Brief on the Merits

No. 22-0514

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

Team 80

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QUESTIONS PRESENTED

1. When a trial judge amends a final judgment, does the time for filing a post-judgment motion challenging unchanged portions of the judgment run from entry of the original final judgment or the amendment?

2. Does a University violate the First Amendment by adopting a viewpoint-neutral policy of refusing to discipline students who interfere with speakers on campus?

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Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 Mich. L. Rev. 982 (1996). 32

Erwin Chemerinsky, *Constitutional Law* 1177 (6th ed. 2020). 27

Final Judgment, *Black's Law Dictionary* (12th ed. 2024). 19

Inside Higher Ed, Student Mental Health Worsens, but More Are Seeking Help, National Center on Safe Supportive Learning Environments (Mar. 17, 2023), https://safesupportivelearning.ed.gov/news/student-mental-health-worsens-more-are-seeking-help. 43

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OPINIONS BELOW

The Thirteenth Circuit's unpublished opinion for Case No. 22-0514 is reproduced in the record at 1a-19a. The district court's opinion for Civil Action No. 21-cv-1285 is reproduced in the record at 20a-25a.

JURISDICTION

The Thirteenth Circuit entered its judgment on May 10, 2023. McMillan timely petitioned for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

The First Amendment to the United States Constitution is relevant to this case and is reprinted in Appendix A. Federal Rules of Civil Procedure 6(b) and 50(a)-(b) are also relevant to this case; they are reprinted in Appendix B.

STATEMENT OF THE CASE

City University of Lantana is one of the oldest and most storied educational institutions in New Tejas. R. at 2a. Since its humble founding in 1849, the University has grown tenfold, cultivating a tradition of excellence in academics, athletics, and civic engagement along the way. R. at 2a. This proud tradition has made an indelible mark on New Tejas: Nearly every one of the state's governors has been a proud "Scorpion." R. at 2a.

Not content to rest on its storied history, the University, years ago, hired into its deanship alumnus and former All-American football star Mason Thatcher. R. at 4a. Mr. Thatcher needs no introduction in New Tejas—at least since tallying 21 sacks in the Scorpion's 1998 season. R. at 4a. After that stellar season, Mr. Thatcher left the University for the NFL draft and played seven years with the Arizona Cardinals. R. at 4a. When he suffered a career-ending injury, however, Mr. Thatcher quickly returned to Lantana—this time, as Dean of Student Affairs for the University. R. at 4a.

Despite his placement in the Department of Student Affairs, Dean Thatcher's efforts (and recognition) served the University best when oriented toward development and alumni relations. Indeed, donations to the University increased dramatically when Dean Thatcher hit the fundraising circuit. R. at 4a. Alumni engagement similarly improved once he began personally hosting tailgates for Scorpions' athletic events. R. at 4a.

Back at the Department of Student Affairs, however, Dean Thatcher was more "hands-off." R. at 5a. He never adopted formal standards for student discipline and was generally uninterested in dishing it out himself. R. at 5a. After all, he believed the University's students were "good kids" who "worked hard" and deserved to "blow off a little steam" from time to time. R. at 5a. Eventually, Dean Thatcher's "boys will be boys" attitude spread throughout the office—including to campus security personnel. R. at 5a. Thereafter, student protests became increasingly disruptive. R. at 5a. Students at the University began heckling or "shouting down" guest speakers, leaving the speakers unable to address their audiences. R. at 5a.

A wide array of speakers fell victim to these "heckler's veto" incidents. R. at 5a. Indeed, student protesters showed no quarter for their political compatriots. R. at 5a. Speakers were shouted down at the University regardless of the topic or content of their speech and regardless of which student group invited them. *See* R. at 5a (affected speakers gave talks on institutional racism, armed self-defense, marijuana, and climate change). Students were not disciplined for their interruptions, even when University officials supported the affected speaker's views. R. at 5a, 12a.

On February 8, 2020, Dove McMillan arrived at the University by invitation of the Campus Vegan Alliance. R. at 6a. She began to "talk about how the human species has been exploiting and murdering animals at unprecedented levels in the name of consumerism, and [how] such depraved activities need to stop to save humanity and the world." R. at 6a. Shortly after McMillan began to speak in the University's auditorium, however, student protestors began assembling, making

noise, and drowning out her remarks. R. at 6a. McMillan asked the students to quiet down but to no avail. R. at 6a. After 15 minutes, she gave up and left the auditorium stage. R. at 6a. A campus security officer was present and witnessed the disruption, but consistent with the general "hands-off" culture of student discipline, he did not engage any protestors or put a stop to the disruption. R. at 7a.

McMillan sued the University under 42 U.S.C. § 1983, alleging that her First Amendment rights were violated by the University's hands-off approach to student discipline. R. at 7a, 11a. At trial, the University moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). R. at 7a. The district court denied the University's motion and sent the case to the jury. R. at 7a. The jury awarded McMillan $12,487 in compensatory damages and $350,000 in punitive damages. R. at 7a. On January 20, 2022, the district court entered an initial judgment that included only the awarded compensatory damages. R. at 7a. The court "did not intentionally exclude punitive damages" from its initial judgment, which made clear that "all relief not granted herein is DENIED." Clarification Questions for 2024 Moot Court National Championship Problem at 2 (first quotation); R. at 20a (second quotation).

A week later, on January 27, the district court *sua sponte* entered an amended final judgment that included the jury's $350,000 punitive damages award. R. at 7a. Twenty-eight days after that, on February 24, 2022, the University filed a renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). R. at 7a. The University's motion properly challenged the evidentiary basis for the

jury's finding of liability but did not directly challenge the punitive damages award. R. at 10a, 23a.

The district court ruled that the University's motion was untimely without addressing its merits. R. at 7a, 21a. Specifically, the court found that Rule 50(b)'s 28-day filing timeline began running when the court entered its initial judgment on January 20, 2022, R. at 23a-24a, and that Federal Rule of Civil Procedure 6(b) precluded the court from "extend[ing]" the University's time to file a post-judgment motion, R. at 21a-22a.

This Court granted certiorari on October 7, 2024, limited to two matters: (1) when a district court amends its judgment, does the time for filing a post-judgment motion run from the court's initial entry of judgment or its subsequent entry of an amended final judgment; and (2) whether a University violates the First Amendment by failing to protect campus speakers' free speech rights from private, third-party infringement.

SUMMARY OF THE ARGUMENT

The district court below entered two judgments against the University, one after the other. The University timely filed a Rule 50(b) motion 28 days after the district court entered its second judgment—a final amended judgment that materially altered the rights and obligations of both parties. But in misunderstanding Rule 6(b)'s prohibition on "extend[ing] the time to act under Rule[] 50(b)," the district court determined that the University's timeline for filing a post-judgment motion ran from the court's initial entry of judgment. Fed. R. Civ. P. 6(b)(2). Then, in failing to

properly review the University's post-judgment motion as a Rule 60(b) motion seeking relief for the district court's "mistake," the court determined the motion was not timely filed. Prudently, the Thirteenth Circuit reversed, adopting a superior timeliness test that—unlike the district court's test—gives full effect to Federal Rule of Civil Procedure 50 and respects binding precedent and the rule of finality. This Court should affirm that decision and hold as timely the University's 50(b) motion.

But in addition to being timely, the University's motion was also meritorious. No amount of evidence can show that the University violated the First Amendment by implicitly approving an organic, student-led culture of viewpoint-neutral interference with campus speakers. The University has no constitutional duty to protect Petitioner's right to free expression from being abridged by private, third-party actors (e.g., students). And the First Amendment's text, as well as this Court's precedents, make clear that the University cannot violate the First Amendment through nonaction. Moreover, no court-made exceptions can render the University constitutionally liable for a third party's obstruction of Petitioner's speech. Perhaps society is prepared to accept the consequences of imposing an affirmative duty to protect on at least some state actors. If that is the case, however, the duty should be created through democratic political processes. It should not be created by this Court, nor should it be discovered lurking somewhere in the text of the First Amendment 233 years after its ratification.

Assuming, however, that the University had a constitutional duty to protect Petitioner's free speech rights, its neutral, hands-off approach toward student

discipline would not constitute a breach. The University engaged in no content- or viewpoint-based discrimination. Petitioner failed to allege anything more than an impartial and evenhanded application of non-disciplinary action and did not even state a claim under § 1983. Had Petitioner stated a claim, the University's hands-off approach to student discipline would nonetheless satisfy intermediate scrutiny and be entitled to its own constitutional protection as government speech. Given these details, the Thirteenth Circuit held that the University's actions could not have possibly violated the First Amendment. This Court should affirm.

ARGUMENT

I. The University preserved its arguments with a timely Rule 50(b) motion.

A party that moves for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) may file a renewed motion under Rule 50(b) "[n]o later than 28 days after the entry of judgment." Fed. R. Civ. P. 50(b). Here, the district court below entered two judgments against the University, one after the other. The district court—after entering its initial judgment—substantially amended that judgment to alter the rights and obligations of both parties. R. at 7a ("Seven days [after entering an initial judgment against the University], the district court *sua sponte* modified the judgment to include [$350,000 of] punitive damages . . . ."). The result of the court's substantive amendment was a final amended judgment that actually disposed of the case at hand. 50(b)'s 28-day timeline can only run from one of these two judgments. This Court must determine which one that is—the district court's initial judgment, or its final amended judgment.

The district court below would fix 50(b)'s timeline to run from the initial judgment entered against the University. Surprisingly, there exists at least some support for this peculiar practice: In the Seventh Circuit, for example, the deadline for filing a post-judgment motion runs from a district court's entry of an amended judgment only if the motion "bear[s] some relationship to the district court's alteration" of its initial judgment. *McNabola v. Chi. Transit Auth.*, 10 F.3d 501, 521 (7th Cir. 1993). Here, the University's 50(b) motion challenged liability, which was not affected by the district court's alteration. R. at 8a. Consequently, the district court found that the University's filing timeline remained unaffected by the court's $350,000 alteration. This finding was procedurally and factually incorrect—even under the Seventh Circuit's test, the University sought timely post-judgment relief.

On appeal below, the Thirteenth Circuit adopted a "better reasoned" timeliness test from the Fifth Circuit. R. at 9a. Under this test, the deadline for filing a post-judgment motion runs from the entry of an amended judgment that "change[s] matters of substance," "resolve[s] a genuine ambiguity," or "revise[s the] legal rights and obligations of the parties" involved. *Wilmington Sav. Fund Soc'y, FSB v. Myers*, 95 F.4th 981, 982-83 (5th Cir. 2024) (cleaned up); *see also, e.g.*, *Dominguez v. Better Mortg. Corp.*, 88 F.4th 782, 788 (9th Cir. 2023) ("If a later order materially changes the substance of an earlier order, the later order can restart the clock for appeal of the entire earlier order, even where the appeal concerns a different matter from that revised by the district court.") (cleaned up). Here, the district court's award of punitive damages changed the substance of its initial judgment and "disturbed legal

rights and obligations which had been plainly and properly settled" under it. R. at 9a-10a. The Thirteenth Circuit, therefore, reversed the district court and held as timely the University's 50(b) motion. This decision should be affirmed.

The Fifth Circuit's "revises rights of a party" test is plainly superior to the Seventh Circuit's "relates to alteration" test. The Fifth Circuit's test fully effectuates the Federal Rules of Civil Procedure; the Seventh Circuit's test obstructs them. The Fifth Circuit's test is bolstered by Supreme Court precedent; the Seventh Circuit's test runs contrary to it. The Fifth Circuit's test looks to the finality of judgments; the Seventh Circuit's test obscures it, impeding litigants' fair notice and encouraging piecemeal motion practice and appellate review. Accordingly, this Court should affirm the Thirteenth Circuit's commonsense ruling, adopt the Fifth Circuit's timeliness test, and hold as timely the University's 50(b) motion.

A. The Federal Rules of Civil Procedure and Supreme Court precedent require the University's 50(b) timeline to run from the district court's entry of an amended judgment.

The Seventh Circuit's test requires that 50(b) motions address the altered portion of an amended judgment. This demand is functionally impossible. Moreover, the district court fundamentally misinterpreted Rule 6(b)(2) in ruling against the University. Both of the timeliness tests proposed below are consistent with Rule 6, but only the Fifth Circuit's test effectuates Rule 50. A simple presumption against ineffectiveness, therefore, counsels the Court to affirm.

Adopting the Seventh Circuit's test, the district court incorrectly found that the University's deadline for filing a 50(b) motion ran from the court's initial entry of

judgment. Specifically, because "the arguments raised in the University's [50(b)] motion d[id] not concern th[e] [c]ourt's alterations" to its initial judgment, but rather challenged "liability," the University's 50(b) timeline could not run from the court's entry of an amended judgment. R. at 23a. The problem here is that Rule 50(b) precluded the University from addressing the court's alterations.

All Rule 50(b) motions challenge "liability," and none can seek relief on a ground not previously raised in a motion made under Rule 50(a).[1] But 50(a) motions, in turn, must be filed *before* a final judgment is entered. The Seventh Circuit's test thus requires the University, in a 50(a) motion, to address the altered portion of an amended judgment that does not yet exist. The Court should reject this nonsensical approach to timeliness and affirm the Thirteenth Circuit's decision.

As this Court said in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008), "[a] motion under Rule 50(b) is not allowed unless the movant sought relief on similar grounds under Rule 50(a) before the case was submitted to the jury." Indeed, "[d]istrict courts lack authority to [even] grant a Rule 50(b) motion on a ground not previously raised in a Rule 50(a) motion." *Johnston v. Borders*, 36 F.4th 1254, 1270 n.31 (11th Cir. 2022) (quoting *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 902–03 (11th Cir. 2004)); *see also* Fed. R. Civ. P. 50 advisory committee's note to 2006 amendment ("A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion."). "The reason for this strict rule is simple. It 'is

[1] The University does not dispute the district court's broad characterization of 50(b) motions challenging "liability." R. at 23a. More precisely, however, 50(b) motions "challenge[] the sufficiency of the evidence in a civil jury trial." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 399 (2006).

designed to prevent unfair surprise and to provide the responding party with an opportunity to correct any deficiencies in her proof before the case is sent to the jury." *Cornwell Ent., Inc. v. Anchin, Block & Anchin, LLP*, 830 F.3d 18, 25 (1st Cir. 2016) (quoting *Lynch* v. *City of Bos.,* 180 F.3d 1, 13 n. 9 (1st Cir. 1999)).

Of course, a movant filing a Rule 50(a) motion before his case is submitted to the jury can hardly be expected to anticipate the jury's verdict, the court's subsequent entry of an initial judgment, and the court's later alteration of its initial judgment. But that is exactly what the Seventh Circuit's test demands of all movants, and what the district court here demanded of the University. Imagine this incongruency in action: In order to comply with both (1) the Seventh Circuit's mandate that 50(b) "motion[s] must challenge the altered" portion of an amended judgment, *McNabola*, 10 F.3d at 521, and (2) Rule 50's requirement that "[a] motion under Rule 50(b) is not allowed unless the movant sought relief on similar grounds under Rule 50(a)," *Exxon Shipping Co.*, 554 U.S. at 486 n.5, the University would have had to move for judgment as a matter of law under 50(a) on grounds that the district court would, months into the future, enter a presumptively unconstitutional award of punitive damages in an amended judgment.[2]

Naturally, a future award of damages entitles no one to judgment as a matter of law. (Recall that motions filed under Rule 50 challenge the sufficiency of evidence

[2] An award of punitive damages becomes constitutionally suspect when it exceeds a corresponding award of compensatory damages by a factor of ten of more. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."). Here, the district court entered awards against the University for $12,487 of compensatory damages and $350,000 of punitive damages. R. at 20a.

at trial.) Hence, compliance with the Seventh Circuit's test—at least for Rule 50(b)—is impossible.[3] And because circuit splits are not resolved in favor of the ruling that most obstructs the Federal Rules of Civil Procedure, the Court should adopt the Fifth Circuit's test. Where one test fully effectuates Rule 50(b), and another test erases any opportunity to utilize 50(b), the former is an obvious pick.

As it was adopted by the district court below, the Seventh Circuit's "relates to alteration" test is also inconsistent with Federal Rule of Civil Procedure 6(b)(2), which prohibits courts from "extend[ing] the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." This prohibitory language was persuasive, if not dispositive, in the district court's adoption of the Seventh Circuit's timeliness test. But more careful scrutiny reveals errors in the district court's analysis and application of Rule 6(b)(2), which is textually agnostic toward the resolution of the circuit split at issue here. Correcting those errors reveals that the University's motion was timely regardless of the circuit test applied. *See infra* Part I. C. For present purposes, however, it suffices to show that Rule 6(b)(2) does not counsel the Court toward adopting the Seventh Circuit's test.

Because Rule 6(b)(2) prohibits courts from "extend[ing] the time to act under Rule[] 50(b)," the district court below disclaimed any "power to extend the [University's] time for a [filing] a post-judgment motion." Fed. R. Civ. P. 6(b)(2); R. at

[3] The notion that the University could have sought post-judgment relief under a different rule—say, Rule 59(e)—is both false and immaterial. It is false because "this Court has determined that a party may only pursue on appeal a particular avenue of relief available under Rule 50(b), namely, the entry of judgment *or a new trial,* when that party has complied with the Rule's filing requirements by requesting that particular relief below." *Unitherm Food Sys., Inc.*, 546 U.S. at 402. It is immaterial because under the Seventh Circuit's test, filing a Rule 50(b) motion is always futile when a judgment has been amended. The Fifth Circuit's test, on the other hand, does no violence to Rule 50(b).

21a-22a. The court then rejected the Fifth Circuit's test because, under the circumstances, that test seemed to "extend" the University's timeline for filing a 50(b) motion. The district court's analysis suffers from a threshold and foundational problem: Extending a 28-day timeline to file a post-judgment motion (say, to 35 days) is not the same as determining that a 28-day timeline should run from the court's entry of an amended judgment (as opposed to its earlier entry of an initial judgment). Put another way, the district court conflated its ability to "extend" the timeline for filing a post-judgment motion—an action prohibited by Rule 6(b)(2)—with its ability to restart the timeline for filing a post-judgment motion to run from an amended judgment—an action consistent with Rule 6(b)(2). The University never sought to extend its time to file a 50(b) motion below, and it does not ask the Court to do so here.

A court that extends a timeline enlarges it in a temporal sense. *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 389 (2021) ("'[E]xtension' . . . refer[s] to the lengthening of a period of time."). The University accepts that Rule 50(b) motions must be filed "[n]o later than 28 days after the [district court's] entry of judgment," and does not seek to enlarge, lengthen, or extend that 28-day timeline. Fed. R. Civ. P. 50(b). The relevant question here is not how long the University's timeline was, but when it began—which of the district court's two judgments is contemplated by Rule 50(b)? By correctly determining that 50(b)'s timeline restarted to run from the district court's entry of an amended final judgment, the Thirteenth Circuit in no way "extended" the timeline. Rather, the Thirteenth Circuit simply

initiated the timeline at its lawful and proper point. The Circuit Courts of Appeals are replete with examples of this "restarting" maneuver, which is perfectly consistent with Rule 6(b)(2). *E.g.*, *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 823 Fed. Appx. 559 (10th Cir. 2020) (movant's timeline for filing a motion under Rule 59(e) restarted to run from the district court's entry of an amended judgment).[4]

The district court's erroneous understanding of Rule 6(b)(2)'s prohibition on granting extensions would, if correct, prohibit both the Fifth and Seventh Circuits' tests. After all, both tests "extend" a movant's timeline for filing a post-judgment motion—at least as the district court employed the word. The two tests just allow for so-called "extensions" in different circumstances. Admittedly, the Seventh Circuit's test is more restrictive—it extends a movant's timeline to file a post-judgment motion only when that motion "bear[s] some relationship to the district court's alteration" of a past judgment. *McNabola*, 10 F.3d at 521. But imagine a slightly different scenario where the University's 50(b) motion "b[ore] some relationship to the district court's alteration" of its initial judgment. *Id.* In that case, the district court would allow for an extension under the Seventh Circuit's test. At the same time, the district court would be stuck arguing that Rule 6(b)(2) precludes the extension.

A proper understanding of Rule 6(b)(2) resolves this conundrum. The rule, "[t]o help preserve the finality of judgments," *Green v. Drug Enf't Admin.*, 606 F.3d 1296,

[4] Note that *Nutraceutical Corp. v. Lambert*, 586 U.S. 188 (2019) and its forebearers preclude a different maneuver—tolling. "[T]olling . . . pauses the clock until a specified event occurs" and is distinguishable from both extending and restarting. *Klayman v. Judicial Watch, Inc.*, 6 F.4th 1301, 1310 (D.C. Cir. 2021). Under *Nutraceutical Corp.*, some claim-processing rules are not subject to equitable tolling for harmless error or excusable neglect. 586 U.S. at 192-93. But *Nutraceutical Corp.* did not concern which of two judgments a timeline attaches to and its prohibition on tolling does not apply to the dispute here.

1300 (11th Cir. 2010), prohibits a court from "extend[ing] 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). But a movant acts under these covered rules by filing a motion invoking their name and, more importantly, their legal standards. Rule 6(b)(2), therefore, prohibits a court from "grant[ing a] motion for extension of time to file" one of its covered motions. *Green*, 606 F.3d at 1300. The Rule does not, as the district court seemed to assume, prohibit a court from restarting a non-jurisdictional claim-processing deadline to run from that court's entry of an amended judgment. Because the Thirteenth Circuit understood this and correctly identified the Fifth Circuit's "revises rights of a party" test as "the better[-]reasoned [timeliness] rule," this Court should affirm. R. at 9a.

The Court should also affirm here because, as the Thirteenth Circuit correctly noted, the Fifth Circuit's test is consistent with *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952). The Seventh Circuit's test is not. In *Minneapolis-Honeywell*, this Court held that the statutory and jurisdictional timeline for seeking a writ of certiorari is unchanged by "the mere fact that [a final appealable] judgment previously entered has been reentered or revised in an immaterial way." *Id.* at 211; *see also id.* at 207 ("The initial question in this case is one of jurisdiction—whether the petition for certiorari was filed within the period allowed by law."). Accordingly, the Court dismissed the Federal Trade Commission's petition, which the Commission had filed five months after the circuit court's entry of a final judgment. *Id.* at 213.

The *Minneapolis-Honeywell* Court also laid bare a test to govern future timeliness challenges: When "a judgment previously entered has been reentered or

revised in an immaterial way," the applicable timeline always runs from the initial judgment. *Id.* at 211. When a later judgment "disturb[s] or revise[s] legal rights and obligations which . . . had been plainly and properly settled with finality" in a past judgment, the applicable timeline runs from the entry of the amended judgment. *Id.* at 212. Or, more simply, "when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered," then "the period within which an appeal must be taken or a petition for certiorari filed begin[s] to run anew." *Id.*[5]

Minneapolis-Honeywell's reasoning does not just apply here, it applies here doubly. There, the Court was considering the Commission's timeline to petition for a writ of certiorari. The Court "ha[s] repeatedly held that this statute-based filing period for civil cases is jurisdictional" and thus "mandatory." *Bowles v. Russell*, 551 U.S. 205, 209, 212 (2007). Even still, the *Minneapolis-Honeywell* Court ruled that a petitioner's timeline restarts to run from the entry of any amended judgment that "disturb[s] or revise[s the petitioner's] legal rights and obligations." 344 U.S. at 212. Here, by contrast, the district court's initial judgment was not final, *see infra* Part I. B., and Rule 50(b)'s timeline is non-statutory and non-jurisdictional. Indeed, Rule 50(b)'s "time limit [is] prescribed only in a court-made rule[and, therefore,] is not jurisdictional; it is, instead, a mandatory claim-processing rule." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 19 (2017). "These are rules that seek

[5] Notably, the dissenting justices in *Minneapolis-Honeywell* would have construed the rule even more permissibly to find the Commission's petition timely. *See, e.g.*, *Minneapolis-Honeywell Regulator Co.*, 344 U.S. at 214 (Black, J., dissenting) ("[T]he petition for certiorari here was filed in time.").

to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

One strains to reason how, under the Seventh Circuit's test, a procedural claim-processing timeline can attach inseparably to the entry of an initial judgment that is later superseded to affect the legal rights of the parties. *Minneapolis-Honeywell* forecloses such a test—even if the relevant timeline is jurisdictional and statutorily linked to the entry of a final judgment. The Seventh Circuit's test simply cannot be administered consistently with *Minneapolis-Honeywell*. The Thirteenth Circuit understood this when it adopted the Fifth Circuit's "revises rights of a party" test. This Court should affirm that decision and adopt the test nationwide.

B. The rule of finality requires the University's 50(b) timeline to run from the district court's entry of an amended judgment.

The district court's initial judgment purported to be the case's final judgment and expressly denied all relief not granted therein. R. at 7a. No one disputes that the district court's initial judgment "constituted a final judgment" at the time it was entered. R. at 23a n.2. Petitioner, however, fails to take account of how circumstances changed a week later when the court superseded its initial judgment. At that point precisely—when the court entered a final amended judgment that materially altered the rights and obligations of both parties—the district court's initial judgment was rendered nonfinal. The University sought timely post-judgment relief under Rule 50(b) 28 days later, only to have its relief denied because the Seventh Circuit's test

does not distinguish between final and nonfinal judgments. The Court should remedy this deficiency by affirming here and expressly adopting the Fifth Circuit's test.

Under the Seventh Circuit's test, timeliness turns on whether a post-judgment motion "bear[s] some relationship to the district court's alteration" of an earlier judgment. *McNabola*, 10 F.3d at 521. The test, therefore, looks to the substance of the post-judgment motion while remaining agnostic as to the substance of the district court's alteration. This ignores finality: Even when (as was the case here) a district court completely supersedes and renders nonfinal its initial judgment, the Seventh Circuit's test still allows claim-processing timelines to run from the court's entry of that superseded judgment. So long as a movant's post-judgment motion does not "challenge the altered" portion of the court's amended judgment, the timeline will remain attached to a judgment that has been rendered nonfinal. *Id.*

Under the Fifth Circuit's test, on the other hand, the timeline for filing a post-judgment motion is inherently linked to the district court's entry of a final judgment. The test looks to finality and thus distinguishes between final and nonfinal judgments. Doing so is crucial because finality is a bedrock principle of post-judgment motion practice and appellate procedure. Once a judgment is final, litigants are afforded certainty as to their rights and obligations. They are likewise encouraged to settle, seek post-judgment relief, or appeal. The Court, therefore, should affirm here, adopt the Fifth Circuit's test, and hold as timely the University's 50(b) motion.

Finality depends on completeness—whether a judgment fully "put[s] to rest the questions which the parties had litigated." *Minneapolis-Honeywell Regulator Co.*,

344 U.S. at 213. Finality does not, however, depend on titling. A court may enter a separate document that is labeled as its "final judgment"; that judgment is not final unless it completely disposes of the issues at hand. *See id.* at 212-13 (rejecting the argument that the court of appeals's decree was final by virtue of being labeled as such). Put differently, "the question of whether the time for [post-judgment relief is] to be enlarged cannot turn on the adjective which the court below chose to use in the caption of its [initial] judgment." *Id.* at 212. Extrinsic sources and more modern precedents agree. Black's Law Dictionary defines a "final judgment" as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment." *Final Judgment*, *Black's Law Dictionary* (12th ed. 2024). And this Court has recently said that a final judgment "leaves nothing for the court to do but execute the judgment," *Hall v. Hall*, 584 U.S. 59, 64 (2018), and "is typically one 'by which a district court disassociates itself from a case,'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint v. Chambers Cnty. Comm'n,* 514 U.S. 35, 42 (1995)).

Here, the rights of the parties were not settled until the district court—in its second judgment—entered an award of punitive damages for Petitioner. Just as obviously, if the district court's first judgment was final and the court, therefore, had "nothing to do," it would not have amended its judgment to award Petitioner punitive damages 28 times larger than her award of compensatory damages. *Hall*, 584 U.S. at 64; *see also* R. at 7a. That is because "[i]n damage and injunction actions, a final

judgment in a plaintiff's favor declares not only liability but also the consequences of liability—what, if anything, the defendants must do as a result." *Franklin v. District of Columbia,* 163 F.3d 625, 629 (D.C. Cir. 1998). Here, only the district court's amended judgment declared fully the consequences of the University's liability. Thus, the district court's initial judgment *was* final, but only for one week. When—at the end of that week—the district court entered its amended judgment, the court simultaneously extinguished the finality of its initial judgment. In other words, the initial judgment was wholly superseded by the second, amended judgment.

Because the Seventh Circuit's test refuses to distinguish between final and nonfinal judgments, it works to destroy the certainty a final judgment is intended to provide. Litigants—like the University here—are precluded from relying on the finality of judgments. Litigants are likewise encouraged to participate in piecemeal motion practice and seek appellate review of multiple judgments.

To illustrate, imagine the district court here had not amended its initial judgment after seven days. Next imagine that the University, perhaps content to pay $12,487 in compensatory damages and avoid further costs of litigating the matter, had decided not to seek post-judgment relief. But then, 35 days after entering its initial judgment, the district court, *sua sponte*, modified its initial judgment to include a $350,000 award of punitive damages against the University. Under the Seventh Circuit's test, the University—without fair notice and through no fault of its own—is stuck without any opportunity to file a 50(b) motion challenging the sufficiency of the evidence leading to the (presumptively unconstitutional) damages award. Moreover,

the University is precluded from seeking appellate review of the issue, since "in the absence of such a motion an appellate court is without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400–01 (2006) (cleaned up). Of course, here the facts are identical in function and outcome. And while the Thirteenth Circuit saved the University from such a nonsensical rule, the Court should formally adopt the Fifth Circuit's test nationwide to restore the rule of finality to post-judgment motion practice.

C. The University sought timely post-judgment relief irrespective of the timeliness test applied.

The district court below amended its initial judgment to add a presumptively unconstitutional $350,000 award of punitive damages. Under the Fifth Circuit's test, this amendment restarted Rule 50(b)'s 28-day timeline for filing a post-judgment motion; the University's motion was filed 28 days later and, therefore, timely. This Court should adopt this test and affirm the Thirteenth Circuit's ruling. But even if the Court disagrees and adopts the Seventh Circuit's test, it should still hold that the University sought timely post-judgment relief under Rule 50 and reach the merits of Petitioner's First Amendment claim.

There are two reasons why the University satisfied the Fifth Circuit's "revises rights of party" test. Recall that under this test, the deadline for filing a post-judgment motion runs from the entry of an amended judgment that "change[s] matters of substance," "resolve[s] a genuine ambiguity," or "revise[s the] legal rights and obligations of the parties" involved. *Wilmington Sav. Fund Soc'y, FSB*, 95 F.4th

981 at 982-83 (cleaned up). Here, the district court's amendment changed the substance of its initial judgment. "[M]atters of substance," of course, speak to "the intrinsic rights and wrongs of a case . . . in distinction from matters of form." *Johnson v. Williams*, 568 U.S. 289, 302 (2013). Since "punitive[damages] are aimed not at compensation but principally at retribution and deterring harmful conduct," their award speaks plainly to the rights and wrongs—the substance—of a case. *Exxon Shipping Co.*, 554 U.S. at 492 (2008). Perhaps more obviously, here, the district court's "original judgment 'omitted a paragraph of substance'" as compared to its amended judgment. R. at 10a (quoting *Cornist v. Richland Par. Sch. Bd.*, 479 F.2d 37, 39 (5th Cir. 1973)). And "while it is certainly true that [this Court] accord[s] great deference to a district court's interpretation of its own orders, that deference does not permit the district court, *post hoc,* to add provisions to an order that simply were not there originally." *Dudley ex rel. Estate of Patton v. Penn-Am. Ins. Co.*, 313 F.3d 662, 669 (2d Cir. 2002) (Sotomayor, J., concurring) (citations omitted). Moreover, as the Thirteenth Circuit correctly noted, the district court's award of punitive damages "disturbed legal rights and obligations which had been plainly and properly settled" under the initial judgment. R. at 9a-10a.

But even if the Court favors the Seventh Circuit's "relates to alteration" test, the University still sought timely post-judgment relief. Mandatory in the Seventh Circuit—and commonplace elsewhere—is the practice of construing untimely post-judgment challenges as timely motions brought under Rule 60(b), which need only be filed "within a reasonable time." Fed. R. Civ. P. 60(c)(1); *see also Helm v. Resolution*

Tr. Corp., 43 F.3d 1163, 1166 (7th Cir. 1995) ("Helm's motion was required to be considered as a 60(b) motion, not just as an untimely 59(e) motion."); *Meilleur v. Strong*, 682 F.3d 56, 60 (2d Cir. 2012) ("Meilleur's motion fell far outside the 28–day period for filing a Rule 59(e) motion to alter or amend a judgment. Consequently, we construe her motion as proceeding under Rule 60(b)."). Presumably, this practice was made mandatory in the Seventh Circuit as a band-aid to cover the jurisdiction's overly restrictive timeliness standard. But regardless of the reasoning behind its adoption, the University's motion satisfied Rule 60(b)'s legal standards and "reasonable" time limit and, therefore, was timely filed even under the Seventh Circuit's test.

Blue v. Int'l Bhd. of Electrical Workers Local Union 159, 676 F.3d 579, 583 (2012) illustrates that the Seventh Circuit has "long construed [untimely post-judgment] motions . . . as motions for relief under Federal Rule of Civil Procedure 60." *See also id.* (collecting cases). In *Blue*, "the district court . . . violated Federal Rule of Civil Procedure 6 by extending [the defendant's] time to file its post-trial motions beyond 28 days." *Id.* at 584. But "[t]he only consequence . . . [was] that the scope of the court's authority became constrained by Rule 60." *Id.*

Quite notably, Rule 60(b)(1) allows relief for a court's "mistake," which "includes a judge's errors of law." *Kemp v. United States*, 596 U.S. 528, 533–34 (2022); *see also* Fed. R. Civ. P. 60(b)(1). Moreover, "Rule 60(b)(1) covers all mistakes of law made by a judge," rather than simply "obvious" legal errors. *Kemp*, 596 U.S. at 534. The *Kemp* Court observed that this interpretation would allow litigants "to evade other time limits set forth in the Federal Rules. For instance, Rule 59(e) motions to

alter or amend a judgment must be filed within 28 days, and appeals must generally be filed within 30 days." *Id.* at 537. Of course, the same concern applies to Rule 50(b). Regardless, the *Kemp* Court dismissed as "overstated" concerns over "litigation gamesmanship and strategic delay." *Id.* at 538. Rule 60 itself provided a sufficient backstop for the Court, since "all Rule 60(b) motions[] must be made 'within a reasonable time.'" *Id.* at 538 (quoting Fed. R. Civ. P. 60(c)(1)).

Taken together, *Blue* and *Kemp* prove that the University's post-judgment motion—even if untimely when construed as 50(b) motion—should have been construed as a timely 60(b)(1) motion under the Seventh Circuit's test. Such a construction is uniquely intuitive because, at least as applied in this case, the legal standards of the two rules are virtually indistinguishable. Recall that Rule 50 motions "challenge[] the sufficiency of the evidence in a civil jury trial," *Unitherm Food Sys., Inc.*, 546 U.S. at 399, and that both 50(a) and 50(b) motions are constrained to the same arguments, *Exxon Shipping Co.*, 554 U.S. at 486 n.5. Here, the University filed a 50(a) motion during trial and renewed its same arguments after trial under Rule 50(b). Hence, the University's 50(b) motion is necessarily alleging the district court made a "mistake of law" by denying its earlier motion. Moreover, because the standards for relief under both 50(b) and 60(b)(1) fall on one side of the same coin, the trial court erred by not accepting the University's motion as timely under Rule 60. Put simply, the University's motion was argued within the scope of Rule 60 and properly filed within its "reasonable time" limit. Fed. R. Civ. P. 60(c)(1). Therefore,

even under the Seventh Circuit's "relates to alteration" test, the University sought timely post-judgment relief.

* * *

In sum, Rule 6(b) merely prohibits a court from granting a motion to extend the time to file a covered post-judgment motion. The district court erred to the extent that 6(b) factored into its adoption of the Seventh Circuit's test and erred again when it failed to analyze the University's motion under Rule 60(b). To be sure, this Court should adopt the Fifth Circuit's test because it is more consistent with the Federal Rules of Civil Procedure, precedent, and the finality of judgments. But even if the Court adopts the Seventh Circuit's test, the University's motion should be construed as a timely motion filed under Rule 60(b) and the Court should rule on the merits of Petitioner's First Amendment Challenge.

II. The University did not violate Petitioner's First Amendment rights and has no duty to protect them from private infringement.

The First Amendment to the United States Constitution proclaims that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Congress is the subject of the First Amendment's prohibitions and, therefore, "the First Amendment constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 804 (2019); *see also Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the First Amendment's prohibitions against the states). The First Amendment, therefore, grants a negative right, not a positive right. The difference is that negative rights arrest government power and provide citizens with the liberty to "be[] let alone by the state." *Jackson v. City of*

Joliet, 715 F.2d 1200, 1204 (7th Cir.). Positive rights, on the other hand, grant citizens the privilege of "being helped by the state." *Id.* Petitioner fails to distinguish between the two conceptions. Her claims presuppose that the First Amendment creates an affirmative duty for state actors to protect the free speech rights of individuals.[6] It does not. The First Amendment has never been interpreted to impose an affirmative duty to protect, and the Court has no constitutional authority to create one now. The Court should reject Petitioner's ambitious attempt to rewrite American history and constitutional law and hold that the University had no duty to protect her rights from private infringement.

Even if the Court disagrees, however, a brief indulgence into Petitioner's sweeping constitutional revision reveals that her claims are without merit. A municipal body like the University cannot be subject to liability under § 1983 unless it causes harm through an official policy or custom with the force of law. But the University's general culture of non-discipline formed organically; it was never adopted as—and never amounted to—a policy, practice, or custom with the force of law. Moreover, for Petitioner's § 1983 claims against the University to be successful, she must prove that the University deprived her of rights, privileges, or immunities secured by the First Amendment. *E.g.*, *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). But Petitioner's First Amendment rights were not violated by any state actor, much

[6] Or, perhaps, Petitioner may be alleging that a broader affirmative duty to protect constitutional rights can be found within the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 1. The University's arguments against such a duty primarily reference the First Amendment but apply equally to the Due Process Clause. Moreover, this Court has already said that the Due Process Clause creates no affirmative duty for government entities to protect against private violations of rights. *See infra* Part II. A.

less the University. Petitioner failed to even allege that the University approached student discipline in a discriminatory matter with regards to speakers, viewpoints, or content. Under these circumstances, Petitioner's First Amendment claims must fail, even if the University had a duty to protect her constitutional rights. Accordingly, the Court should affirm the Thirteenth Circuit's ruling that no reasonable jury could find the University violated Petitioner's First Amendment rights.

A. The University has no legal obligation to protect Petitioner's constitutional rights from private, third-party infringement.

Petitioner argues that the University had a duty to protect her constitutional rights from being violated by private actors. It did not. The First Amendment prohibits government intrusion but does not compel government protection. The Thirteenth Circuit correctly held that Petitioner stated no claim for relief under the First Amendment, and this Court should affirm.

The First Amendment prohibits "Congress" from making "law[s]" which "abridg[e] the freedom of speech." U.S. Const. amend. I. Thus, "the First Amendment constrains governmental actors and protects private actors"—unambiguously and on its face. *Manhattan Cmty. Access Corp.*, 587 U.S. at 804. The history of the Bill of Rights and the views of early figures in U.S. history also support what is plain from the Constitution's text—that free speech is an individual right that protects citizens from government actions and abuses of power. The full suite of rights contained in the First Amendment was a direct reaction to English suppression of speech and press and persecution of minority religions throughout the seventeenth and eighteenth centuries. Erwin Chemerinsky, *Constitutional Law* 1177 (6th ed. 2020).

That is why Thomas Jefferson—shortly before the First Amendment was adopted—opined that "[a] bill of rights is what the people are entitled to *against every government* on earth." *The Papers of Thomas Jefferson* 440 (J. Boyd ed., 1958) (emphasis added).

Federal courts have at least decades of precedent supporting the idea that the amendments "protect[] the citizen against the State itself and all of its creatures." *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966). Judge Richard Posner captured the essence of the matter when he explained that the Constitution focuses on negative rather than positive liberties and that the authors of the Bill of Rights "were not concerned that Government might do too little for the people but that it might do too much to them." *Jackson*, 715 F.2d at 1203. Judge Posner went on to explain that the purpose of the Fourteenth Amendment—which was adopted in the 1860s "at the height of laissez-faire thinking"—was similarly not to secure general government services, but to protect the citizens from state government intrusions. *Id.*

Ignoring text and history, Petitioner seeks to invert these principles and remake the First Amendment into a "positive" right. We must be clear about what relief she is seeking: revision. Petitioner asks this Court to rewrite the Free Speech Clause to compel government action rather than prohibit it. But there is no precedential, historical, or logical support for doing so. In fact, this Court already rejected a similar opportunity over three decades ago in *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs*, 489 U.S. 189 (1989). *DeShaney* is good law; it is still followed by courts to this day, and its analytical framework controls the case at hand.

The *DeShaney* Court considered whether a state actor's failure to protect an individual against private violence violated the Due Process Clause. *Id.* at 191. The Court's answer: No. The Winnebago County Department of Social Services had no special duty to affirmatively protect the constitutional rights of Joshua DeShaney, a four-year-old boy suspected of being abused by his father. *Id.* That was true even though the Department had been put on notice of the father's abusive behavior, which eventually led to young Joshua's permanent and severe retardation. *Id.* at 193. In fact, Joshua "suffered brain damage so severe that he [was] expected to spend the rest of his life confined to an institution." *Id.* Notwithstanding the severity of the facts, the Court ruled that the Due Process Clause was "a limitation on the State's power to act, not [] a guarantee of certain minimal levels of safety and security." *Id.* at 195. Therefore, "nothing in the language of the . . . Clause [] require[d] the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 196.

The Thirteenth Circuit correctly identified *DeShaney* as the controlling framework in Petitioner's § 1983 action. Petitioner—like Joshua DeShaney before her—claims that a state actor has an affirmative duty to protect her constitutional rights. But *DeShaney* squarely forecloses such a theory. The University—like the Department of Social Services in *DeShaney*—has no "affirmative obligation" to ensure Petitioner's constitutional rights were not violated by the University students, who are private third parties. *Id.* at 195. And it makes no difference that the University was aware that student protestors had fallen into a habit of shouting down speakers

invited to campus. Again, *DeShaney* speaks directly to the issue: No "affirmative duty to protect arises [] from the State's knowledge of [an] individual's predicament or from its expressions of intent to help h[er]." *Id.* at 200. Because the Thirteenth Circuit correctly held that the First Amendment acts as a limitation on the government's power to act, not as a guarantee of certain minimal levels of safety and security, the Court should affirm. The First Amendment prohibits government action; the University did not—and cannot—violate it through nonaction.

There are, however, at least some exceptional circumstances where an affirmative duty to protect can be triggered. None apply here. The first exception exists when a state actor takes an individual into custody and restrains his ability to act on his own behalf. *See, e.g.*, *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("When a person is institutionalized—and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist."). This exception is born of extremity and only applies when an individual's liberty is so constrained he must rely on the state for his basic needs. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976). And "even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities." *Youngberg*, 457 U.S. at 317. Moreover, courts have generally held that students fall outside the narrow exception. *See, e.g.*, *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 973 (9th Cir. 2011) (finding schools have no affirmative duty to protect students because "[c]ompulsory [] attendance and *in loco parentis* status do not create custody" and collecting cases supporting the same); *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773 (8th Cir. 2001) (school has no duty to protect students from private violence).

Perhaps the University would have an affirmative duty to protect Petitioner if she was its prisoner or foster child. *See White v. Lemacks*, 183 F.3d 1253, 1258 (11th Cir. 1999); *Niccini v. Morra*, 212 F.3d 798 (3d Cir. 2000). But she was not. The University did not take Petitioner into its custody, nor did it restrain her ability to act on her own behalf. Hence, the custodial exception does not apply here.

The "state-created danger doctrine," which can impose on government entities a duty to protect individuals from private harm that the government manifests or worsens through its affirmative actions, is similarly inapplicable here. *See DeShaney*, 489 U.S. at 201-02; *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998). That is because the doctrine offers an incredibly narrow exception that attaches liability to deliberately indifferent government actions that manifest significant physical or life-threatening harm. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) is illustrative of the high burden plaintiffs must meet to establish a state actor's affirmative duty under the state-created danger doctrine. There, police impounded a vehicle, arrested its driver, and left its female passenger stranded in a high-crime neighborhood at 2:30 AM. *Id.* at 586. Police were held liable after the woman was raped before making it home. *Id.* The circumstances that trigger a state actor's affirmative duty to protect thus tend to be extreme, deliberate indifference that results in significant physical or life-threatening harm. *See, e.g.*, *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082 (9th Cir. 2000) (police liable after escorting heavily intoxicated man out of bar, preventing him from driving home or reentering the bar, and watching him walk off into an abandoned railway yard, where he died of

exposure in the 11-degree weather). But no extreme circumstances were present in the events giving rise to this lawsuit, and Petitioner does not (and cannot) allege she was subject to significant physical or life-threatening harm.

Moreover, here the University was not responsible for creating the "danger"—if it can even be characterized as such—that resulted in the deprivation of Petitioner's First Amendment rights. Nor did the University worsen whatever "dangerous" conditions Petitioner may allege to have existed. The University simply continued with its hands-off approach to student discipline while private actors shouted down Petitioner's speech. The First Amendment compels it to do no more, and because no recognized exception warrants attaching an affirmative protective duty to the University's conduct, Petitioner's claims must fail.

In sum, this Court has explicitly rejected the existence of an affirmative obligation on government entities to protect individuals' constitutional rights from infringement by private actors. A majority of lower courts reach the same conclusion when faced with similar "failure-to-protect" cases, whether brought under tort law or the Due Process Clause. Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 Mich. L. Rev. 982 (1996). Petitioner now takes a completely novel stab at "failure-to-protect" litigation by bringing claims arising under the First Amendment. But this Court has already ruled that there exists no obligation for any state actor to protect her rights from private infringement. Because the Thirteenth Circuit correctly identified *DeShaney* as controlling precedent, the

Court should affirm here and hold that the University has no affirmative duty to protect constitutional rights from private infringement.

B. Imposing on the University an affirmative duty to protect Petitioner's constitutional rights is neither reasonable nor within the scope of judicial authority.

Petitioner asks this Court to impose a novel and burdensome constitutional duty on government actors across the country. The Court has no constitutional authority to do so. Laws are emphatically the business of the legislature. In our federal system, Congress makes laws and creates legal duties. The federal judiciary has an equally valuable role under the Constitution, but it is a role quite distinct from lawmaking: "Article III . . . assigns to the Federal Judiciary the responsibility and power to adjudicate 'Cases' and 'Controversies'—concrete disputes with consequences for the parties involved." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024). The "judicial Power" assigned by Article III enables courts "to determine what is the law applicable to a case, to apply that law to the case, and to render judgment accordingly." *Judicial Power*, *Black's Law Dictionary* (4th rev. ed. 1968). Creating—out of whole cloth—an affirmative duty to protect Petitioner's constitutional rights from private infringement is not within the judicial power. If such a duty is to be created, it should be created by Congress, not this Court.

Of course, past Courts have approached Article III's limits with varying enthusiasm. Even still, when this Court has considered "creating" a legal duty, it has asked whether the Court, rather than the political branches, was better equipped to decide if existing remedies "should be augmented by the creation of a new judicial

remedy." *Bush v. Lucas*, 462 U.S. 367, 388 (1983). Here, the answer is no. Not only because the judiciary's "authority to do so at all is, at best, uncertain," but because the federal courts are not equipped for the policy-centric analyses that all failure-to-protect claims necessarily entail. *Hernandez v. Mesa*, 589 U.S. 93, 140 (2020).

And even then—when existing remedies *should* be judicially augmented—courts are to evaluate a wide range of policy considerations, just as a legislature would. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971). These considerations can include "economic and governmental concerns," "administrative costs," and the "impact on governmental operations systemwide." *Ziglar v. Abbasi*, 582 U.S. 120, 136 (2017). The Court can attempt to weigh these diverse interests, but Congress and state legislatures are the more appropriate (and more accountable) bodies. The legislative branch can more effectively weigh tradeoffs, make political compromises and policy determinations, and take heed of constituent interests. *See Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("[T]he Legislature is far more competent than the Judiciary to . . . decide [what] would be good policy."). The Court should decline Petitioner's invitation to engage in judicial lawmaking and, instead, apply the First Amendment as it was written—to confer a negative right to "be[] let alone by the state." *Jackson*, 715 F.2d at 1204. Because the Thirteenth Circuit correctly held that "[t]he limit on government power in the First Amendment does not constitute an 'affirmative obligation' on the government to ensure exercise of these rights," this Court should affirm. R.at 14a.

This Court's substantive due process jurisprudence also counsels against judicial creation of an affirmative duty to protect. A new constitutional right, obligation, or cause of action that is not expressly contained within the constitution "must be deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 231 (2022). No test could more squarely preclude the Court from creating an affirmative duty for government entities to protect against private infringement of speech. Such a duty is foreign to our Nation's history and antithetical to the tradition of the First Amendment, which has always been held to "*constrain*[] *governmental actors*" from infringing speech. *Manhattan Cmty. Access Corp.*, 587 U.S. at 804 (emphasis added).

When the Constitution does not expressly confer an asserted right, the power to do so is best returned to the people and the democratic process. *Dobbs*, 597 U.S. at 232. History supports this sentiment as applied to the creation of new governmental duties: The Framers of our Constitution happily left the government's obligation to protect individuals' constitutional rights to be meted out in "democratic political processes." *DeShaney*, 489 U.S. at 196. This was a deliberate and prescient choice—courts do not have the institutional bandwidth or competency to handle failure-to-protect cases arising under the First Amendment. And the Fourteenth Amendment, to the extent Petitioner relies on it, is not a mechanism for courts to leapfrog the legislative process and compel state actors—like the University here—to allocate

scarce resources and provide the Court's preferred services. *Harris v. McRae*, 448 U.S. 297, 309 (1980).

Still, Petitioner asks this Court to find an affirmative duty to protect lurking somewhere in the text of the First Amendment. If the Court finds one, it will necessarily require judges nationwide to determine the resource allocation and budgetary decisions of state actors. These decisions are properly made "by locally elected representatives, [not] by federal judges interpreting the basic charter of Government for the entire country." *Collins v. City of Harker Heights*, 503 U.S. 115, 128-29 (1992). Here, specifically, if the Court were to accept Petitioner's failure-to-protect claim, it would necessarily dictate the University's budgetary decisions on myriad issues: (1) the amount and quality of security guards who are hired and retained by the University, (2) whether the University's sound system is upgraded to allow speakers to convey their messages despite disruptions, and (3) whether removable physical barriers are purchased or constructed to prevent students from forming protests. These items—in addition to the many other budgetary decisions courts may face in failure-to-protect cases—are most appropriately decided by a political body accountable to the people. The Court should reject Petitioner's request to commandeer the budgetary decisions of government entities across the nation.

Moreso, the need for new legal rights and duties to filter through a democratic political process is particularly forceful in the context of school discipline. Hence, even if this Court does impose on state actors an affirmative duty to protect—instead of allowing the political branches to do so—the duty should not attach to educational

institutions. School officials are given a "wide latitude of discretion" in reasonably conducting school affairs that are generally considered to be outside of the realm of judicial authority. *Burnside*, 363 F.2d at 748. It is far more likely that the various authoritative bodies at the University will make better decisions concerning the students, resources, and general practices of the school than any court could manage.

Additionally, forcing schools to protect against private infringement of First Amendment rights would create unwarranted and unnavigable burdens in the educational sphere. Schools would be required to take on significant financial and temporal burdens to constantly monitor their students' behavior. Or, more likely, schools would just become punching bags in courts across the country as federal and state dockets explode beyond possibility. Courts may not be prepared to determine when one student's free speech rights are "infringed" by another student, but that doesn't mean cases will not be brought. They will. Is a school's failure to put down a brief but intense classroom disruption now actionable? Must universities now monitor the communication channels of all registered student organizations, lest they be held liable when Johnny Bow-hunter and Ricky Steak-for-breakfast get blocked from the Vegan Alliance's group chat? The Court should not invite such absurdity to courtrooms across the country. Neither the First Amendment nor the Fourteenth provides any judicially manageable standard for resolving the lawsuits that will inevitably plague the judiciary if educational institutions are compelled to protect against private violations of the First Amendment.

Lastly, an affirmative duty to protect is—in the educational sphere—not only legally unmanageable but also impossible to implement on the ground. The University cannot vigilantly protect speakers' First Amendment rights from the actions of private student actors. Indeed, no school can. And particularly so when inflammatory speakers are invited to campus. In such a case, the University, by blocking or canceling an inflammatory speaker, would invite liability for content- or viewpoint-based suppression of speech. It may even face liability from dissidents and protestors, who have their own constitutionally protected rights to assemble and voice opposition to speakers. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). But the University would likewise maintain liability by bringing the speaker in and risking a student-led disruption.

Fortunately, there is a better path forward for this Court, and for educational institutions across the country. It is the same path this country has always taken regarding affirmative duties to protect. This Court should simply give due respect to the University's disciplinary and educational decisions and apply the First Amendment as it was written—to prohibit *government* infringements of speech. There are no roots in this nation's history for the idea that state actors have an affirmative constitutional duty to protect against private violations of free speech rights. And here, the Court's authority to create such a duty is tenuous at best. This Court should reject Petitioner's request to invent a new constitutional duty and affirm the Thirteenth Circuit's ruling that no reasonable jury could have found that the University violated Petitioner's First Amendment rights.

C. The University is not subject to liability under § 1983, but its hands-off approach to student discipline nonetheless satisfies intermediate scrutiny.

A municipal body like the University cannot be subject to liability under § 1983 unless it causes harm through its official municipal policy. *Lozman v. Riviera Beach*, 585 U.S. 87, 95 (2018). A policy does not have to be written out or formally adopted. Rather, the existence of a policy can be inferred from the "decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 61 (2011); s*ee also* 42 U.S.C. § 1983 (2012) (providing a cause of action against state actors who, "under the color of any . . . regulation, custom, or usage," deprive a citizen "of any rights, privileges, or immunities secured by the Constitution and laws"). But here, the University's hands-off approach toward student discipline was not a persistent, widespread practice with the force of law. The Thirteenth Circuit cursorily proclaimed "that a reasonable jury had a legally sufficient evidentiary basis to find that the University had a policy (or at the very least, a custom)" of failing to protect speakers' right, but if the Court reaches this question, it should reverse the circuit court's finding.

Regarding student discipline, the University adopted no policy, practice, or custom with the force of law, and cannot, therefore, be held liable under § 1983. Dean Thatcher—while focusing on development and alumni relations—may have been uninterested in dishing out discipline. But the "private predilections" of state officials do not constitute practices or customs with the force of law unless they are converted

into "compulsory rules of behavior no less than legislative pronouncements." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 168 (1970). Here, there were no such rules. The University's security staff tended to align with and "adhere[] to" Dean Thatcher's views on student discipline, but they did so of their own volition. R. at 5a. There was no requirement for security staff to adopt Dean Thatcher's views; there was no punishment provided if they refused to. *See* R. at 5a. Petitioner cannot allege even one occasion where Dean Thatcher so much as pondered over the issuance of an obligatory rule pertaining to student discipline. Section 1983 requires far more; namely, it requires showing the University adopted or promulgated "compulsory rules of behavior." *Adickes*, 398 U.S. at 168. Needless to say, a behavior that is neither formally required nor "inspired" through punishment is not compulsory. And without a compulsory rule or any other persistent practice with the force of law, the University cannot be liable under § 1983.

But even if the Court should disagree and find that the University's hands-off approach toward student discipline was forceful enough to be considered an official policy, the University still survives intermediate scrutiny. That is because the University's "policy" is viewpoint- and content-neutral and narrowly tailored to serve an important University interest in student well-being. Consequently, the Court should affirm the Thirteenth Circuit's ruling that the University's policy "did not—and could not have—violated the First Amendment." R. at 14a.

Supposing the University had a formal "policy" on student discipline, that policy was content- and viewpoint-neutral. Content-neutral policies are "justified

without reference to the content of the regulated speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 156 (2015) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)). Content-based policies, on the other hand, "target speech based on its communicative content" and thus "appl[y] to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163. Consequently, to determine whether a content-neutral policy has been violated, "enforcement authorities" must "examine the content of the [violative] message." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984)).

Here, the Thirteenth Circuit correctly found that "[Petitioner] did not demonstrate—or even allege—that [the University's] policy was applied in a viewpoint-discriminatory manner." R. at 11a. The University's hands-off approach to student discipline was enforced consistently and without regard to the content of the speeches it affected. *Cf. Reed*, 576 U.S. at 156. Under the University's approach, majority and minority views were treated equally, and non-discipline reigned without regard to the affected speakers' politics or popularity. R. at 5a (affected speakers gave talks on institutional racism, armed self-defense, marijuana, and climate change). And certainly, Dean Thatcher never "examine[d] the content of" any disrupted speeches before withholding discipline from student disrupters. *McCullen*, 573 U.S. at 479 (quoting *League of Women Voters of Cal.*, 468 U.S. at 377). Even when Petitioner planned to share her strong (and potentially inflammatory) views on the necessity and virtue of veganism, Dean Thatcher had no inhibitions toward her speech. Indeed, he personally agreed with many of Petitioner's sentiments. R. at 12a.

But he nonetheless continued with a neutral application of the University's approach to discipline.

In fact, the record here reveals only one consideration that led to the University's disciplinary "policy." It was not the content of Petitioner's speech, nor that of any other speaker. It was solely the welfare of the University's students. Dean Thatcher clearly believed that "students at the University are 'good kids' who . . . 'work hard' and 'just need to blow off a little steam'" from time to time. R. at 5a. The fact that Dean Thatcher categorically withheld discipline from these students proves that his lenient policy did not "target speech based on its communicative content." *Reed*, 576 U.S. at 163 (quoting *Ward,* 491 U.S. at 791). And as viewpoint discrimination is simply a more "egregious form" of content-based discrimination, *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995), the Thirteenth Circuit correctly held that the University's disciplinary practices could not be considered either content- or viewpoint-based. R. at 11a. This Court should embrace that finding.

The University's hands-off approach to student discipline further satisfies intermediate scrutiny—as well as the *O'Brien* test—because it was narrowly tailored to serve an important government interest. Under *United States v. O'Brien*, 391 U.S. 367, 376 (1968), a content-neutral policy that imposes only an incidental burden on speech is constitutionally permissible if it (1) furthers an important governmental interest that is (2) unrelated to the suppression of protected speech, and if (3) the incidental restrictions on protected speech are no greater than necessary to further

that interest. The University's "policy" satisfies all these requirements and, therefore, passes constitutional muster.

The University's approach to student discipline furthers an important interest unrelated to the suppression of protected speech: the well-being of students. Just last year, a sample of nearly 100,000 students throughout more than 130 universities found that 44% of students had symptoms of depression, 37% had an anxiety disorder, and 15% had serious thoughts of suicide. *Inside Higher Ed, Student Mental Health Worsens, but More Are Seeking Help*, National Center on Safe Supportive Learning Environments (Mar. 17, 2023), https://safesupportivelearning.ed.gov/news/student-mental-health-worsens-more-are-seeking-help. Against this backdrop, the University valuably allows its students to "blow off a little steam" without fear of punishment. R. at 5a. This small but significant step helps to relieve pressure among the student population, empower students, and mitigate the serious nationwide problem of deteriorating mental health. Of course, other universities are entitled to take their own steps to mitigate the mental health crisis. But this Court is under no constitutional command to forbid the University's approach and destroy a valuable experiment in the laboratory of democracy—especially where no record evidence suggests the experiment is failing.

Additionally, Petitioner failed to allege that the University's approach to student discipline had *any* connection to her First Amendment rights. *See supra* pp. 42-42; R. at 12a (finding no evidence the University acted with an "impermissible motive" or out of "hostility to particular viewpoints"). At worst, the University simply

acquiesced to a culture of non-discipline, but its actions within this culture were "consistent[] and evenhanded[]." R. at 11a. And certainly, where Dean Thatcher "personally agreed with many of the sentiments expressed by [Petitioner]," these consistent and evenhanded actions were not related to Petitioner's speech. R. at 12a.

Lastly, while the University's policy created wholly incidental burdens on Petitioner's speech, those burdens were narrow and no greater than necessary to further the University's interest in student well-being. In fact, the only lawful way to implement the University's approach is through categorical non-discipline. Otherwise, the University would be stuck "examin[ing] the content of" speakers' messages to determine which protestors would receive discipline. *McCullen*, 573 U.S. at 479 (quoting *League of Women Voters of Cal.*, 468 U.S. at 377). Petitioner does not—and cannot—suggest any alternative approach that would be less restrictive while still furthering the University's interest in facilitating a hands-off culture of student empowerment and well-being. (Not that the University's policy must, in the first instance, "be the *least* restrictive or *least* intrusive means of" furthering this interest. *Ward*, 491 U.S. at 798 (emphasis added)). Simply put, the University's policy is not overly restrictive. Even where a speaker is unable to present her message formally to the campus at large, student protests do not cut off her channels for communication. *Cf. Lederman v. N.Y.C. Dep't. of Parks & Recreation*, 731 F.3d 199, 202 (2d Cir. 2013) (intermediate scrutiny satisfied where regulation "leav[es] open ample alternative channels for communication of the information"). Speakers remain free to meet privately with student groups who invite them to campus, to connect

through online platforms, and—ultimately—to address the full campus and engage directly with any student protestors. Accordingly, the University's hands-off approach to student discipline satisfies both the requirements of the *O'Brien* test and intermediate scrutiny: The policy furthers an important interest, wholly unrelated to the suppression of protected speech, and is narrowly tailored to (incidentally) burden no more speech than necessary. Therefore, even if the University's disciplinary practices amount to a policy with the force of law, they remain permissible under the First Amendment.

However, as a final consideration, the Court should take into account that the University's hands-off approach toward discipline is entitled to its own constitutional protection as government speech. Although the First Amendment restricts any abridgment of speech, it does not restrict government officials from "engaging in their own expressive conduct." *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 187 (2024). Conduct is expressive when it is intended to convey a particularized message, regardless of whether that message is likely to be understood by its audience. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Thus, whenever "a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others," thereby engaging in expressive conduct. *Matal v. Tam*, 582 U.S. 218, 234 (2017).

The motivating purpose behind the University's hands-off approach to student discipline is student well-being. Again, Dean Thatcher believes that his students are all "good kids" who sometimes "need a good talking to, [but] not any kind of punishment." R. at 5a. The Dean's lenient view extends to more than just the student

protests at speaking events—University students have engaged in rowdy senior pranks, lavish (and unauthorized) parties, and even the occasional keg stand at a school event. R. at 3a. Instead of disciplining these students, Dean Thatcher took the opportunity to let them relax from their hard academic work and "blow off a little steam." R. at 5a. His lenient disciplinary measures surely meant to communicate that support, whether the students fully comprehended or appreciated the message. Consequently, if the Court finds that the University adopted a policy of non-discipline, it should likewise find that by adopting and implementing the policy, the University "embark[ed] on a course of action," *Matal*, 582 U.S. at 234, to express—through conduct—Dean Thatcher's motto: "boys will be boys," R. at 5a.

* * *

In sum, the University has no constitutional duty to protect Petitioner's speech from private student infringement, and the University cannot violate the First Amendment through its own non-action. That is the law as it stands, and this Court should refrain from accepting Petitioner's invitation to remake it. Moreover, the University had no official municipal policy for the purposes of § 1983 liability, and even if it did, that policy would survive intermediate scrutiny. Given these circumstances, the Thirteenth Circuit correctly held that the University "did not—and could not—violate the First Amendment." This Court should affirm.

CONCLUSION

For these reasons, the Court should affirm the Thirteenth Circuit's decision, find the University's 50(b) motion timely, and hold that the University did not violate Petitioner's First Amendment rights.

Dated: November 17, 2024

Respectfully submitted,
TEAM 80

/s/ Team 80

Counsel for Respondents

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

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APPENDIX A

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution

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.

APPENDIX B

RELEVANT PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 6. Computing and Extending Time; Time for Motion Papers

(b) Extending Time.

> **(1)** ***In General.*** When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> > **(A)** with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
> >
> > **(B)** on motion made after the time has expired if the party failed to act because of excusable neglect.
>
> **(2)** ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(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.