, however, did not impose an affirmative constitutional duty on the government to provide individuals with the financial resources to support those decisions. *Id.* This Court refused to translate the constitutional limitation on governmental power into an affirmative funding obligation because "[n]othing in the Due Process Clause supports such an extraordinary result." *Id.*

Similarly here, nothing in the First Amendment supports the "extraordinary result" of imposing a duty on the University to provide protection for campus speakers. Just as the Fourteenth Amendment only protects against government interference with a woman's right to decide whether to have an abortion and does not obligate the government to provide resources to fund those abortions, the First Amendment only protects against government interference with free speech and does

not obligate the government to provide resources to support the exercise of free speech. *See Harris*, 448 U.S. at 318. The First Amendment is similar to the other protections against government interference referenced in *Harris*. Just like the First Amendment, the right to use contraceptives from *Griswold* and the right to send children to private school from *Pierce* are both rights that strictly prohibit government interference. *Harris*, 448 U.S. at 318. The right to free speech is thus framed as a "limitation on governmental power," *id.*, and nothing in the First Amendment warrants the translation of that limitation into an affirmative duty to protect that right. Accordingly, the First Amendment's prohibition against government interference does not require that the University provide protection for the exercise of free speech.

This Court has followed its precedent in *Harris* to hold that the government is not obligated to provide individuals with resources or opportunities to assert their rights under the First Amendment. The government is not obligated to listen or respond to any individual's exercise of their First Amendment right to associate or advocate. *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 466 (1979) ("[T]he First Amendment does not impose any affirmative obligation on the government to listen [or] to respond."); *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 285 (1984) (same). Similarly, the government is not obligated to extend food stamp assistance to striking individuals who experience a decline in their incomes since the First Amendment right to associate does not entitle an individual to funding when exercising that right. *Lying v. Int'l Union*, 485 U.S. 360, 369 (1988). In accordance

with this Court's precedent in *Harris* and related First Amendment decisions, the University is not obligated to provide McMillan with resources to exercise her right to free speech.

B. Even If the University Had an Affirmative Duty to Provide Minimum Free Speech Protection, the University Did Not Violate the First Amendment Because Its Hands-Off Approach to Discipline Is Viewpoint-Neutral and Reasonable.

Even if this Court concludes that the University had an affirmative obligation to provide protection for McMillan to exercise her right to free speech, that right was still not infringed here. Upon finding a valid constitutional basis for McMillan's claim, this Court must next consider the second and third prongs of the free speech analysis by identifying the nature of the forum and applying the appropriate standard for analysis. *Cornelius*, 473 U.S. at 797. Under the second prong of the analysis, the forum at issue is the Auditorium, which is a limited public forum. *Id.* at 802. Once a university creates a limited public forum, "the university cannot then exclude speakers based on their ideology or . . . viewpoint." *Viewpoint Neutrality Now! v. Regents of the Univ. of Minn.*, 516 F. Supp. 3d 904, 919 (D. Minn. 2021); *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). For a limited public forum, the appropriate inquiry under the third prong is whether the University's policy is "reasonable and viewpoint neutral." *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679, n.11 (2010). The parties agree that the University's policy of inaction was not applied in a facially viewpoint-discriminatory manner, R. at 11a, nor was it adopted out of "hostility towards particular viewpoints." R. at 12a.

This Court's analysis thus turns on whether the University's policy satisfies viewpoint-neutrality or whether it amounts to viewpoint-discrimination. A speech restriction cannot "serve as a façade for viewpoint discrimination." *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 508 F.3d 94, 100 (2d Cir. 2007). Here, the University's policy of not disciplining students for their interference with campus activities—including shouting down speakers—does not serve as a façade for discrimination. This policy is viewpoint-neutral because it does not favor majority speech over minority speech, given that the University has consistently declined to intervene or discipline students for shouting down speakers who have spoken on a range of topics, such as institutional racism, Second Amendment rights, the legalization of recreational marijuana, and climate change. R. at 5a. The University's viewpoint-neutral policy is also reasonable in light of the purpose of the forum because it is consistent with Dean Thatcher's approach to student discipline. R. at 5a. The University's non-disciplinary policy, therefore, satisfies all three prongs of the free speech analysis. *Cornelius*, 473 U.S. at 797. As such, this Court should grant judgment as a matter of law in favor of the University and hold that the University did not violate McMillan's right to free speech under the First Amendment.

1. The University may properly limit free speech because the Hedge Family Auditorium is a limited public forum aimed at furthering the University's goal of educational advancement.

Because the constitutionality of speech restrictions on government property "'turns on the nature of the property involved and the restrictions imposed,'" *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 875 (8th Cir. 2020), the type of forum at issue frames this Court's analysis of McMillan's First Amendment claim.

Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001). This Court recognizes three types of fora: (1) the traditional public forum; (2) the public forum created by government designation (also known as a limited public forum); and (3) the nonpublic forum. *Cornelius*, 473 U.S. at 802. Government entities such as the University can create limited public forums by designating property for use by certain groups or for the discussion of certain subjects. *Martinez*, 561 U.S. at 679, n.11.

The forum at issue here is the Hedge Family Auditorium, which is categorized as a limited public forum because it was created by the University during its founding. R. at 2a. The Auditorium is part of the University's campus and is housed in the University's original campus building, New Tejas Hall. R. at 2a. The facts in the Record do not indicate the purpose of the Auditorium. Because the Auditorium is part of the University's campus, however, and the University is committed to "academic excellence, civic engagement, and leadership for the common good," R. at 2a, the Auditorium can be used as a forum to advance those goals. The University is intended to be an institution "open to everyone." R. at 2a. Thus, the Auditorium properly serves the University's purpose when its use is limited to speakers invited to speak on campus, such as McMillan. R. at 6a.

2. <u>The University's policy of inaction adheres to this Court's viewpoint-neutrality standard and does not establish a preference for majority speech over minority speech.</u>

Upon identifying the Auditorium as a limited public forum under the second prong, the final inquiry under the third prong is whether the University's non-disciplinary policy is viewpoint-neutral and reasonable in light of the purpose of the forum. *Cornelius*, 473 U.S. at 797. The University's hands-off approach to student

discipline is considered a policy for purposes of McMillan's § 1983 claim. R. at 11; 42 U.S.C. § 1983. This non-disciplinary policy does not favor majority speech over minority speech and therefore is a viewpoint-neutral and reasonable policy that does not violate the First Amendment. A policy is viewpoint-neutral when "minority views are treated with the same respect as [] majority views." *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) [hereinafter *Southworth I*]. A court must inquire into whether a policy is, in fact, viewpoint-neutral where a policy is facially neutral but disparately impacts particular viewpoints. *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 94 (2d Cir. 2003). This analysis turns on the purpose of the policy. *Id.* A facially-neutral policy is viewpoint-discriminatory "only if its *purpose* is to impose a differential impact upon a viewpoint." *Id.* (emphasis added). Because the University's non-disciplinary policy exists to reflect Dean Thatcher's laid-back approach to student discipline rather than to discriminate against certain viewpoints, the policy adheres to the viewpoint-neutrality standard of *Southworth I*.

The University's policy of not disciplining its students or preventing them from causing disruption is a genuinely viewpoint-neutral policy, unlike the facially neutral yet viewpoint-discriminatory policy in *Riley v. Nat'l Fed'n. of the Blind*, 487 U.S. 781 (1988). In *Riley*, this Court held unconstitutional a facially-neutral policy preventing charities from retaining "unreasonable" or "excessive" fees based on a tiered schedule. *Riley*, 487 U.S. at 784. As part of the policy, the professional fundraisers were required to disclose to potential donors the gross percentage of revenues retained, as well as obtain a license before beginning solicitation. *Id.* at 786. In holding the fee

policy unconstitutional, this Court found that the compelled disclosures frustrated professional charities' efforts to raise funds for the charities they represented, which "necessarily discriminate[d] against small or unpopular charities" that typically relied on professional fundraisers. *Id.* at 799–800. This in turn encouraged professional fundraisers to cease representing small or unpopular charities, and ultimately chilled those charities' ability to speak. *Id.* at 794. This Court determined that the facially-neutral policy discriminated against minority views and thus directly violated the charities' First Amendment right to free speech. *Id.*

Unlike *Riley*, however, the University's non-disciplinary policy does not discriminate against speakers advocating for minority views. University students have shouted down all kinds of speakers, including speakers on institutional racism, speakers discussing Second Amendment rights, speakers discussing the legalization of recreational marijuana, and speakers addressing the effects of climate change. R. at 5a. The Record does not indicate the various viewpoints for which these campus speakers were advocating; however, it is likely that these speakers were advocating for the majority viewpoint, but were still interrupted by students given their general "habit" of shouting down speakers. R. at 5a. It is also likely that the student protesters would have interrupted McMillan's speech no matter what stance she took to veganism. In all likelihood, McMillan could have been speaking in *opposition* to veganism and the students would have still gathered in protest. Regardless of McMillan's view, the University's policy of inaction in any situation would have had

the same effect. Thus, the University's decision not to intervene based on its non-disciplinary policy does not favor particular viewpoints over others.

Moreover, the purpose of the non-disciplinary policy is to give the students the freedom to be themselves, not to discriminate against speakers on campus. R. at 5a. Students have executed drastic senior pranks and have regularly interrupted classes and scheduled events with unauthorized parties—all events which resulted in no discipline. R. at 3a. No majority view is "safe" from rowdy student behavior. R. at 4a n.2. The University's failure to discipline students at McMillan's speech is therefore not a reflection of preference for majority over minority views, but rather is a reflection of Dean Thatcher's views towards the student body. R. at 4a. Accordingly, the policy does not serve as a "façade for viewpoint discrimination," *Amidon*, 508 F.3d at 100, and passes the *Southworth I* requirement of viewpoint neutrality. *Southworth I*, 529 U.S. at 235.

3. The University's non-disciplinary policy is reasonable in light of Dean Thatcher's approach to student governance.

The University's non-disciplinary policy is also reasonable in light of the purpose of the forum because it is consistent with Dean Thatcher's approach to student discipline. A viewpoint-neutral limitation on speech must also be "reasonable in light of the purpose of the forum." *Cornelius*, 473 U.S. at 797; *see also Rosenberger*, 515 U.S. at 829. Reasonableness is determined by considering the express purpose of the forum and all the surrounding circumstances. *Cornelius*, 473 U.S. at 797. A restriction is reasonable "when it is consistent with the government's legitimate interest in preserving the property for the use to which it is lawfully dedicated." *Int'l*

Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 688 (1992) [hereinafter *ISKCON*]. Reasonableness is a fact-intensive inquiry that balances factors such as "the uses to which the forum is typically put, the particular risks associated with the speech activity at issue, and the proffered rationale for the restriction." *New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20 (1st Cir. 2002) (citing *ISKCON*, 505 U.S. at 687–93). Consideration of the special attributes of the forum is also highly relevant. *ISKCON*, 505 U.S. at 688. Notably, reasonableness is "not a particularly high hurdle," *Ridley v. Mass. Bay. Transp. Auth.*, 390 F.3d 65, 90 (1st Cir. 2004), and a restriction on speech "need not be the most reasonable decision possible." *Id.*

Here, the University's non-disciplinary policy is reasonable in light of the purpose of the forum because it is consistent with Dean Thatcher's approach to student governance. The rationale for Dean Thatcher's laid back, hands-off approach to discipline is that the students are "good kids" who work hard and should not be punished. R. at 5a. Dean Thatcher's approach is embraced by campus security and the employees of the Department of Student Affairs, who generally leave students to their own devices. R. at 5a. As a preeminent educational institution, the University is permitted to discipline its students as it sees fit, even if that policy is one of non-discipline. R. at 5a. The non-disciplinary policy thus passes the low bar of reasonableness, *Ridley*, 390 F.3d at 90, because it is in line with Dean Thatcher's overarching views on student discipline. R. at 5a. As Dean of Student Affairs at the University, R. at 5a, Dean Thatcher may set disciplinary standards as he wishes.

Accordingly, the University's non-disciplinary policy is both viewpoint-neutral and reasonable in light of the purpose of the forum.

Thus, because the University's non-disciplinary policy satisfies all three prongs of the free speech analysis, the University did not violate McMillan's First Amendment right to free speech. This Court should therefore affirm the Thirteenth Circuit's decision granting judgment as a matter of law in favor of the University.

C. The University Did Not Effectuate a "Heckler's Veto" Because McMillan Voluntarily Ended Her Speech When Student Protesters Arrived.

Although the Thirteenth Circuit's decision properly held that the University did not violate McMillan's right to free speech, the court improperly phrased the students' habit of shouting down campus speakers as a "heckler's veto." R. at 5a. The University could not have effectuated a heckler's veto here because McMillan voluntarily ended her speech and left the stage when the protesters arrived. R. at 6a. A heckler's veto occurs when the state "curtail[s] 'offensive' speech to avoid . . . risks of public disorder." *Kessler v. City of Charlottesville*, No. 20-1704, 2022 U.S. App. LEXIS 35873 at *3 (4th Cir. Dec. 29, 2022) (quoting *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985)); *see Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) ("Speech cannot be . . . punished . . . simply because it might offend a hostile mob."). There are "several hallmarks of a heckler's veto: (1) a peaceful speaker; (2) a hostile crowd; and (3) a state actor that 'cuts off' only the peaceful speaker because of the crowd's reaction to their speech." *Balogh v. Virginia*, No. 23-1581, 2024 U.S. App. LEXIS 26814, at *16 (4th Cir. Oct. 23, 2024). A heckler's veto is categorically impermissible under the First Amendment because it is a form of viewpoint

discrimination against a speaker. *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248 (6th Cir. 2015). Here, no unconstitutional heckler's veto occurred because the University did not cut off McMillan or curtail any of her speech to avoid disruption by the student protesters. On the contrary, the University effectively gave McMillan a platform to continue speaking by not intervening at all. R. at 7a. McMillan, however, chose to preemptively cut off her own speech and permanently leave the stage. R. at 6a.

There is a difference between a state actively removing a speaker and a state declining to intervene so that it "does not destroy the right to free speech by indefinitely silencing the speaker." *Bible Believers*, 805 F.3d at 253. In *Meinecke v. City of Seattle*, a plaintiff speaker peacefully read from the Bible at both an abortion rally and at a LGBTQ+ festival and was physically assaulted by attendees of the two events. 99 F.4th 514, 517 (9th Cir. 2024). Instead of dealing with the abusive crowd, the police asked the plaintiff to move and later arrested him for refusing to relocate. *Id.* The Ninth Circuit held that the police officers effectuated a heckler's veto because they curbed the plaintiff's speech after the audience reacted with violence. *Id.* at 523–24. In contrast, in *Balogh v. Virginia*, the plaintiff participated in a "Unite the Right" rally, which quickly devolved into violence between protesters and counter protesters and led to numerous injuries, significant property damage, and one death. *Balogh*, 2024 U.S. App. Lexis, 26814, at *2. Police officers followed the Chief of Police's directive not to intervene and did not interrupt the "mutual combat." *Id.* The Fourth Circuit held that no heckler's veto occurred because the police did not "decline to

intervene on behalf of only one group." *Id.* at 17. Even if one party had remained peaceful, the heckler's veto claim would have failed because law enforcement effectively silenced both the hecklers and the speaker. *Id.* Additionally, the police officers were not required to "go down with the speaker" in the midst of the escalating violence between the parties. *Id.*

Here, the University did not cut off McMillan nor remove her from the stage in an attempt to silence the protesters. The Record plainly indicates that McMillan removed herself from the stage voluntarily after a few minutes and chose not to return. R. at 6a. Additionally, the University security officer did not "decline to intervene on behalf of only one group." *Balogh*, No. 23-1581, 2024 U.S. App. LEXIS 26814, at *17. Like the police officers in *Balogh* who followed the Chief of Police's directive to not intervene with the protest, the University's security officer followed Dean Thatcher's hands-off policy and did not intervene or discipline the students. R. at 5a, 7a. The security officer simply did not engage with either McMillan or the student protesters. R. at 7a. Therefore, because McMillan left on her own accord and was not cut off by the University in any capacity, the University did not effectuate an unconstitutional heckler's veto during McMillan's speech.

The Thirteenth Circuit correctly held that the University did not violate McMillan's First Amendment right to free speech because it did not have an affirmative constitutional obligation to provide measures to protect that speech. Even if this Court imposes such an obligation, the University still did not violate McMillan's First Amendment right because its non-disciplinary policy is viewpoint-

neutral and reasonable in light of the purpose of the forum. Moreover, the University did not effectuate an unconstitutional heckler's veto during McMillan's speech. Accordingly, this Court should affirm the Thirteenth Circuit's decision granting judgment as a matter of law in favor of the University.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests this Court affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully Submitted,

Team 67

Counsel for Respondent

November 18, 2024

APPENDIX

Constitutional Provisions

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

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

Statutory Provisions

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

> 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 50 provides in pertinent part:

> (a) **Judgment as a Matter of Law**.
>
> (1) *In General*. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (A) resolve the issue against the party; and
>
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be

maintained or defeated only with a favorable finding on that issue.

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

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

(1) allow judgment on the verdict, if the jury returned a verdict;
(2) order a new trial; or
(3) direct the entry of judgment as a matter of law.

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