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 88
Counsel for Respondent
November 18, 2024

QUESTIONS PRESENTED

1. Whether the time for filing a post-judgment motion runs from the entry of an amended final judgment that makes substantive changes to an original judgment, even if the motion challenges an unchanged portion of the amended judgment.
2. Whether the University's viewpoint-neutral policy that refrains from intervening with speech or disciplining students who do and is applied evenly and consistently regardless of a group's views violates the First Amendment.

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The opinion of the United States District Court for the Eastern District of New Tejas is unpublished and may be found at *McMillan v. Bd. of Regents of City Univ. of Lantana*, D.C. No. 20-cv-1857 (E.D. New Tejas Mar. 29, 2022). The opinion of the United States of Appeal for the Thirteenth Circuit is unpublished and may be found at *Bthd. of Regents of City Univ. of Lantana v. McMillan*, C.A. No. 22-0514 (13th Cir. May 10, 2023).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Thirteenth Circuit entered final judgment on this matter on May 10, 2023. (R. 1a.) Petitioner then filed a writ of certiorari, and this Court granted certiorari. Order Granting cert., Oct. 7, 2024, No. 24-0514. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

The appendix contains the pertinent text of the following constitutional and statutory provisions relevant to this case: United States Constitutional Amendment I, 42 U.S.C. § 1983, and Federal Rule of Civil Procedure 50(b).

STATEMENT OF THE CASE

A. Procedural History

On February 8, 2020, Dove McMillan ("Petitioner") decided to end her speech at City University of Lantana (the "University") as a result of student protestors. (R. 6a.) Petitioner sued the Board of Regents of the University in the District Court for the Eastern District of New Tejas, alleging that the University violated her First Amendment rights under 42 U.S.C. § 1983. (R. 5a, 7a.) The matter proceeded to trial and was tried before a jury between January 17, 2022, and January 20, 2022. (R. 20a.) During trial the University moved for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure. (R. 7a.) The district court denied the University's motion. (*Id.*)

On January 20, 2022, at the close of trial, the Jury found against the University and awarded Petitioner compensatory and punitive damages. (*Id.*) That same day, the district court entered a final judgment awarding only the compensatory damages (the "Original Judgment"). However, seven days later, the district court *sua sponte* amended the Original Judgment to include both compensatory and punitive damages (the "Amended Judgment"). (*Id.*) Twenty-eight days from the Amended Judgment, thirty-five days from the Original Judgment, the University filed a renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). (R. 7a.)

Without regard to its merits, the district court denied the University's Rule 50(b) motion on March 29, 2022. (R. 20a.) The University appealed to the Thirteenth Circuit. (R. 1a.) The Thirteenth Circuit reversed the denial and rendered a decision on the merits in favor of the University. (R. 2a.) The Thirteenth Circuit held that the University preserved its argument with a timely Rule 50(b) motion (R. 7a.) Moreover, the Thirteenth Circuit held that the University did not violate Petitioner's First Amendment rights. (R. 14a.)

Following Petitioner's appeal of the Thirteenth Circuits ruling, this Court granted certiorari to address (1) whether the time for filing a post-judgment motion challenging unchanged portions of the Amended Judgment ran from entry of the Original Judgment or the Amended Judgment, when the district court judge amended a final judgment; and (2) whether the University violates the First Amendment by adopting a viewpoint-neutral policy of refusing to discipline students who interfere with speakers on campus. Order Granting Cert., Oct. 7, 2024, No. 24-0514.

B. Statement of the Facts

1. The University

Respondent, City University of Lantana, is one of the oldest and most preeminent educational public institutions in New Tejas. (R. 2a.) The University is committed to academic excellence, civic engagement, and leadership—commitments reflected in the school's motto, *Doctrina Perpetua*, or 'Forever Learning.' (R. 2a, 3a.) The University also offers over sixty student organizations that embrace a wide range

of viewpoints and affinities. (R. 3a.) These student organizations range from arts and culture organizations, performance groups, intramural sports groups, political organizations, gender and sexuality groups, religious organizations, to social action groups. (*Id.*) Notably, the main student newspaper on campus, the *Stinger*, publishes articles on a weekly basis and has done so since its founding in 1914. (*Id.*)

2. The Policy

Recently, the University hired Mason Thatcher ("Dean Thatcher"), a 1998 alum who played in the National Football League, as its Dean of Student Affairs. (R. 4a.) During his tenure as a Dean, Thatcher has experienced a number of successes. (*Id.*) Thatcher regularly attends and speaks at fundraising events, has seen an increase in donations to the University, and has received positive reception from alumni organizations. (*Id.*) As for student discipline, although students are sometimes rowdy, Thatcher believes that they are "good kids" who "work hard" and "just need a good talking to," instead of punishment. (R. 5a.) This hands-off approach is applied consistently and even handedly, without regard to particular viewpoints. (R. 11a, 12a.) This policy has also not been adopted out of hostility to particular viewpoints. (R. 12a.) Campus Security and members of the Department of Student Affairs have followed this hands-off approach in instances where student rowdiness has impacted speakers on campus. (R. 5a.) On such occasions, students have "shouted down" speakers invited to present on campus, leading the speakers to step down from their speech. (*Id.*) The students have engaged in this conduct in response to a variety of speakers, including speakers on institutional racism invited by the Lantana Black

Student Coalition, speakers discussing Second Amendment rights invited by Lantana Students for Armed Self-Defense, speakers discussing whether recreational marijuana should be legalized in New Tejas invited by the High Five Society, and speakers addressing the current and ongoing effect of climate change invited by campus representatives of Carbon180. (*Id.*) In each instance, the University's security adhered to Thatcher's hands-off policy by not intervening or punishing students. (*Id.*)

3. The Incident

Petitioner, Dove McMillan, was invited to speak on campus in the Hedge Family Auditorium by the Campus Vegan Alliance. Her speech aimed to persuade others to abstain from consuming animal products. (R. 6a.) After Petitioner had spoken about her subject for five minutes, student counter protestors gathered at the foot of the auditorium stage. (*Id.*) Some of the protesters carried banners and noisemakers, and some of the protesters wore animal masks and costumes, but none of the protesters threatened violence. (*Id.*) Petitioner stayed on the stage for fifteen minutes and attempted to silence and remove the protestors before she eventually made the decision to leave and not return. (*Id.*) A member of campus security was present during these events and adhered to the University's policy of not intervening. (R. 7a.) Only after Petitioner had stopped speaking and left, did the protestors cause damage to the auditorium facilities. (R. 6a.) The protestors voluntarily left the auditorium thereafter and were not disciplined. (*Id.*)

3. **Petitioner' Suit**

Subsequently, Petitioner filed suit against the University in the District Court for the Eastern District of New Tejas, alleging it violated her First Amendment rights under 42 U.S.C. § 1983. At trial, the University moved for judgment as a matter of law under Rule 50(a). (R. 7a.) The district court denied the motion. (*Id.*) The evidence at trial undisputedly showed that the policy was not applied in a viewpoint discriminatory manner, nor was there evidence that they adopted this out of disagreement with certain viewpoints. (R. 11a, 12a.) In fact, Dean Thatcher testified that he personally agreed with Petitioner's sentiments. (R. 12a.) After a four-day jury trial, a jury returned a verdict in favor of Petitioner, on January 20, 2022. (R. 20a.) The jury verdict awarded Petitioner $12,487 in compensatory damages and $350,000 in punitive damages. (*Id.*) "Pursuant to the verdict," the district court filed its Original Judgment that awarded Petitioner $12,487 in compensatory damages, stating that "[a]ll relief not granted herein is DENIED." (Final Judgment, Jan. 20, 2002, No. 21-cv-1285.) Seven days later, the district court *sua sponte* modified the substance of its Original Judgment to include $350,000 more in punitive damages. (Amended Final Judgment, Jan. 27, 2022, No. 21-cv-1285.) The district court stated that the Amended Judgment was issued "[p]ursuant to the [jury] verdict" and that "[a]ll relief not granted herein is DENIED." *Id.* The parties agree that this change did not involve a collateral issue or a clerical error. (R. 8a.) Exactly twenty-eight days from the Amended Judgment, the University filed a renewed motion for judgment as a matter of law pursuant to Rule 50(b), challenging liability. (R. 7a.) The parties also

agree that the arguments made in this Rule 50(b) motion were properly preserved by the earlier Rule 50(a) motion. (R. 21a n. 1.) Petitioner opposes the Rule 50(b) motion, both on the grounds of timeliness and on its merits. (R. 21a.)

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Thirteenth Circuit because the time for filing a post-judgment motion challenging unchanged portions of a judgment runs from the entry of the amendment. First, when an amended judgment targets a matter of substance, it changes the legal rights and obligations of the parties. Without evidence that such a change was made solely to extend litigation, filing times must reset. Second, the Federal Rules of Civil Procedure provide for flexible timing standards to ensure resolutions on the merits. Thus when an issue of merits changes between two judgments, the last judgment must prevail to the extent of resolving contradictions.

This Court should affirm the decision of the Thirteenth Circuit because the First Amendment does not provide for an affirmative obligation to protect speakers from third party interference, and the University's policy meets all viewpoint neutrality requirements. First, third parties actions cannot be imputed to the University, accordingly, the University's practice of non-intervention does not create a duty to act under the First Amendment. Second, the University's viewpoint-neutral policy treats majority and minority views with the same respect.

ARGUMENT

I. WHEN A TRIAL JUDGE AMENDS A FINAL JUDGMENT, THE TIME FOR FILLING A POST-JUDGEMENT MOTION CHALLENGING UNCHANGED PORTIONS OF THE JUDGMENT RUNS FROM THE ENTRY OF THE AMENDMENT.

This Court should affirm the Thirteenth Circuit's judgment and adopt the approach that the time for filing a post-judgment motion challenging unchanged portions of the judgment runs from the entry of the amendment. The time for filing runs from the Amended Judgment, because the Amended Judgment targeted matters of substance and disturbed the finality of the Original Judgment. *See Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 206 (1952). Moreover, when an amended judgment targets matters of substance, the Federal Rules of Civil Procedure require a tolling period for post-judgment motions. *See Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

This Court has the opportunity to harmonize the application of Federal Rule of Civil Procedure 50(b) and clarify a long-standing area of procedural uncertainty. Specifically, the Court should affirm that when a final judgment is substantively amended, the time for filing post-judgment motions runs from the entry of the amended judgment, even if the motion challenges unchanged portions of the original judgment. This interpretation is necessary to prevent procedural traps that unfairly undermine a party's ability to seek relief.

Rule 50(b) allows a party to file a renewed motion for judgment as a matter of law within 28 days after the entry of judgment. However, the critical question arises when a court substantively amends the original judgment—does the deadline restart?

Supreme Court precedent and practical fairness dictate that it must. A judgment that substantively alters the legal rights or obligations of the parties disturbs the finality of the original judgment, resetting the timeline for seeking post-judgment relief.

The Court's ruling in *Fed. Trade Comm'n* provides a foundational framework—when a "lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered" filing periods renew. *See Fed. Trade Comm'n*, 344 U.S. 211-12. The principle is that when a lower court modifies a judgment in a way that revises substantive legal obligations, the time for appeal or post-judgment motions must be measured from the new judgment for purposes of practicality. *See id.* at 212. This principle recognizes that litigants must be afforded a fair opportunity to address significant changes that impact their legal positions.

While the Fifth and Seventh Circuits have approached this issue differently, their rulings can be reconciled under the *Fed. Trade Comm'n*, framework. The Fifth Circuit, in *Cornist v. Richland Parish School Board*, held that an amended judgment that alters substantive obligations resets filing deadlines, ensuring procedural clarity. 479 F.2d 37, 37 (5th Cir. 1973). In contrast, the Seventh Circuit has expressed limited caution, holding that deadlines do not reset unless the amendment specifically addresses the grounds for the post-judgment motion. *See McNabola v. Chicago Transit Authority*, 10 F.3d 501, 521 (7th Cir. 1993). However, this distinction reflects the unique context of Rule 59 motions, which can be used to perpetually extend deadlines through repeated amendments. *Id.* Rule 50(b) motions do not pose the same risk and therefore merit distinct treatment.

In the present case, the district court's Amended Judgment substantively altered the Original Judgment by adding punitive damages. This change imposed new legal obligations on the University, effectively nullifying the finality of the Original Judgment. Applying the Seventh Circuit's cautious approach to this Rule 50(b) motion would unjustly penalize the University for a procedural technicality, contrary to the principles articulated in *Fed. Trade Comm'n*. *See Fed. Trade Comm'n*, 344 U.S. at 206. The Fifth Circuit's interpretation rightly prevents such outcomes by focusing on substantive changes rather than procedural formalities. *See Cornist,* 479 F.2d at 37.

This Court should take this opportunity to provide critical guidance: when an amended judgment affects the substantive rights or obligations of the parties, the timeline for all post-judgment motions must reset. Doing so will promote fairness and align federal procedural rules with their overarching goal of achieving just outcomes without sacrificing efficiency.

A. When An Amended Judgment Targets Matters of Substance, the Change in Legal Obligations Resets the Time for Filing Post-Judgment Motions.

Because the Amended Judgment disturbed the legal obligations of the University, the time for filing the post-judgment motion ran from the amendment. The legal framework governing this principle is well established: (1) Does the amendment disturb or revise legal rights and obligations that were previously settled with finality?; and (2) If so, does the amendment serve a legitimate judicial function

rather than merely extending filing deadlines? *See Fed. Trade Comm'n*, 344 U.S. at 211–12; *see also Missouri v. Jenkins*, 495 U.S. 33, 49 (1990).

Applying these principles confirms that substantive amendments, whether prompted by the parties or initiated *sua sponte*, reset post-trial filing deadlines. First, a substantive amendment like the addition of punitive damages unquestionably disturbs settled legal obligations necessitates a corresponding reset of filing timelines. *See Fed. Trade Comm'n*, 344 U.S. at 211–12 Second, so long as parties are not attempting to manipulate filing deadlines, it is proper for filing times to toll. *See Jenkins*, 495 U.S. at 49.

1. An amendment to damages is a substantive change that disturbs previously settled legal obligations.

This Court looks at the substance of an amended judgment to determine whether it tolls the time within which review must be sought. *See Fed. Trade Comm'n* 344 U.S. at 211-12. The question is whether the second judgment has "*disturbed* or *revised legal rights* and *obligations* which, by [a] prior judgment, had been plainly and properly settled with finality." *Id.* at 212 (emphasis added). Such rights and obligations are disturbed where a new judgment changes matters of substance, or resolves a genuine ambiguity, in a previous judgment. *Id.* at 211; *See also United States v. Adams*, 383 U.S. 39, 41 (1966) (holding that a second judgment amending liability, tolled the time for a petition for review).

At its core, this Court's "test is a practical one." *Fed. Trade Comm'n*, 344 U.S. at 212. So long as the amendment makes a material change to what the court has

previously decided, the time for filing tolls. *See id.* Consistent with this Court's test, a judgment amending an award of punitive damages would materially change an original judgment and reset the time for filing a post judgment motion. After all, damages are a matter of substance inextricably tied to liability. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428-29 (1996); *see also Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 330 (1988) (holding that the proper measure of damages under a federal statute was "inseparably connected with the right of action, and therefore . . . an issue of substance").

Here, the Amended Judgment disturbed a properly settled legal right by introducing punitive damages. (R. 7a.) Under this Court's ruling in *Fed. Trade Comm'n*, such amendments to a judgment toll the time for filing post-judgment motions because they disrupt the finality of the original judgment and alter the parties' legal obligations. *See Fed. Trade Comm'n*, 344 U.S. at 212. As this Court emphasized, when a judgment "disturb[s] or revise[s] legal rights and obligations," procedural deadlines must be recalibrated to ensure fairness. *Id.* at 212. Alone, the Original Judgment awarded the Petitioner $12,487 and denied all other relief. (Final Judgment, Jan. 20, 2002, No. 21-cv-1285.) Regardless of the jury's verdict, the University was not put on notice of the district court's final award of damages, until the judge filed his second judgment. It was not until the Amended Judgment that the University knew that it might be liable for $362,487. (Amended Final Judgment, Jan. 27, 2022, No. 21-cv-1285.) It is this monetary alteration that changed the University's legal obligations and warranted tolling. Further, a change in damages is a material

change, because it is "inseparably connected with the right of action." *See Monessen Sw. Ry. Co.*, 486 U.S. at 330. As in *Adams*, the amendment to damages here implicated the liability and should reset filing times. *See Adams*, 383 U.S. at 4.

In addition to changing legal obligations, the Amended Judgment also identified that a genuine ambiguity existed as to the proper award of damages. The practical test set out by this Court in *Fed. Trade Comm'n*, requires that parties receive a proper chance to address such ambiguities, given that they alter legal obligations. *See Fed. Trade Comm'n*, 344 U.S. at 211-12. At the time of the Original Judgment, the parties were only aware that the judge awarded compensatory damages. (R. 20a.) At this point, the judge had denied all other forms of relief despite a jury verdict awarding both compensatory and punitive damages. (*Id.*) While this discrepancy alone is enough to show a genuine ambiguity as to the judgments, the judge further acknowledged the ambiguity by filing an Amended Judgment which clarified the proper legal obligations of the parties. (*Id.*) This Court holds that such genuine ambiguities require filing times to reset. *See id.*

The Fifth Circuit's decision in *Cornist*, fully adopts the principle from *Fed. Trade Comm'n*, that "the second judgment prevails." *See Cornist* 479 F.2d at 38. In *Cornist*, the court held that a substantive amendment—specifically one altering legal obligations—tolls the time for filing post-judgment motions, when it "disturbed or revised legal rights and obligations." *See id.* at 38 (quoting *Fed. Trade Comm'n*, 344 U.S. at 211-212). As *Cornist* clarified, the rule acknowledges a change in legal obligations shows that a "the second judgment was intended to supersede the first."

See Cornist 479 F.2d at 39. Similarly, the Seventh Circuit in *Charles* acknowledged that substantive changes to a judgment warrant a recalibration of procedural timelines. *See Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986). The Seventh Circuit recognized that it is proper to reset filing times in the face of a substantive change, thereby "affording aggrieved parties time to seek alteration or . . . appeal." *See id.* at 348.

2. It is appropriate to run the time for filing a post-judgment motion from entry of amended judgment, when the amendment was not aimed at manipulating deadlines.

Deadlines are not tolled when a court amends a judgment "solely for the purpose of extending time limits." *Jenkins*, 495 U.S. at 49 (1990). The principle is that a court should not manipulate timelines to indefinitely extend litigation. *See id.* However, the Court drew a critical distinction—when a judge's amendment substantively alters a judgment, it replaces the original judgment, resetting filing deadlines. *Fed. Trade Comm'n* at 211-12. This Court's rule balances procedural rules with fairness, giving parties additional time to respond to amendments where there is no concern that parties are evading filing deadlines.

The Seventh Circuit applied a similar principle—"if a judge alters her judgment in response to the first motion, the party aggrieved by the change may file a motion directed to the difference." *Branion v. Gramly*, 855 F.2d 1256, 1259 (7th Cir. 1988). In *Branion*, the litigant filed multiple post-judgment motions, culminating in a Rule 52 motion that invited the court to amend its findings. *Id.* at 1260. Because the court entered an amended judgment that "reaffirmed rather than revised" the

original judgment, there was no concern that the amended judgment aggrieved the litigant. *Id.* at 1260; *see also Tru-Art Sign Co., Inc. v. Local 137 Sheet Metal Workers Int'l Ass'n*, 852 F.3d 217, 222 (2d Cir. 2017) (holding that "the time limit stated in Rule 59(e) would be ineffective if parties could continually file motions . . . thereby preventing the judgment from becoming final.") (citing McNabola).

Although the Seventh Circuit's expressed caution regarding the extension of deadlines, it did so in the specific context of consecutively filed Rule 59 motions, where the risk of tactical manipulation through repeated amendments is higher. *See McNabola* 10 F.3d at 521. *McNabola* does not dispute the general principle that substantive changes reset filing times by disturbing legal obligations. Indeed, *McNabola* reaffirms that when an amendment affects substantive rights—such as damages or liability—"a person aggrieved by the alteration may ask for correction." *Id.* at 521; *See* 12 Moore's Federal Practice - Civil § 59.35 (2024) (citing McNabola for the proposition that "[w]hen a trial court grants a motion to . . . amend a judgment, and the . . . amendment is substantive, a new judgment results; the previous judgment no longer exists."). In *McNabola*, the Seventh Circuit took issue with the possibility of parties "continually fil[ing] new motions, preventing the judgment from becoming final." *See McNabola*, 10 F.3d at 521. When the district court issued its *sua sponte* Amended Judgment, it disturbed the Original Judgment's substantive framework, without implicating Rule 59. Neither the University nor Petitioner filed any post-judgment motions before the Amended Judgment. Without such a motion, there is no concern that this situation rises to the level of an indefinite extension of

deadlines. To hold otherwise would deprive the University of a meaningful opportunity to contest a significant new liability, contrary to the equitable principles underlying this Court's procedural rules.

Here, the district court's *sua sponte* amendment aligns perfectly with the framework articulated in *Jenkins*. As the parties stipulate, the district court's alteration was not a clerical error. (R. 8a.) And, while not a mistake, the record unequivocally shows that the district court's actions in amending the Original Judgment were for the purpose of extending filing deadlines. *See Jenkins*, 495 U.S. at 49; (R. 7a.) If the district court intended to grant the University more time to file, it would have granted the University's Rule 50(b) motion—instead, it denied the motion. (R. at 20a.) So, by independently revising the Original Judgment without external prompting, the district court demonstrated its actions were not a procedural tactic aimed to extend filing deadlines. *See Jenkins*, 495 U.S. at 49.

Moreover, no part of the record demonstrates that the University filed its Rule 50(b) motion to indefinitely extend litigation. This case is fundamentally distinguishable from *Branion*. In *Branion*, the litigant filed successive motions that repeatedly invited judicial reconsideration, eventually leading to an amended judgment. *See Branion*, 855 F.2d at 1260. By contrast, the University filed only a single post-judgment motion under Rule 50(b), challenging the judgment's conclusion, not seeking to amend it. (*Id.*) The University's motion was filed after the district court had already amended its conclusions. Further, the Amended Judgement did not "reaffirm" the conclusions made in the Original Judgment, it obviated the

Original Judgment altogether. *See Branion*, 855 F.2d at 1260. The Amended Judgment was not a response to a motion, it was a correction to a prior decision. Without invitation to amend the Judgment through a Rule 59(e) motion, there is no concern that the Amended Judgment was a tactic aimed at "preventing the judgment from becoming final." *See Tru-Art Sign Co., Inc.*, 852 F.3d at 222. Thus there is no concern that resetting the filing deadline here would indefinitely prolong litigation.

B. The Federal Rules of Civil Procedures Would Be Undermined if Substantive Changes Did Not Reset Filing Times.

The Federal Rules of Civil Procedure are intended to ensure the fair and efficient resolution of disputes, emphasizing substance over procedural technicalities. *See Fed. R. Civ. P. 1*; *see Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). This Court has long recognized that procedural rules must be interpreted flexibly to achieve just outcomes. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978). In this case, a proper application of Rule 50(b) requires the time for filing post-judgment motions to reset when an amended judgment substantively alters the original judgment.

First, the Federal Rules of Civil Procedure are designed to effectuate a merits based resolution of every case, they should not be read so as to dismiss claims based on technicalities. *See Surowitz*, 383 U.S. at 373. Second, courts already apply a flexible tolling standard to motions under Rules 52(b), 59(b), 60(b)—rules restricted by Rule 6(b)(2)—and this standard should extend to Rule 50(b). Rule 6(b)(2) limits a

court's ability to extend deadlines for specific motions but does not preclude tolling when substantive changes occur.

Because the district court's *sua sponte* amendment added punitive damages—a significant substantive change—the time to file the University's Rule 50(b) motion properly reset. This Court should clarify that Rule 6(b)(2) does not bar filing times from resetting the filing deadlines.

1. Rule 50(b) motions function to promote fairness and predictability not dismissals based on technicalities.

The Federal Rules of Civil Procedure are intended to secure justice and prevent the dismissal of meritorious claims due to technical procedural missteps. *See Foman v. Davis*, 371 U.S. 178, 181 (1962). It is "entirely contrary to the spirit of the Federal Rules" to avoid decisions on the merits based on procedural technicalities. *See Surowitz* 383 U.S. at 373 (finding that strict pleading requirements in Rule 23(b) could not be used to dismiss what was otherwise a factually supportable claim); *see also Bankers Trust Co.* 435 U.S. at 387 (holding that the Federal Rules should be interpreted flexibly to avoid harsh results that undermine the equitable administration of justice). This principle reflects the broader purpose of the Rules—to ensure the "just, speedy, and inexpensive determination of every action." *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986).

Specifically, this Court has consistently recognized the importance of Rule 50(b) in streamlining the litigation process. *See Johnson v. New York, N. H. & H. R. Co.*, 344 U.S. 48, 50–51 (1952); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250

(1940). Rule 50(b) was "adopted for the purpose of speeding litigation and preventing unnecessary retrials." *Montgomery Ward,* 311 U.S. at 250. If granted a Rule 50(b) motion "ends the litigation and often makes it possible for [a court] to dispose of the case." *See id.* at 251. The effect of Rule 50(b) is to provide a "precise plan" to reduce confusion surrounding post-trial motions, ensuring consistency and predictability in procedural practices. *See Johnson*, 344 U.S. at 48. (holding that the timing requirements under a Rule 50(b) motion are "firmly grounded in principles of fairness.")

Here, the University's reliance on the amended judgment as resetting the filing deadline aligns squarely with these principles. The district court's *sua sponte* amendment introduced punitive damages, a substantive change that the University reasonably believed restarted the Rule 50(b) clock. The University filed its motion within twenty-eight days of the amended judgment, and demonstrated a good faith adherence to the Rules as they are meant to function. (R. 7a.) To hold otherwise would unfairly penalize the University for relying on an amended judgment that substantively altered its legal obligations.

Moreover, finding the University's motion untimely would contravene the fundamental purpose of the Rules, which seek to facilitate decisions on the merits rather than procedural dismissals. *See Foman* 371 U.S. at 181. Just as in *Surowitz*, where strict pleading requirements could not be used to dismiss a meritorious claim, a strict application of the timing requirements under should not bar the University's meritorious claim. *See Surowitz* 383 U.S. at 373. It is "entirely contrary to the spirit

of the Federal Rules" to dismiss a meritorious claim because of a procedural technicality. *See id*. Specifically, Rule 50(b) was designed to provide a "precise plan," for ending litigation in a predictable and consistent manner—there is no predictability in ignoring amendments that change the substantive rights of parties. *See Johnson*, 344 U.S. at 48. The timing restrictions outlined in Rule 50(b) are "firmly grounded in principles of fairness," and can not function as a trap to prevent the University new legal liability introduced in the Amended Judgment.

Refusing to reset the filing deadline in this case would undermine the clarity and uniformity that Rule 50(b) was intended to provide. As *Johnson* emphasized, Rule 50(b) aims to eliminate confusion surrounding post-judgment motions. *See Johnson*, 344 U.S. at 51–52. Allowing a *sua sponte* amendment to reset the filing period aligns with this goal by ensuring that litigants are not blindsided by substantive changes that might otherwise be deemed non-appealable. Any other conclusion would inject uncertainty into the Rule 50(b) process, frustrating its purpose and leading to inconsistent application across cases.

2. Rule 6(b)(2) permits flexibility in filing deadlines in the face of substantive amendments to a judgment.

The Supreme Court and multiple circuit courts have already applied flexible timing standards for post-judgment motions governed by Rule 6(b)(2). *See Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 205 (1943) (holding that a Rule 52(b) motion paused the time for filing an appeal); *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 466 F.3d 97, 100–

01 (2d Cir. 2006) (holding that the one-year period under Rule 60(b) might reset where a substantive alteration is made from one judgment to the next); *Wilmington Sav. Fund Soc'y, FSB v. Myers*, 95 F.4th 981, 982 (5th Cir. 2024) (holding that the first Rule 59(e) motion "stops the clock" for filing an appeal); *Trendsettah USA, Inc. v. Swisher Int'l, Inc.*, 31 F.4th 1124, 1335 (9th Cir. 2022) (holding that the filing period under Rule 60(b) resets as a result of a subsequent appellate decision); *The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1089 (10th Cir. 2005) (holding that the one-year period under Rule 60(b) might reset if a second judgment alters the first one).

Although Rule 6(b) limits the extension of filing deadlines under 50(b), 52(b), 59(e), and 60(b), substantive changes to a judgment reset these deadlines. *See Leishman*, 318 U.S. at 205. In *Leishman*, the petitioner filed a Rule 52(b) motion asking that the trial court's findings "be amended and supplemented." *Id.* at 204. The trial court then granted the motion and made additional substantive changes to their original judgment, despite the petitioner never asking for such changes. *Id.* at 205. This Court found that it was "immaterial that petitioner did not specifically request the amendment of the judgment," the court altered its conclusions and the "time for appeal [did] not begin to run until the disposition of the motion." *Id.* Where a court alters its conclusions, it is necessary for filing times to reset. *Id.*

Similarly, the Eleventh Circuit applied a flexible tolling standard to a Rule 59 motion. *See Wright v. Preferred Research, Inc.*, 891 F.2d 886, 890 (11th Cir. 1990). There, the court held that a motion challenging a second judgment, which

reduced the original damages award, was timely because it represented the appellant's first opportunity to contest the substantive change. *Id.* at 889. The Eleventh Circuit emphasized that procedural deadlines should not preclude litigants from addressing new and substantive changes to a judgment, especially when those changes impose significant legal consequences. *See id.* This principle underscores that the strict time limitations in Rule 6(b)(2) are not inflexible when substantive fairness demands an exception.

Whereas Rule 6(b)(2) does not prevent flexible tolling standards for Rules 60(b), 52(b) and 59(e), a flexible tolling standard should equally apply for Rule 50(b). As in *Leishman*, the court's substantive alterations here require filing deadlines to reset. *See id.* It is not dispositive that the University did not "specifically request the amendment of the judgment." *See Id.* It only matters that the Amended Judgment resulted in a substantive change. Therefore, consistency demands that the court's *sua sponte* amendment be treated the same way as a Rule 52(b) motion. The Amended Judgment should have reset post-judgment filing times.

Here, the Amended Judgment tolled the time—not extended it— because it made a substantive change to the Original Judgment. *See Wright*, 891 F.2d at 890.. As in *Wright*, where a judgment's change to damages was enough to restart the time for filing a post-judgment motion, the change to damages here must also reset the clock. *See id.* Given the nearly three-fold increase in damages—from $12,487 to $362,487—it is essential for the University to have an opportunity to challenge the basis of the damages decision. The district court's *sua sponte* amendment imposed a

dramatic new financial burden and as in *Wright*, the Amended Judgment marked the University's first opportunity to challenge the basis for the punitive damages award. *See id.*

C. The Amended Judgment Reexamined the Finality of the Original Judgment and Replaced It as the Court's Final Decision.

Finality is an issue "of importance and concern to every litigant in a federal court, since. . . the timeliness of post-trial motions, may turn on the question of when judgment is entered." *See United States v. Indrelunas*, 411 U.S. 216, 217 (1973). A judgment is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *See Ray Haluch Gravel Co. v. Cent. Pension Fund of the Int'l Union of Operating Eng'rs*, 571 U.S. 177, 183 (2014). However, even a final judgment is subject to abrogation, either by the parties or by the Court itself. *See e.g., Banister v. Davis*, 590 U.S. 504, 508 (2020) (holding when a party files a Rule 59(e) motion "there is no longer a final judgment to appeal from."); *Phillips v. Negley*, 117 U.S. 665, 673 (1886) (holding that "all judgments, . . . however conclusive in their character, . . . are under the control of the court which pronounces them, during the term at which they are rendered. . .").

Here, the Amended Judgment altered the award of damages, disrupted the Original Judgment's finality, and reset filing times. This is because judgments are final when they end litigation on the merits and a reexamination of the merits disrupts finality. *See Banister*, 590 U.S. at 508. Even if a reexamination of the merits did not disrupt finality, when there are two inconsistent judgments, the second

judgment has final effect. *See Valley Nat. Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir. 1997).

1. When an amended judgment alters an award of damages, it disrupts the original judgment's finality.

A judgment cannot be considered final if the parties have not received notice that the issues in their case have been conclusively resolved. *See Scofield v. National Labor Relations Board*, 394 U.S. 423, 427 (1969). "Failure to determine either expressly *or by reference* the amount to be awarded is strong evidence" that a judgment is not final. *See United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 233 (1958)* (emphasis added)*; see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (holding that "a person who is awarded nominal damages receives 'relief on the merits of his claim.").

When "deciding if and how much [damages] should be granted, a district court must examine . . . matters encompassed within the merits of the underlying action." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989). In *Osterneck*, the plaintiffs filed a post-judgment motion for discretionary prejudgment interest after a jury verdict in their favor on securities fraud and state law claims. *See id.* at 172. The district court granted the motion, amending the judgment to include prejudgment interest. *See id.* at 172. This Court reasoned that because prejudgment interest is part of the plaintiff's full compensation, the motion on prejudgment interest required reexamining substantive factors, such as the defendant's conduct and the extent of the plaintiff's injury. *See id.* at 176; *see also Duncan v. Wells*, 23 F.3d 1322, 1324 (8th

Cir. 1994) (holding that the award of damages in a section 1983 claim depends on questions of liability and conduct).

Here, the introduction of punitive damages through the Amended Judgment demonstrated that the court had not fully determined the damages in its Original Judgment. This aligns with the principle in *Uzuegbunam* that even an award of nominal damages provides "relief on the merits" and is therefore a final judgment. *See Uzuegbunam*, 141 S. Ct. at 801. The addition of punitive damages fundamentally altered the relief awarded, indicating that the Original Judgment lacked finality and could not trigger procedural deadlines.

Moreover, the district court's amendment functioned as a substantive reexamination of the case's merits, akin to a Rule 59(e) motion. As the Supreme Court noted in *Banister*, a Rule 59(e) motion allows the court to alter or amend a judgment, thereby rendering the original judgment non-final. *See Banister*, 590 U.S. at 508. Similarly, the district court's introduction of punitive damages required reassessing the University's conduct and the extent of the plaintiff's injury, directly impacting the merits of the case. This reexamination invalidated the finality of the Original Judgment, resetting the timeline for post-judgment motions to ensure procedural fairness. There is no question that a judge retains control over their judgments during the period within which they hear a case. *See Phillips* 117 U.S. at 673. So, it is in line with this Court's rules that an amended judgment could supersede a prior one.

This case has to go no further than the decision in *Osterneck*, where the addition of prejudgment interest required a substantive reexamination of the merits,

disrupting the judgment's finality. *See Osterneck*, 489 U.S. at 176. In *Osterneck*, the district court's post-judgment motion addressed factors such as the defendant's conduct and the extent of the plaintiff's injury, elements integral to the case's merits. *Id.* Likewise, the introduction of punitive damages here necessitated a similar substantive evaluation. In the effort of avoiding piecemeal examination of cases, it does not matter whether the judge intended to reexamine the case, it only matters that the judge's change was of the kind that typically requires a reexamination of the case. The University, therefore, acted appropriately by filing its Rule 50(b) motion within the reset timeline, challenging the punitive damages awarded. Holding otherwise would prevent the University from challenging the underlying basis for the award of $350,000 extra in damages after the court's amendment.

In the Petitioner's § 1983 claim, the determination of damages is inherently linked to the question of liability. *See Duncan*, 23 F.3d at 1324. As the Court in *Duncan* held, the award of damages depends on an examination of liability and the defendant's conduct. *Id.* Here, the Petitioner brought a § 1983 based on the University's conduct, therefore the punitive damages award directly implicated liability. Although the Amended Judgment did not directly alter the issue of liability, it is impossible to address damages for a § 1983 claim without looking at liability. The University's Rule 50(b) motion sought to challenge the imposition of punitive damages, because the award of damages was a direct product of its conduct. Denying the University the opportunity to contest this substantive alteration would effectively preclude it from addressing what was a fundamental change to its liability.

2. When there are two inconsistent judgments the last judgment supersedes the first.

When a court is faced with inconsistent judgments it should give final effect to the last judgment, clarifying which judgment is final. *See First Tenn. Bank N.A. v. Smith,* 766 F.2d 255*,* 259 (6th Cir. 1985). "[L]eaving unresolved apparently contradictory rulings on issues of similar consequence is legal error." *United States v. Hasan*, 526 F.3d 653, 663 (10th Cir. 2008). The last in time rule is designed to end "the chain of relitigation . . . by stopping it where it [stands]' after entry of the [most recent] court's judgment, and thereby discourages relitigation in [yet another] court." *See Robi v. Five Platters, Inc.*, 838 F.2d 318, 323 (9th Cir. 1988) (quoting *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1530 (9th Cir. 1985)).

Regardless of what a judgment changes, when a court is faced with inconsistent judgments it should give final effect to the last judgment entered. *See Valley Nat. Bank of Arizona* at 1335. In *Valley National Bank*, a jury found that a transaction between a lender and the borrower was an illegal joint venture and awarded damages to the guarantors. *Id.* Despite the jury's verdict, the trial court later entered a $12 million default judgment against the borrower and the borrower did not appeal. *Id.* In a separate trial, a federal trial court refused to enforce the default judgment. *Id.* Using the last in time rule, the Ninth Circuit held that the federal trial court was required to enforce the default judgment, because when a "second judgment is entered by the same court that entered the first," the second judgment controls. *See id.* at 1336. "The decision is not binding because it is correct;

it is binding because it is last." *Id* at 1335 (quoting *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d at 1530).

Here, the last in time rule should apply to give final effect to the Amended Judgment. There is a clear conflict between the Original Judgment and the Amended Judgment and it is appropriate to clarify that the Amended Judgment was final and reset filing timelines. Although both judgments purported to give effect "[p]ursuant to the [jury] verdict," and stated that "[a]ll relief not granted [t]herein [was] DENIED," the relief granted between the judgments substantially differed. (*See* Final Judgment, Jan. 20, 2002, No. 21-cv-1285); (Amended Final Judgment, Jan. 27, 2022, No. 21-cv-1285). Leaving the contradiction unresolved would be a "legal error." *See Hasan*, 526 F.3d at 663. Such an error has subjected the court's decisions to collateral attack and relitigation in the current proceeding. *See Robi*, 838 F.2d at 323. The practical solution, recognized by last in time rule, is to confirm once and for all that the Amended Judgment was final and by consequence began the clock for post-judgment filings.

As in *Valley Nat. Bank of Arizona*, the facts here are that a "second judgment [was] entered by the same court that entered the first." *See Valley Nat. Bank of Arizona*, 121 F.3d at 1336. Where the default judgment in *Valley* was a final judgment despite its contradiction with a jury verdict, likewise the Original Judgment was final despite its contradiction with a jury verdict. *See id.* The subsequent Amended Judgement then had the same effect on the Original Judgment. The Amended

Judgment "is not not binding because it is correct; it is binding because it is last." *See id* at 1335. To hold otherwise would undermine the doctrine of finality, creating uncertainty that would invite collateral attacks on judicial decisions.

In Conclusion, the Amended Judgment's resulted in a material and substantive change that implicated the University's legal obligations. The Federal Rules and this Court's interpretations on finality demand that the University have a chance to respond to the Addend Judgment. The most consistent rule in this case, is to reset filing deadlines when a judge's amendment disturbs issues of substance that were previously settled.

II. THE UNIVERSITY'S VIEWPOINT NEUTRAL HANDS-OFF POLICY DOES NOT VIOLATE THE FIRST AMENDMENT.

This Court should affirm the Thirteenth Circuit's opinion below because the University is under no constitutional obligation to prevent third parties from interfering with others speech rights. Likewise, the University's viewpoint-neutral policy treats minority and majority views with the same respect and is reasonable in light of the University's purpose of its educational mission. Should the Court hold that the University is required to protect every speaker on campus from third parties, such a ruling would undermine the framework for Constitutional rights. *See Harris v. McRae,* 448 U.S. 297, 318 (1980) (explaining that the Constitution does not confer an entitlement to subsidized rights, "[t]o hold otherwise would mark a drastic change in [the] understanding of the Constitution.").

A. The University Has No Affirmative Obligation to Protect Speakers from A Third Party's Actions.

The First Amendment merely guarantees that the state will not suppress or interfere with one's speech. U.S. CONST. amend. I. This protection, like other constitutional protections, is a negative right—it does not guarantee the government will support the exercise of one's rights when others seek to suppress it. *See e.g.*, *Harris*, 448 U.S. at 317–18 (acknowledging that the Fifth Amendment only affords protection against unwarranted government interference); *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (acknowledging that the Second Amendment codifies a pre-existing right and "declares only that it shall not be infringed."); *DeShaney v. Winnebago Cnty. Dept. of Social Services*, 489 U.S. 189, 196 (1989) (acknowledging that the Fourteenth Amendment limits the state's power to act, it does "not act as a guarantee of certain minimal levels of safety and security").

Thus, this Court's fundamental decisions on negative rights supports findings that (1) there is no affirmative obligation to police protection under the First Amendment, (2) third party action cannot impute to the government, and (3) government inaction cannot transform into an affirmative act of interference.

1. The University has no affirmative obligation to subsidize the exercise of free speech by providing speakers with police protection.

It is established that the Constitution does not confer a duty on the government to aid in the exercise of rights. *See Harris*, 448 U.S. at 318. In *Harris*, this Court laid out the limits of constitutional obligations placed upon the government under the

Constitution. *See id.* at 317. Although the Constitution guarantees a right to not have the government interfere, this Court held that no one is entitled to aid that would avail themselves of the "full range of protective [rights]." *See id.* at 316–17. It held that the Fifth Amendment "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.* at 318. In making this conclusion, this Court explained that to "translate the limitation on governmental power implicit in the Due Process Clause into an affirmative obligation" would place burdens on the government that are not warranted by the Constitution. *Id.* Thus, where the government did not place obstacles that interfered with their freedom of choice, the government was not required to subsidize services to aid in individuals' exercise of their freedom of choice. *Id.* at 316.

Using the negative rights analysis from *Harris,* this Court held that the First Amendment in no way places an obligation to grant benefits in order for a person to exercise their speech rights to their fullest extent. *See Regan v. Tax'n with Representation of Wash.*, 461 U.S 540, 545 (1983). In *Regan*, the regulation challenged was not infringing on any First Amendment rights or even regulating First Amendment activity. *Id.* at 546. Rather the regulation enforced refused to subsidize certain First Amendment activities, particularly not paying for the plaintiff's lobbying. *Id.* This court explained, "the reasoning of these decisions is simple." *Id.* at 549. Although one may not exercise their freedom of speech as much as they would like, the First Amendment does not confer "an entitlement to such funds as may be

necessary to realize all advantages of that freedom." *Id.* (citing *Harris v. Mcrae*, 448 U.S. 297, 317 (1980)).

Once again using the negative rights analysis, this Court held that the Fourteenth Amendment does not place an affirmative obligation on the government to provide protective services, "even where such aid may be necessary to secure … interests of which the government itself may not deprive the individual." *DeShaney*, 489 U.S. at 196. In reaching this decision, this Court explained that "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference … it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." *Id.* (quoting *Harris v. Mcrae*, 448 U.S. 297, 317 (1980)). This court explained that its limited "language cannot fairly be extended to impose an affirmative obligation to protect individuals when private parties seek to harm them." *Id.* Courts have readily applied *Deshaney* to First Amendment cases. *See e.g.*, *Balogh v. Virginia*, 120 F.4th 127, 137 (4th Cir. 2024); *Hilton v. City of Wheeling*, 209 F.3d 1005, 1006–07 (7th Cir. 2000); *Robles v. City of Berkeley*, 820 Fed. App'x. 529, 533 (9th Cir. 2020); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1513 (11th Cir. 1992).

The University has met the requirements under the First Amendment—it does not interfere with protected speech. Similar to *Regan*, the University's hands off policy does not prohibit, regulate, or restrict one's speech; rather, the University chooses not to interfere. *See Regan,* 461 U.S at 546; (R. 5a.) The University's hands-off policy places no obstacle in the way of First Amendment speech. *See Harris*, 448

U.S. at 318. Instead, the policy encourages a free exchange of ideas, which is evidenced by over sixty student organizations that the University permits to invite speakers of varying backgrounds and viewpoints. (R. 3a, 5a.) As well as, maintaining a weekly student newspaper that has been an important part of its institution for over a century serving as another place for students to share their views. (*See* R. 3a.) The record is devoid of any evidence that the University has acted to infringe on any speech.

Although some students have shouted down speakers, the University is under no obligation to provide aid in the form of police protection. Petitioner's argument is misguided as she has confused protection against government interference with a requirement for the government to support the full exercise of her rights. Like the Fourteenth Amendment, the First Amendment does "not act as a guarantee of certain minimal levels of safety and security." *See generally DeShaney*, 489 U.S. at 196. Both *Deshaney* and *Regan* cite *Harris* for the exact same proposition—a negative right "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Regan*, 461 U.S at 549 (quoting *Harris v. Mcrae*, 448 U.S. 297, 317 (1980)); *see also DeShaney*, 489 U.S. at 196 (quoting *Harris v. Mcrae*, 448 U.S. 297, 317 (1980)). The University is under no obligation to fund speech rights. *See Regan*, 461 U.S at 549. Therefore, employing the same negative rights analysis, it must follow that the First Amendment also does not place a duty on the government to provide protective services to aid in the exercise of speech rights.

2. A third party's violation of an on-campus speaker's First Amendment rights cannot be imputed to the University.

Applying *Deshaney*, the Fourth, Seventh, Ninth, Eleventh and now the Thirteenth Circuit all agree that the First Amendment does not require the government to protect persons from third party actions. *See Balogh*, 120 F.4th at 137; *Hilton*, 209 F.3d at 1006–07; *Robles*, 820 Fed. App'x. at 533; *Haitian Refugee Ctr., Inc.*, 953 F.2d at 1513. First Amendment protections "are triggered only in the presence of state action and ... a private entity acting on its own cannot deprive a citizen of First Amendment rights." *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000).

Therefore, the government's failure to act does not constitute affirmative conduct that violates the First Amendment. *See Robles*, 820 Fed. App'x. at 533; *see also Johnson v. City of Seattle*, 474 F.3d 634, 641 (9th Cir. 2007) (finding that the withholding of police protection was not an affirmative conduct). In *Robles*, the district court acknowledged that nearly a hundred campus police stood idly by as third parties interfered, some through violence, with protesters' speech. *See Robles v. In the Name of Humanity*, No. 17-cv-04864, 2018 WL 10604117, at *4 (N.D. Cal. Sept. 14, 2018). No affirmative actions were alleged, only that officer and the city failed to do anything. *Id.* However, the district court emphasized that in order for a violation of free speech to be present there must be "affirmative actions by the government that deterred or chilled one's speech." *Id.* The Ninth Circuit upheld the lower court's decision that the defendants failure to intervene did not constitute an affirmative

action, and thus failed to state a violation of the First Amendment. *See Robles*, 820 Fed. App'x. at 533.

Even in the presence of violence, no affirmative duty to protect speakers from third party actions is created. *See Balogh*, 120 F.4th at 131 (refusing to "transform the First Amendment from a shield to guard against invasive speech regulations into a sword to wield against violent speech disruptions."); *see also DeShaney*, 489 U.S. at 201–02 (holding no duty to act was created because allowing continued exposure to a known danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger). The Fourth Circuit had the opportunity to answer the question of whether the government must protect protesters, amid violence, on two separate occasions—both times the court found that even in those circumstances, the government has no obligation to act . *See Balogh*, 120 F.4th at 131; *Kessler v. City of Charlottesville*, No.20-1704, 2022 WL 17985704, at *1 (4th Cir. Oct. 21, 2022) (holding where the organizer of the rally brought First Amendment claims based on the same facts, no affirmative obligation to act was created under the circumstances of this case).

In *Balogh*, local law enforcement received reports that counter protesters were planning to disrupt a rally protesters were permitted to hold. *See Balogh*, 120 F.4th at 131. Rather than engage the crowd and prevent fights, the police refrained from doing anything due to a stand-down order. *Id.* at 132. Once violence broke out on both sides, they declared the rally an unlawful assembly. *Id.* The court reiterated that the defendants did not have a duty to protect the protesters from a hostile audience. *Id.*

at 133. Despite knowledge of potential violence from counter-protestors, and despite the violence that actually occurred between the protesters and counter protesters, the Fourth Circuit court affirmed the district court's holding that effectuating a plan that ordered the police to refrain from intervening did not violate the First Amendment. *See id.* at 131, 135; *see also Robles*, 820 Fed. App'x. at 533 (affirming the lower court's finding that even where violence was only exhibited by the counter protesters, and officers failed to intervene, no danger was created by the city)

Petitioner fails to allege a single affirmative act on the part of the University. Here, the students entered the auditorium with their own volition. The students' behavior was entirely separable from the University and, under a First Amendment analysis, bore no import on the University's liability. *See Lansing*, 202 F.3d at 828. In order to succeed on the merits of a First Amendment violation claim, Petitioner needs to prove affirmative acts by the University that chilled her speech. *See Robles*, 2018 WL 10604117, at *4. The record reflects that campus security and employees within the Department of Student Affairs adopted Dean Thatcher's approach of not not interfering or disciplining students at Petitioner's speech. (R. 5a.) No action whatsoever is alleged by Petitioner, rather it was that they did nothing. (R. 11a.)

Allegations that the University should have done more to punish students does not transform their hands off policy into an affirmative action that chills speech. *See id.* Like *Robles* where the third party's actions of disrupting speech did not turn into affirmative actions of the police when they choose to do nothing, here, the actions of the students cannot be imputed to the University. Regardless of the surrounding

circumstances, idle behavior cannot constitute an affirmative act under the First Amendment. *See Robles*, 820 Fed. App'x. at 533; *see also Johnson*, 474 F.3d at 61 (withholding of police protection is not an affirmative conduct).

Moreover, the tenor of student behavior, violent or otherwise, does not require the University to provide speakers with protection. *See Balogh*, 120 F.4th at 131. While some students arrived with banners, noisemakers, and dressed in animal masks and costumes, their conduct did not escalate to actual violence or threats of violence against Petitioner during her speech, only after Petitioner left did they engage in more violent conduct. (R. 6a.) In contrast, in *Balogh*, where violence did occur during the protest, the court nevertheless concluded that the government had no affirmative duty to act, and no First Amendment violation resulted from its inaction. *Id.* Where the presence of violence has not been sufficient to place an obligation for the government to act under the First Amendment, the absence of violence during Petitioner's speech, at a minimum, suggests that the University has no affirmative obligation to prevent student protesters from interfering with Petitioner's speech.

Although the University has a history of speakers getting shouted down from their speeches, without more, this does not create a duty where the University must act. *Id.* at 135; see *DeShaney*, 489 U.S. at 201–02. Much like in *Balogh*, here the student protestors were a rowdy group of students who intended to disrupt a speech. 120 F.4th at 131; (*Id.*) And much like in *Balogh*, here the University acted pursuant to a policy when it decided not to intervene with the disruption. *Id.*; *see also Robles*,

820 Fed. App'x. at 533 (affirming the district court's finding that despite standing idly by as counter protesters acted with violence against the protesters, it was not a danger created by the city, and thus no First Amendment violation); (R. 5a.) The law is clear—the University cannot be held liable for the disruptive actions of third party protestors nor can an affirmative obligation to act be created under these circumstances.

3. A blanket hands-off policy lacks the action required to effectuate a heckler's veto.

The heckler's veto doctrine is a narrow principle that only applies where the government themselves suppresses or silences a speaker because of fear or threat of a hostile crowd. *See Terminello v. Chicago*, 337 U.S. 1, 4 (1949) (holding the government cannot remove a speaker due to the hostile reactions to his message); *see also Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (holding the police's removal of demonstrators due to the fear of a dangerous situation building violated the First Amendment). This Court's decisions make clear that, in its true sense, a heckler's veto is a First Amendment construct based on state action. *See Terminello*, 337 U.S. at 4; *Edwards*, 372 U.S. at 235.

The circuit courts have reaffirmed this narrow principle in their review of the heckler's veto. *See Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985) (holding a heckler's veto exists where the government "curtail[s] 'offensive' speech" to "avoid … risks of public disorder."); *see also Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna*

Transit Sys., 938 F.3d 424, 438 (3d Cir. 2019) (finding a heckler's veto is invited where the government signals that they will suppress speech if the public behaves badly).

Because the heckler's veto requires state action, a failure to intervene does not subject a speaker to a heckler's veto. *See Jackson v. Cowman*, No. 19-13181, 2022 WL 3973705, at *8 (11th Cir. Sept. 1, 2022). In *Jackson*, the plaintiff attempted to deliver a sermon at the University of Georgia. Some students got very close to the speakers, aggressively engaging with them. One student "put his mouth right up on his ear and yelled" while another "chest-bumped" the petitioner. *Id.* at *2. The two officers standing by even told one of the students he was "doing a good job" at countering his speech. *Id.* Other than that interaction, the officers did not take any action to prevent the counter protesters from drowning out the speaker's speech. *Id.* Relying on Supreme Court precedent, the court reiterated that in each case a heckler's veto was found in the limited circumstance of the "police order[ing] unpopular, but peaceful, protestors to disperse because they were concerned that counter-protestors were about to become violent." *Id.* The court clarified that "no court has ruled that a heckler's veto principle requires an officer to protect a speaker from counter speech." *Id.* Thus, where the plaintiff was never ordered to disperse by the officers, "[t]his is therefore not a heckler's veto case." *Id.*

Rather, the heckler's veto doctrine only requires that, when action is taken, the state must take reasonable steps to control the hostile crowd before shutting down the peaceful speaker. *See Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 255 (6th Cir. 2015). In *Bible Believers*, a group of Christian evangelists were preaching "hate and

denigration" to a crowd of Muslims, some of whom responded with threats of violence and lawlessness, which caused the police officers to remove the speakers "to restore the peace." *Id.* at 234. The police were only criticized for resorting to shutting down the speaker as a result of the threats posed from the hostile crowd. *Id.* at 255. The court explicitly stated "our point here is that before removing the speaker due to safety concerns, and thereby permanently cutting off his speech, the police must first make bona fide efforts to protect the speaker from the crowd's hostility by other, less restrictive means." *Id*. Thus, nothing in this court's decision suggests that the police have an obligation to act under the heckler's veto doctrine, only that if they do act they should control the crowd rather than remove the speaker. *See id. But see Balogh*, 120 F.4th at 137 (acknowledging that even if the speaker did not engage in violence, a government action in declaring an unlawful assembly would not amount to a heckler's veto "because [the officers] silenced the so-called hecklers too.")

The University never affirmatively cut off Petitioner's speech. (R. 6a.) Although the students reacted in a negative way towards the messages and may have exhibited rowdiness, the Petitioner remained on the stage speaking—campus security never removed Petitioner or ordered her "to disperse because they were concerned that counter-protestors were about to become violent." Jackson, 2022 WL 3973705, at *2; (*Id.*) Rather, the Petitioner decided to step down on her own accord. (*Id.*) Although those countering Petitioner's speech wore obnoxious outfits and were making noise, this plays no role in the heckler's veto analysis where officers did not react to this behavior by attempting to shut down the speaker. *See Bible Believers*,

805 F.3d at 255; (*Id.*) Regardless, their actions during Petitioner's speech were less intimidating than those demonstrated in *Jackson*; where counter protesters yelled directly in the speaker's ear and "chest-bumped" him, the court still held that the officers' inaction did not effectuate a heckler's veto. *See Jackson*, 2022 WL 3973705, at *2. This was not a situation where the officers silenced the speaker because of a hostile crowd or ordered the speaker to leave, "this is therefore not a heckler's veto case." *Id.*; *see also Bible Believers*, 805 F.3d at 255 (standing for the proposition that no action is required, but when the government does act they cannot resort to removing the speaker).

Similarly, the University's hands off policy does not invite or signal that speech will be suppressed due to an audience's reaction. Rather, it "signals" that even views of groups that may be disfavored on campus have no fear of censorship because the University will *not* shut down the speaker based on the crowd's reaction. Nothing in the record reflects that Dean Thatcher, campus security, or any other employee of Student Affairs encouraged them to "shout down" the speaker. (*See* R. 7a.) To the contrary, Dean Thatcher agreed with Petitioner's sentiments. (R. 12a.) Thus, where officers who praised counter protesters in their efforts at attempting to drown out the speaker did not invite a heckler's veto, refraining from action, would fall within the strict confinements of a heckler's veto case. *See Jackson*, 2022 WL 3973705, at *2.

B. The University's Policy is Viewpoint Neutral and Reasonable in Light of its Purpose as an Educational Forum.

In order to pass constitutional muster, restrictions on speech in limited public forums need only be viewpoint neutral and reasonable in light of the purposes of the forum, and not serve as a facade for viewpoint discrimination. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S 661, 679 (2010); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). A limited forum describes government property where only particular subjects may be discussed or that only certain groups or speakers may use. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). In other words, a limited public forum is not open to the public at large for discussion of any and all topics. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 47 (1983). The record reflects that the only people that have spoken on the University's campus and used its facilities have been invited speakers associated with student organizations or faculty members to host student events; the University's facilities, like the Hedge family Auditorium, where Petitioner spoke, is not open to the general public. (R. 3a, 5a.) Thus, the University has created a limited public forum and its policy need only be viewpoint neutral and reasonable.

To meet the requirements of viewpoint neutrality, a policy must not discriminate based on a group's views. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (hereinafter "*Southworth I*"). In other words, minority and majority views must be treated with the same respect. *Id.* Recently courts have suggested there is an additional consideration in a viewpoint neutrality

analysis in a limited public forum—whether a restriction grants unbridled discretion in a decision-maker. This consideration has been anchored in the principle that access to a forum does not depend on majoritarian consent. *See Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 592 (7th Cir. 2022) (hereinafter "*Southworth II*"). However, a differential impact among viewpoints alone does not turn a viewpoint neural law into a discriminatory one. *See Pahls v. Thomas*, 718 F.3d 1210, 1236 (10th Cir. 2013).

As for reasonableness, the policy must be assessed in the light of the purpose of the forum and all the surrounding circumstances. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985). The restriction need not be the most reasonable or the only reasonable limitation. *Id.* at 808. Moreover, this court has noted that universities differ from other public fora in important ways. *See Christian Legal Soc'y.*, 561 U.S. at 686–88. In particular, universities have a mission to educate. *See id.* Therefore, when it comes to their campus and facilities, universities generally may issue reasonable regulations that are consistent with that mission.

1. The University's policy meets the requirements of viewpoint neutrality because it treats majority and minority views with the same respect.

The Supreme Court has made clear that a policy is not "vulnerable to constitutional assault ... because it systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream." *Christian Legal Soc'y* , 561 U.S. at 695; *see also Pahls*, 718 F.3d at 1236 (holding

where a law is on its face viewpoint neutral but has a differential impact among viewpoints, the inquiry into whether the law is in fact viewpoint discriminatory turns on the law's purpose). In *Christian Legal Soc'y*, this court dealt with a facially viewpoint neutral policy that required student groups to accept all new comers. 561 U.S. at 695. This Court explained this policy draws no distinctions based on their message or perspective. *Id.* In an attempt to invalidate this policy, the plaintiff pointed to its effect. *Id.* However, this Court rejected this attack explaining, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)). Because the requirement of accepting all comers was justified without reference to its content or viewpoint, no violation of First Amendment rights existed.

Moreover, although minority views must be treated with the same respect as majority views, the University has no duty to ensure the balance of viewpoints. *See Husain v. Springer*, 494 F.3d 108, 130 (2d Cir. 2017) (holding that although the procedure in providing funds must be viewpoint neutral, "this in no way means that the college has a duty to ensure that the positions expressed … reflect a balance of viewpoints."); *see also Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 650 (7th Cir. 2013) (noting that although benefits may fall more heavily on groups with one particular viewpoint it does not transform a facially neutral law into a discriminatory one). *But cf. Riley v. Nat'l Fed'n of the Blind of N.C.*, Inc., 487 U.S. 781, 799 (1988) (holding a law regulating solicitation of charitable contributions by

professional fundraisers was a content-based law and thus was not narrowly tailored under exacting First Amendment scrutiny where it necessarily discriminated against small or unpopular charities).

What matters is how the policy is administered—viewpoints cannot be considered in making decisions. *See Southworth I*, 529 U.S. at 235. In *Southworth I,* this court was concerned with whether the decision making process intertwined within a student referendum was consistent with viewpoint neutrality or allowed student government unbridled discretion to defund groups based on majority vote. *See id.* On remand, all criterias used to determine who would receive funding were found to be in line with viewpoint neutrality except for two. *See Southworth II*, 307 F.3d at 595. One standard favored student organizations that had previously received funding and the other favored long-established organizations. *Id.* at 593. However, because political and religious groups had previously been excluded from receiving funding, these two standards inherently disadvantaged religious and politically partisan viewpoints and thus favored one viewpoint over another. *Id.* at 593–94. Inherent in the administration of this policy is a conflict with the essence of viewpoint neutrality—they ultimately considered one's views in determining who would and who would not receive funding. *See also Amidon v. Student Ass'n of State Univ. of N.Y at Albany*, 508 F.3d 94, 101–02 (2d Cir. 2007) (holding the decision-making process in a student referendum inherently disadvantaged those with minority views and gave the student government unbridled discretion where the referendum simply asked the student government who should receive the funding, thus qualifying access

to funds on majority approval). *Cf Wisconsin Educ. Ass'n Council*, 705 F.3d at 649 (holding the policy did not have the effect of viewpoint discrimination where the policy had no inherent connection to a particular viewpoint but rather any effect from the policy was simply coincidental).

Here, the University is employing a practice where, in essence, it applies a neutral in administering its hands-off policy. Regardless of the speaker, topic, or views, the University does not interfere. (R. 5a.) Unlike in *Southworth II* and *Amidon*, a student groups' viewpoint is not inherently intertwined with the administration of this hand-off policy. *See Southworth II*, 307 F.3d at 595; *See Amidon*, 508 F.3d at 101–02. The administration of this hands-off approach is not subject to a student referendum or anything of the sort—the decision not to interfere is not reflective of viewpoints nor is it dependent on majority approval. (*See* 5a.) Where the safeguards of neutrality were abandoned in the referendum cases by conditioning resources based on another's groups tolerance or approval of its views, the decision not to interfere is not dependent on approval by anyone. *See Southworth II*, 307 F.3d at 595. In every scenario, despite the speaker or views being expressed, the University has refused to intervene. (R. 5a).

Since the administration of this policy does not run afoul to viewpoint neutrality, the fact that some views may be "shouted down" does not turn this policy into a First Amendment violation. The University has no duty to ensure a balance of viewpoints are expressed on campus, only that restrictions they place are viewpoint-neutral. *See Husain*, 494 F.3d at 130. The dissent seems to suggest that those who

will be allowed to speak will only be those approved by the majority and therefore the University's policy violates the First Amendment. (R. 18a.) However, the dissent below misapplies *Southworth II* and *Amidon*. These cases support that organizations need not be funded equally, so long as funding differences are not reflective of student or administrative tolerance of a group's views. *See Amidon*, 508 F.3d at 101–02; *Southworth II*, 307 F.3d at 595.

However, here, the dissent is not stating that the administration of the University's policy is based on majority approval, but rather it is pointing to its *effect*. (*See* R. 18a.) But, this Court has already rejected this idea. See *Christian Legal Soc'y*, 561 U.S. at 695. Although the *effect* of this policy may have a disparate impact on unpopular groups or views among students on campus, it is not subject to constitutional assault because the policy itself is justified without reference to viewpoints. *See id.* There is no evidence that this was adopted out of hostility for particular viewpoints. (R. 12a) Instead, Dean Thatcher agreed with the sentiments expressed by Petitioner. (*Id.*) Thus, although different groups, even perhaps those out of favor with the campus, may be shouted down as a result of the University not interfering at all times, it does not turn this viewpoint neutral law into a discriminatory one. *See Pahls*, 718 F.3d at 1236. The policy of non-intervention aligns with the university's educational mission by fostering an environment where diverse viewpoints can be expressed and debated without fear of censorship or retaliation. In fact, if the University were to step in and act at its discretion, that may demonstrate the University favoring one group's views over another. That some speakers may be

countered over others reflects the inherent nature of our society in debate, not that the University's policy treats views differently.

2. The University's Policy advances its educational mission and does not foreclose speech.

The final step is to determine whether the viewpoint neutral policy is reasonable. A policy is reasonable if it can be reasonably perceived as advancing the institution's educational mission. S*ee Christian Legal Soc'y*, 561 U.S. at 686 (acknowledging that because "judges lack the on-the-ground expertise and experience of school administrators, . . . we have cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'") (quoting *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., v. Rowley*, 458 U.S. 176, 206 (1982)) . When reviewing a university's policy for reasonableness, deference is owed to the institution's reasonable judgment regarding the best means to fulfill its educational mission. *See id.*

In *Christian Legal Soc'y*, with due respect for the judgment of the school administrators, this Court determined that the university's all-comers policy was reasonable, given the administrators' belief in its potential to promote education. *See Christian Legal Soc'y*, 561 U.S. at 688–89. Under this policy, all student groups were required to accept any student who wanted to join in order to be a registered student organization affiliated with the law school and be granted certain school benefits. *Id.* at 668–70. This Court found that it was reasonable for this university to implement this policy under the belief that the "educational experience is best promoted when

all participants in the forum must provide equal access to all students" and that this type of policy would "encourage tolerance, cooperation, and learning among students." *Id.* 688–89. Thus, in light of the university's mission and the experience of educators in implementing policies to achieve their missions, this court found the policy reasonable.

Moreover, reasonableness of a restriction is supported where sufficient alternative channels remain open to exercise First Amendment rights. *Id.* at 690; s*ee also Hill v. Colorad*o, 530 U.S. 703, 780 (2000) (affirming that ample alternative channels remained open where petitioners, and "indeed, everyone, are still able to protest, counsel, shout, implore, dissuade, persuade, educate, [and] inform … [t]hey just [could not] knowingly approach within eight feet of an individual who [was] within 100 feet of a healthcare facility entrance."); *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (explaining although a policy may reduce to some degree the potential audience for one's speech it is of no consequence where the remaining avenues have not been shown to be inadequate). In *Christian Legal Soc'y*, although the student group could not take advantage of the Registered Student Organization-specific methods of communication as a result of not abiding by the all-comers policy, this Court pointed out that the "advent of electronic media and social networking lessens the importance of those channels." 561 U.S. at 691. Moreover, it was noted that private groups are still allowed, and do maintain a presence on campus without official school affiliation. *Id.* Therefore, this court found both were sufficient

alternative channels that allowed the student group to communicate with students despite being cut off from using official channels. *See id.*

Here, the University's hands-off policy is reasonable with respect to the university's mission of fostering a coeducational institution open to everyone and its commitment to civic engagement, academic excellence, and leadership for the common good. (R. 2a.) It is reasonable for the University to believe that having a hands-off policy where students will not be prevented from sharing their views will help achieve these missions and goals. *See id.* at 668–69. Likewise, it is also reasonable for the University to believe that allowing all viewpoints to be expressed and shared without intervention will aid in upholding their school motto—"Forever Learning"—aiding in its commitment to intellect. (R. 3a.) While there may be instances of disruptive behavior, the policy does not need to be the most reasonable. *See Cornelius*, 473 U.S. at 808. The University is one of the most preeminent educational public institutions in New Tejas and has continued to see success under Dean Thatcher's leadership. (R. 2a, 4a.) With the university's experience of creating an institution that produces top students, deference should be given to the ways it believes best to continue this success. *See Christian Legal Soc'y*, 561 U.S. at 686. The University's decision to allow all viewpoints to be shared without interference is consistent and reasonable in light of its broader educational objectives.

Moreover, this policy is not foreclosing any channel of communication. No speaker is being silenced by the University and no message is prohibited. S*ee Hill* 530 U.S. at 780. But even if this hands-off policy of non-intervention leads to some not

being able to complete their speech in front of students at places on campus like the Hedge Family Auditorium, student groups and invited speakers have an alternative channel to exercise their freedom of speech. For example, the University is home to the *Stinger*, a student newspaper that has been a vital part of campus life for over a century. (R. 2a) Published weekly, this student newspaper serves as an effective outlet to share updates and communicate ideas. (*See Id.*) Therefore, any student organization, including the Campus Vegan Alliance, could have an invited speaker, like Petitioner, take advantage of this student newspaper to share her message with the larger student body. Although the Petitioner may face challenges in her effort to speak in front of an audience due to the actions of others, this policy does not restrict that opportunity and the availability of the *Stinger* "lessens the importance of those channels." *Christian Legal Soc'y* , 561 U.S. at 691; *see also Ward*, 491 U.S. at 791.

Petitioner is seeking to create a First Amendment right that does not exist. The University has no affirmative obligation to protect a speaker from a third party's actions. Moreover, its hands-off policy meets the scrutiny required by this court—it is both viewpoint neutral and reasonable. Therefore, this Court should affirm the Thirteenth Circuit's decision and grant our motion for judgment as a matter of law.

CONCLUSION

For these reasons, this Court should conclude the time for filing a post-judgment motion ran from the Amended Judgment and that the University filed a timely Rule 50(b) motion. Further, this Court should hold that the University's viewpoint-neutral policy of non-intervention does not violate the First Amendment. Accordingly, Respondent respectfully requests that this Court affirm the Thirteenth Circuit's finding that the Rule 50(b) motion was timely and affirm the grant of judgment as a matter of law on the merits.

Respectfully submitted,

TEAM 88

Counsel for Respondent

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Respondent, hereby certifies that, in compliance with Competition Rule 2.5 and Supreme Court Rule 33.1, Respondent's brief contains 13,548 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

Respectfully submitted,

TEAM 88

Counsel for Respondent

APPENDIX

CONSTITUTIONAL PROVISIONS

The First Amendment of the United States Constitution 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.

42 U.S.C. § 1983 provides in pertinent part:

> 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.

Federal Rule of Civil Procedure 50 provides:

(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.

(c) *Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.*

(1) *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is

conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) *Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal*. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.