No. 24-0514

In The

Supreme Court of the United States

Dove McMillan,

Petitioner,

v.

Board of Regents of City University of Lantana

Respondent.

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

BRIEF FOR THE PETITIONER

Team 92

Counsel for Petitioner

QUESTION PRESENTED

(1) Whether the time for filing a Rule 50(b) post-judgment verdict runs from the date of entry of the original final judgment or an amended final judgment when the motion is only challenging issues that were unchanged and do not have a specific relationship to the alterations made by the judge.

(2) Whether a University can maintain a viewpoint-neutral policy of not restraining or punishing students who interfere with controversial speakers on campus under the First Amendment, resulting in a heckler's veto.

TABLE OF CONTENTS

QUESTION PRESENTED I

TABLE OF CONTENTS II

TABLE OF AUTHORITIES IV

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STANDARD OF REVIEW 1

STATMENT OF THE CASE 2

I. FACTUAL BACKGROUND 2

II. PROCEDURAL HISTORY 4

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. THE COURT SHOULD FIND THAT THE UNIVERSITY'S RULE 50(B) MOTION WAS UNTIMELY AND THE DEADLINE TO FILE IT SHOULD BE MEASURED FROM THE ORIGINAL FINAL JUDGMENT AND NOT THE AMENDED FINAL JUDGMENT WHEN THE MOTION WAS NOT RELATED TO THE DIFFERENCE IN JUDGMENTS. 7

A. THE COURT SHOULD ADOPT THE COMMON-SENSE APPROACH OF THE SEVENTH AND SECOND CIRCUIT'S AND HOLD THAT A POST-VERDICT MOTION MUST BE SUFFICIENTLY RELATED TO THE ALTERATION MADE IN AN AMENDED JUDGMENT IN ORDER TO RELY ON THE LATER DATE FOR FILING TIME LIMITS BECAUSE OF THE PURPOSE OF THE TIMING RULES AND TO AVOID ABSURD RESULTS. 8

i. The Court should apply the test from McNabola that required a sufficient relationship to an amended judgment to extend deadlines to file because it considered the balance of finality and justice. 11

ii. The Court should reject the broad test from Cornist because it does not consider the purpose of the rules, conflates the time for appeals with times for filing post-verdict motion, and leads to absurd results 12

iii. Using the relationship-based test from McNabola, the University's general 50(b) motion for liability was not specifically addressed to the alteration in the amended judgment of punitive damages 16

B. ALTERNATIVELY, EVEN IF THE COURT DECIDES TO ADOPT THE EXPANSIVE FIFTH CIRCUIT APPROACH, THE FACTS OF THIS CASE CAN BE DISTINGUISHED FROM THE FIFTH CIRCUIT CASES. 17

I. THIS COURT SHOULD REVERSE THE THIRTEENTH CIRCUIT DECISION AND FIND THAT THERE WAS SUFFICIENT EVIDENCE AS A MATTER OF LAW FOR A REASONABLE JURY TO HAVE FOUND THE UNIVERSITY LIBALE FOR A 42 U.S.C. § 1983 CLAIM FIRST AMENDMENT CLAIM BASED ON THE UNIVERSITY'S UNCONSTITUTIONAL POLICY 18

A. A HECKLER'S VETO UNCONSTITUTIONALLY ALLOWS FOR THE SUPPRESSION OF MINORITY VIEWPOINTS AND DOES NOT FURTHER THE PURPOSE OF THE FIRST AMENDMENT. 18

i. Courts have recognized the necessity of state intervention to prevent violations of constitutional rights by private actors *18*
ii. A heckler's veto violates the purpose of the First Amendment. *21*
iii. The Court should find a First Amendment violation in the policy of the University because a heckler's veto limits the protections of the First Amendment for minority viewpoints and does not further its purpose. *24*
B. THE UNIVERSITY'S POLICY OF ALLOWING STUDENTS TO DISRUPT SPEAKERS ON CAMPUS FAVORS MAJORITY APPROVED SPEECH OVER MINORITY SPEECH VIOLATES THE FIRST AMENDMENT. 27
C. THE UNIVERSITY VIOLATED THE FIRST AMENDMENT BY INDIRECTLY REGULATING SPEECH THROUGH ITS POLICY OF NOT RESTRAINING STUDENTS WHO DISRUPT CAMPUS SPEAKERS. 30
i. The University can be held accountable for the actions of their students for two reasons: not stopping student's disruption created a foreseeable constitutional violation and not punishing students for disrupting speakers' encouraged speech regulation. *30*
ii. The state can be held liable for the actions of third parties when there is foreseeability that a third party will violate constitutional rights. *31*
iii. This Court should extend the doctrine that prohibits state coercion of third parties that results in suppression of speech to cover state encouragement of third parties that results in suppression of speech. *33*
D. THE UNIVERSITY'S HANDS OFF POLICY IS CONTENT BASED SPEECH DISCRIMINATION AND SHOULD BE PRESUMED INVALID BECAUSE IT TREATS CONTROVERSIAL SPEECH DIFFERENTLY THAN NON-CONTROVERSIAL SPEECH. 36
E. THE CASE AT ISSUE IS DIFFERENT FROM *DESHANEY V. WINNEBAGO COUNTY DEPT. OF SOCIAL SERVICES* AND THUS THE COURT SHOULD HOLD THAT RESTRAINING SOMEONE'S ABILITY TO PROTECT THEIR RIGHT TO SPEAK WHILE ALSO REFUSING TO PROTECT SPEECH IS A VIOLATION OF THE FIRST AMENDMENT. 42
i. New Tejas prevents speakers on campus from protecting their right to speak through use of self-help remedies. *42*
ii. The University refuses to punish those who disrupt speaking. *43*
iii. The combination of not allowing self-help measures and not restraining those who disrupt speech is a violation of the First Amendment because there is a restraint on liberty that triggers protections of the Due Process Clause of the 14th Amendment. *44*
CONCLUSION **47**

TABLE OF AUTHORITIES

CASES

Abrahms v. United States,
250 U.S. 616 (1919) 20, 21
Amidon v. Student Association of State University of New York at Albany,
508 F.3d 94 (2005). 27
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 30, 33, 34
Board of Regents of the University of Wisconsin System v. Southworth,
529 U.S. 217 (2000). 26, 27
Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 23
City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) 39
Cohen v. California,
403 U.S. 15 (1971). 42
Cornist v. Richland Par. Sch. Bd.
(1973).....11
Cottonreader v. Johnson,
252 F. Supp. 492 (M.D. Ala. 1966) 17
Department of Banking v. Pink,
317 U.S. 264 (1942) 9
Deshaney v. Winnebago County Dept. of Social Services,
489 U.S. 189 (1989). 43, 44, 45
Dobbs v. Jackson Women's Health Organization,
597 U.S. 215 (2022) 29
Estelle v. Gamble, 429 U.S. 97 (1976).....44
Feiner v. New York, 340 U.S. 315 (1951).....19
Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992) 19
FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) 9
Greisen v. Hanken, 925 F.3d 1097 (9th Cir. 2019) 1
Imbler v. Pachtman, 424 U.S. 409 (1976).....32
Kazazian v. Bartlett & Bartlett LLP, No. 03 Civ. 7699 (LAP), 2007 WL 4563909 (S.D.N.Y. Dec. 19, 2007) 11
Martinez v. State of California, 444 U.S. 277 (1980) 30, 31, 32
McNabola v. Chicago Transit Auth., 10 F.3d 501 (7th Cir. 1993);.....10, 14, 16
McRae v. Harris, 448 U.S. 297 (1980).....28
Minneapolis Star & Trib. Co. v. Minnesota Com'r of Revenue, 460 U.S. 575 (1983) 35
Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175 (2024) 30, 33, 34
Ortiz v. Jordan, 562 U.S. 180 (2011);.....7
Ovadal v. City of Madison, 416 F.3d 531 (2005). 19
Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California, 475 U.S. 1 (1986).....22
Padilla v. Maersk Line, Ltd., 07-cv-3638 (RMB/THK), 2012 WL 4009555 (S.D.N.Y. Sept. 12, 2012) .10
Police Dept. of Chicago v. Moseley, 408 U.S. 92 (1972) 36, 37
Progressive Indus., Inc. v. United States, 888 F.3d 1248 (Fed. Cir. 2018) 9
Reed v. Town of Gilbert, Az., 576 U.S. 155 (2015) 35, 37, 38, 40, 41

Reno v. ACLU, 521 U.S. 844 (1997) 20
Shelley v. Kraemer, 334 U.S. 1 (1948) 29
Simon & Schuster v. Members of New York State Crime Victims Board, 502 U.S. 105 (1991) 35, 39, 41
Smith v. Ross, 482 F.2d 33 (1973) 18
Tru-Art Sign Co., Inc. v. Local 137 Sheet Metal Workers Int'l Ass'n, 852 F.3d 217 (2d Cir. 2017) 10
TSG Water Res., Inc. v. D'Alba & Donovan Certified Pub. Accts., P.C., No. CV 402-258, 2006 WL 8433815 (S.D. Ga. Aug. 4, 2006) 10
Whitney v. People of California, 247 U.S. 357 (1927) 21, 22
Wilmington Sav. Fund Soc'y, FSB v. Myers, 95 F.4th 981 (5th Cir. 2024) 12

STATUTES

28 U.S.C. § 1254(1). 1
28 U.S.C. § 2071-2077 12
42 U.S.C. § 1983 4
FRCP 6 8
FRCP 60 8
FRCP Rule 50. 7
New Tejas Penal Code § 9.31(b)(1) 41, 45

OTHER AUTHORITIES

David L. Hudson Jr., How 2 Supreme Court cases from 1919 shaped the next century of First Amendment law, ABA Journal (2019) 22
Douglas Gary Lichtman, How the Law Responds to Self-Help, COASE-SANDOR WORKING PAPER SERIES IN LAW AND ECONOMICS, (2004) 42
Leslie Gielow Jacobs, Is There an Obligation to Listen?, 32 U. MICH. J. L. REFORM 489 (1999). 22

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Thirteenth Circuit was entered on May 10, 2023. It arguably did not have jurisdiction to hear the appeal from the District Court for the Eastern District of New Tejas under 28 U.S.C. § 1291 due to timeliness, which is a central issue in this case. Petitioners filed a timely writ for certiorari, which this Court granted on October 7, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New Tejas has not yet been published but can be located at No. 21-cv-1285 and is reprinted on pages 20a–24a of the Record. The United States Court of Appeals for the Thirteenth Circuit's opinion is not yet published but can be located at No. 24-0514 and is reprinted on pages 1a–19a of the Record.

STANDARD OF REVIEW

"Determinations of timeliness are generally matters of statutory interpretation, which we review de novo." *Tru-Art Sign Co. v. Local 137 Sheet Metal Workers Int'l Ass'n*, 852 F.3d 217, 220 (2d Cir. 2017). "We review a district court's grant of judgment as a matter of law de novo, evaluating . . . whether the evidence is so weighted in favor of one side that one party must prevail as a matter of law." *Nat'l Fire Ins. Co. of Hartford v. Arkin Constr. Co., Inc.*, 320 F.3d 1260 (2003).

Whether the actions of the students at the University violated the First Amendment is a question of law, therefore *de novo* review is warranted. *Greisen v. Hanken*, 925 F.3d 1097 (9th Cir. 2019).

STATMENT OF THE CASE

I. Factual Background

On February 8, 2020, Petitioner Dove McMillan ("McMillan") was set to speak at the City University of Lantana ("the University"). R. at 5a. McMillan was invited to speak at the University by the Campus Vegan Alliance, as McMillan is a well-known advocate of veganism. R. at 6a. McMillan had planned to speak about the lack of humane treatment of animals in the agriculture industry and encourage others to refrain or entirely stop consuming animal products of all kinds, as she typically does. *Id.* Within just five minutes of starting her speech, McMillan was confronted with a large group of University students who stormed into the auditorium where she was set to speak. *Id.* These disruptive students began yelling and making noise until McMillan was unable to talk, overwhelming her ability to get across her message to those who came to listen. *Id.* The students gathered right at the foot of the auditorium stage, some carrying banners, others wearing animal costumes and masks, and others even using noisemakers to drown out McMillan's voice. *Id.* McMillan attempted to calm the crowd down, but her pleas were ignored. *Id.* After 15 minutes of attempting to give her speech, McMillan left the stage and did not return. *Id.* The members of the Campus Vegan Alliance were thus left without ever getting the chance to hear what McMillan had to say. *Id.* The

disruptive students remained in the auditorium for approximately an hour leaving behind broken chairs, broken tables, a stained carpet, and a damaged podium in the auditorium when they eventually dispersed. *Id.*

Students shutting down speaking events is well within the norm at the University. R. at 5a. Speakers discussing institutional racism, recreational marijuana, Second Amendment rights, and climate change have all been subject to the "heckler's veto" of these disruptive students' students. *Id.* The students are equal opportunity hecklers, shouting down speakers discussing a wide variety of subjects. *Id.* While there is often campus security at these events, they fail to intervene pursuant to a school policy that promotes a hands-off approach to any form of discipline. *Id.* That policy has been advanced by Mason Thatcher, Dean of the University and former star of the University's football team. R. at 4a. Thatcher did not have any prior academic experience before taking on the role of dean and has largely taken a "boys will be boys" approach to his position. R. at 5a. That policy effectively means that Thatcher will do nothing to punish or discourage the heckling of campus speakers. *Id.* Thatcher believes that sometimes students "just need to blow off a little steam" and thus has refused to intervene in or punish the disruptive actions of the students when speakers attempt to give talks on campus. *Id.* He testified at trial that even if "things may get out of hand every now and then," the disruptions that the students cause doesn't warrant his intervention. *Id.* The University policy of inaction has been equally applied to all instances of disruption; it has not been applied based on the specific subject that a speaker may bring up. R.

at 11a. The employees within the Department of Student Affairs have followed Dean Thatcher's lead, including campus security, and similarly done nothing to stop the student's raucous behavior even when the students destroy property and disturb the peace. R. at 5a. In many cases the students who caused the disruptions are readily identifiable, but the school still refuses to take action against them, following Dean Thatcher's policy. *Id.*

Following the shutdown of her speaking event, McMillan sued the Board of Regents of the City University of Lantana for violating her First Amendment Rights under 42 U.S.C. § 1983. R. at 7a.

II. Procedural History

McMillan sued for a violation of her First Amendment rights under 42 U.S.C. § 1983 in federal district court. R. at 7a. The case proceeded to trial, where the University moved for a judgment as a matter of law under Rule 50(a). The district court denied the motion and a jury found for McMillan. *Id.* She was awarded $12,487 in compensatory damages and $350,000 in punitive damages. On January 20, 2022, the district court entered a final judgment awarding only the compensatory damages. *Id.* A week later on January 27th, the district court *sua sponte* modified the judgment and included the punitive damages as well. *Id.* Twenty-eight days after the date of the modified judgment and thirty-five days from the date of the original judgment, the University filed a renewed motion for judgment as a matter of law under Rule 50(b). *Id.* The district court ruled the renewed 50(b) motion untimely and denied it without regard to the merits. *Id.* The

University then appealed the district court judgment to the 13th Circuit Court of Appeals. *Id.*

The Thirteenth Circuit Court of Appeals reversed the decision of the district court and held that the University had preserved its argument in a timely Rule 50(b) motion. R. at 10a. The Thirteenth Circuit also held that the district court erred in denying judgment as a matter of law on this basis. *Id.* The Thirteenth Circuit then turned to the merits of the challenge and reversed the district court. R. at 14a. The Thirteenth Circuit held that McMillan's First Amendment challenge failed to assert requisite state action to warrant a claim and therefore the University was entitled to a judgment as a matter of law. *Id.* Petitioner McMillan then appealed the Thirteenth Circuits decision. *Id.*

On October 7, 2024, this Court granted certiorari to address whether (1) , and (2) whether a University can maintain a viewpoint-neutral policy of not restraining or punishing students who prevent controversial speakers from speaking on campus under the First Amendment.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Thirteenth Circuit because the Respondent's Rule 50(b) motion was untimely because the time for filing it runs from the original final judgment and not the amended final judgment when the motion was only challenging unchanged portions of the judgment. The Court should apply the common-sense relationship-based test used in *McNabola* because it considers the balancing of finality and justice within the Federal Rules of Civil

Procedure. The Court should not apply the overly broad test of the Fifth Circuit because it conflates the guidelines offered by this Court in *Honeywell* on the timeline for filing appeals and writs of certiorari with those for filing all post-judgment motions, even though they are governed by different principles. The Fifth Circuit's approach also leads to absurd results. Based on the relationship-based test, the 50(b) motion was only directed to liability, which is an issue unchanged by the addition punitive damages by the trial judge. Thus, the motion was untimely, and the issue was not preserved on appeal.

On the merits, this Court should reverse the decision of the Thirteenth Circuit because the University's policy of inaction in the face of students disrupting petitioner McMillan while she was speaking on campus violates the First Amendment. First, allowing hecklers to shut down speakers violates First Amendment law and goes against the policy goals of the First Amendment to create a marketplace of ideas. Second, the policy of allowing students to disrupt speakers on campus favors majority approved speech over controversial speech with minority viewpoints. Third, the policy of inaction amounts to impermissible indirect third-party regulation of speech in violation of the First Amendment. Fourth, the University's hands off policy is content based speech discrimination and should be presumed invalid because it treats controversial speech differently than non-controversial speech. Finally, restraining petitioners' liberty to protect her right to speak while also refusing to protect her ability to speak violates the First Amendment.

ARGUMENT

I. THE COURT SHOULD FIND THAT THE UNIVERSITY'S RULE 50(B) MOTION WAS UNTIMELY AND THE DEADLINE TO FILE IT SHOULD BE MEASURED FROM THE ORIGINAL FINAL JUDGMENT AND NOT THE AMENDED FINAL JUDGMENT WHEN THE MOTION WAS NOT RELATED TO THE DIFFERENCE IN JUDGMENTS.

The Court should find that the District Court for the Eastern District of New Tejas properly ruled that the University filed an untimely Rule 50(b) motion by using the common-sense approach, used by a majority of the circuits who have addressed this issue. The common-sense approach should be adopted because it respects the purpose of the Federal Rule of Civil Procedure and avoids absurd results brought on by adopting the minority approach. This approach properly calculates the time to file the post-verdict motion from the original final judgment and not the amended final judgment where the motion could have been filed initially and was not specifically addressed to the alteration made in the amended judgment.

The Court should adopt this rule, rejecting the Fifth Circuit's expansive approach, and thereby reverse the Thirteenth Circuit. Thus, the motion Respondents filed on February 24, 2022 was untimely because while it was 28 days from the entering of an amended final judgment, it was 35 days after the original final judgment and past the deadline.

a. **The Court should adopt the common-sense approach of the Seventh and Second Circuit's and hold that a post-verdict motion must be sufficiently related to the alteration made in an amended judgment in order to rely on the later date for filing time limits because of the purpose of the timing rules and to avoid absurd results.**

Claims of insufficiency-of-the-evidence, the only claim Respondent has raised on appeal, need to be preserved for appellate review by raising a timely rule 50(b) motion.[1] *See Ortiz v. Jordan*, 562 U.S. 180 (2011); Fed. R. Civ. P. 50(b). This Court has "unequivocally establish[ed] that the precise subject matter of a party's Rule 50(a) motion—namely, its entitlement to judgment as a matter of law—cannot be appealed unless that motion is renewed pursuant to Rule 50(b)." *Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394, 404 (2006)*. "The absence of such a motion" deprives an appellate court of the "power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Id.* at 400–01 (*quoting Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212, 218 (1947)). The Rule 50(b) is a renewal of the Rule 50(a) motion for judgment as a matter of law, which was

[1] This Court recently clarified that "purely legal issues" that were denied in summary judgment are preserved for appeal even in the absence of a Rule 50(b) motion. *Dupree v. Younger*, 598 U.S. 729 (2023). The sufficiency-of-the-evidence issue is not a "purely legal issue" because there are factual questions addressed in Section II of this Brief, namely whether the University's policy was truly viewpoint neutral. *Infra* Section II. However, Petitioner concedes that instead of its untimely Rule 50(b) motion, Respondent may have had the ability to bring purely legal issues related to the question of first amendment violations, as long as a timely notice of appeal was filed. There is nothing in the record to show that respondent has raised any such issues on appeal outside of the sufficiency-of-the-evidence issue and thus, this avenue of appeal must be considered waived.

made prior to submitting the case to the jury. Fed. R. Civ. P. 50(a); Fed. R. Civ. P. 50(b). The party must have "been fully heard on an issue during a jury trial and [if] the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue," it can "resolve the issue" and "grant a motion for judgment as a matter of law." Fed. R. Civ. P. 50(a). The Rule 50(b) motion, at the heart of this case, must have been made "no later than 28 days after the entry of judgment," whereby "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." Fed. R. Civ. P. 50(b).

Importantly, this 28-day time limit cannot be extended,[2] as per Rule 6(b)(2), which states that "[a] court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." Fed. R. Civ. P. 6(b)(2).

However, the final judgment may be amended post-verdict by a motion or *sua sponte* by the trial judge in order to correct an error. *See, e.g.*, Fed. R. Civ. P. 60(a) ("The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice."). A judge may also rule on a motion to correct other legal or factual errors through a Rule 59

[2] This court has clarified timing rules such as these are not jurisdictional, however, because the time limit is not based on a statutory requirement. See *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17 (2017). The rules must nonetheless be followed by lower courts outside of exceptionally good cause, *id.*, but this type of claim has not been raised by Respondents in the present case and is presumably waived.

motion, which is also covered under the extension prohibition of Rule 6(b)(2). *See* Fed. R. Civ. P. 6(b)(2); *see, e.g.*, Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.").

An amended final judgment may toll the timing requirements for filing a timely motion, although this depends on whether the amended judgment is material and non-clerical. *See Progressive Indus., Inc. v. United States*, 888 F.3d 1248, 1253 (Fed. Cir. 2018) ("The Amended Judgment altered only the collateral issue of costs and therefore did not restart the time period for filing a Rule 59(e) motion in this case."); *Department of Banking v. Pink*, 317 U.S. 264 (1942). Although this Court has not analyzed the issue specifically, the Court stated, when analyzing an adjacent issue for petitions of writ of certiorari, that merely reentering a judgment previously entered or "revis[ing] in an immaterial way does not toll the time within which review must be sought." *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211–12 (1952).

However, when the amended final judgment is based on material non-clerical issues, as parties agree is the case here, there are different approaches taken by the circuit courts of whether the 28-day deadline runs from the date of entry of the original final judgment or the amended judgment. Since the issue is so rare, only a small number of circuits have actually ruled on it.

i. The Court should apply the test from McNabola that required a sufficient relationship to an amended judgment to extend deadlines to file because it considered the balance of finality and justice.

The majority of these circuits, including the Seventh and Second circuits, have employed a nexus-test whereby there has to be a relation between the substance of the motion and the alteration made by the judge in order for the time to run from the date of entry of the amended judgment. *See McNabola v. Chicago Transit Auth.*, 10 F.3d 501 (7th Cir. 1993); *Tru-Art Sign Co., Inc. v. Local 137 Sheet Metal Workers Int'l Ass'n*, 852 F.3d 217 (2d Cir. 2017); *Padilla v. Maersk Line, Ltd.*, 07-cv-3638 (RMB/THK), 2012 WL 4009555, at *1 (S.D.N.Y. Sept. 12, 2012) ("Where both an original and an amended judgment exist, a party may not base its own untimely request for alteration of the original judgment on a wholly independent ground from the one that gave rise to the amended judgment.").

In *McNabola*, the plaintiff had argued that by accepting a remittitur, which substantively changed the compensation and amended the judgment, the time to file a Rule 59(e) motion, requesting prejudgment interest should run from the date of entry of the amended judgment. The Seventh Circuit rejected this argument because the motion, which was similarly a post-verdict motion delineated in Rule 60(b)(2), "must bear some relationship to the district court's alteration of the first judgment—that is, the motion must challenge the altered and not the original judgment." *McNabola,* 10 F.3d at 521.

The approach taken by the Seventh Circuit in *McNabola* has been classified as a "common-sense" approach by other courts and honors the interests of the Rules. *See TSG Water Res., Inc. v. D'Alba & Donovan Certified Pub. Accts., P.C.*, No. CV 402-258, 2006 WL 8433815, at *8 n.2 (S.D. Ga. Aug. 4, 2006) ("[T]he court followed a common-sense rule: a motion brought after entry of an amended judgment must bear some relationship to the alteration of the first judgment."); Kazazian v. Bartlett & Bartlett LLP, No. 03 Civ. 7699 (LAP), 2007 WL 4563909, at *3 (S.D.N.Y. Dec. 19, 2007) ("Without a rule like that enunciated in *McNabola*, however, finality would be meaningless and the balance of interests achieved by the Rules utterly compromised."); *Tru-Art,* 852 F.3d 217 ("As noted by the Seventh Circuit in *McNabola*, the time limit stated in Rule 59(e) would be ineffective if parties could continually file motions unrelated to the basis for the new judgment, thereby preventing the judgment from becoming final.").

ii. The Court should reject the broad test from Cornist because it does not consider the purpose of the rules, conflates the time for appeals with times for filing post-verdict motion, and leads to absurd results.

On the other hand, the Fifth Circuit has adopted a more expansive rule that conflates extending the time period allowed for appeals in general with the time requirements of individual motions contemplated by Rule 6(b)(2). *See Cornist v. Richland Par. Sch. Bd. (1973).* In *Cornist*, the defendant, Richland Parish School Board, notified the judge after the final judgment was entered that there was an error, agreed upon by the parties, in including the reinstatement of an additional

teacher. *Id.* An amended final judgment was entered, and then the defendant filed a Rule 59(b) motion for new trial that based on the timing of the second judgment. *Id.* The Fifth Circuit found that the 59(b) motion was timely, even though the error and tolling was the result of defendant's carelessness where he "approved [the judgment] without really reading." *See id.* at 38–39. This was because the amended judgment "disturbed or revised legal rights and obligations." *Id.* (*quoting FTC v. Minneopolis-Honeywell,* 344 U.S. 206*).* The court in *Cornist* ignored the principle of finality within the Rules prohibiting the Courts from extending the deadlines for Rule 59(b) motions, and allowed the defendant, due to their own careless error, file a post-verdict motion and subsequent notice of appeal much later than they should have.

This broad approach has led to results in the Fifth Circuit that fly in the face of the purpose of the rules. In *Wilmington,* another Fifth Circuit case, when the trial court corrected an error in the title of its final judgment, but left the substance exactly the same, the Fifth Circuit improperly ruled that this amended judgment was enough of a change that it could reset the timing requirement for the post-verdict motions. *See Wilmington Sav. Fund Soc'y, FSB v. Myers*, 95 F.4th 981, 982 (5th Cir. 2024). This is an absurd result in light of this Court's direction to only use the amended judgment date for timing requirements when there has been a substantive, non-clerical, change. *Honeywell,* 344 U.S. at 211. The intention of the Fifth Circuit to disregard the authority of the Rules was clear as it notes that it "prefer[red] to dispose of appeals on the merits when possible," even though the

amendment only "arguably created an ambiguity." This should not be the basis this Court uses to decide this issue as it would undermine the weight of the Rules that were themselves approved by this Court. 28 U.S.C. § 2071-2077 (The Rules Enabling Act).

Additionally, the lower court in finding for the Respondent stated that the Fifth Circuit's ruling in *Cornist* was properly based off of this Court's holding in *Honeywell, see* R. at 9a, 10a; however, this is inaccurate because the Fifth Circuit conflated the holding in Honeywell, which was about the overall time to file for appeal, to the time limit to file every post-verdict motion. *See Cornist; Honeywell,* 344 U.S. 206. In *Honeywell*, this Court stated:

> Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Honeywell, 344 U.S. at 211–12. When a later judgment simply reiterated the prior findings, it did not meet the Court's test. *Id. at* 212. Notably, this was specifically stated for the period of time for filing an "appeal or petition for certiori," and has not been extended by this court to other motions specifically. *Id.* at 211.

The Thirteenth Circuit also makes the same unfair assumption that the time to file the post-judgment motion was "just like the time for filing a notice of appeal," without stating why. *See* R. at 10a. This is an incorrect assumption because although the post-judgment motions can toll the time allowed to file for an appeal,

there are seperate timing rules for filing the notice of appeal, which include the ability the judge discretion to provide extensions, an option not available for the motions. Federal Appellate Rules *Rule 4(a).* The Fifth Circuit and the lower court take a surface level inquiry of the language from this Court on an adjacent issue and run with it without analyzing its applicability.

On the other hand, in *Charles v. Daley,* a case referenced in *McNabola,* the Seventh Circuit also relied on *Honeywell* to decide whether to extend the time and in an extensive analysis concluded that "the time limit would be a joke if parties could continually file new motions, preventing the judgment from becoming final." *CHARLES ("*The purpose of the rule suggests that when a court *alters* its judgment, *a person aggrieved by the alteration may ask for correction.").* As stated in *McNabola*, "the second Rule 59(e) motion contemplated in *Charles* must bear some relationship to the district court's alteration of the first judgment." *McNabola.* This is a much more rational analysis of this Court's holding in *Honeywell* because the general holding that the time for overall appeal should be extended still holds true. Importantly, in this case, the potential time to file a notice of appeal is extended by the second judgment, but the method of doing so is important. Even in *McNabola*, the Court stated that the plaintiffs could have filed a timely Rule 59(e) motion based on the amended judgment that objected to the remittitur specifically, and this surely would toll the timing requirements to file for a notice of appeal. *McNabola.* Similarly, here, the Court would not be overruling *Honeywell* by reversing the lower court because the University had the ability to file a timely motion for a new trial or

for consideration specifically on the issue of punitive damages instead of its untimely 50(b) motion, and this would have extended the time for appeal as per *Honeywell*.

Therefore, the Fifth Circuit and lower court's improper application of *Honeywell* to create a broad test rather than a relationship-based test should be rejected by the Court. This avoids absurd results and avoids undermining its own wisdom when approving the Rules. The Court should adopt the common-sense relationship-based test for post-verdict motions in order to honor the purpose of Rule 6(b)(2), which have contemplated the issue and balances finality and justice in stating that, as opposed to other time periods that could be extended for "good-cause," the Court must not extend the time for Rule 50(b) motions.

iii. Using the relationship-based test from McNabola, the University's general 50(b) motion for liability was not specifically addressed to the alteration in the amended judgment of punitive damages.

Based on the relationship test, the Rule 50(b) motion was untimely because it was not based on the alteration of punitive damages, but on the general idea of liability, which could have been filed for the initial judgment. Additionally, the motion was identical to the 50(a) motion made during the trial prior to verdict, which provides further evidence that the 50(b) motion could and should have been made based on the original final verdict. *See* R. 21a. Respondents may argue that the addition of the punitive damages, which are sizable compared to the c damages, constitute a new judgment. However, as discussed, Respondents conflate the issue

of the 50(b) motion and the timeline for appeals in general. Respondents were free to challenge the punitive damages and file a motion that there was not enough evidence to prove punitive damages, for example, or even ask for a new trial based on the issue of punitive damages.

This issue is very similar to that of when a remittitur was added in *McNabola* because that also amended the overall liability of the party. *McNabola*. Similar to the Seventh Circuit, following the common-sense relationship test, the Court should find that the motion about liability was not sufficiently related to the alteration made in the amended final judgment, which only concerned punitive damages.

b. Alternatively, even if the Court decides to adopt the expansive Fifth Circuit approach, the facts of this case can be distinguished from the Fifth Circuit cases.

Finally, even if the Court decides to adopt the expansive Fifth Circuit approach, the facts of this case can still be distinguished from the facts of Fifth Circuit cases because the Courts in those cases resolved a genuine ambiguity closely related to the 59(e) motions that were filed. The Court here was correcting a mistake of omission, which while parties conceded was a non-clerical mistake, was not done intentionally by the trial court, *see* R. at 23a, and was likely a mistake of omission, as defined by Rule 60(a), which provides the Court the ability to correct these mistakes *sua sponte*. Fed. R. Civ. P. 60(a). The District Court's *sua sponte* action was likely valid under 60(a) because it was correcting an oversight in the "translation of the original meaning [of the jury verdict] to the final judgment."

United States v. Griffin, 76 F.4th 724 (2023). A 60(b) mistake in this case would be correcting an error despite the judgment capturing the original meaning. The trial court's correction was different than the actions made in the Fifth Circuit cases, and in the event that this Court chooses to use the generalized approach, rather than the relationship test, the Court could recognize an exception for Rule 60(a) actions as being more closely related to the clerical mistakes contemplated in *Honeywell.* Thus, even in this case, the Court should reverse the Thirteenth Circuit and find that the University's 50(b) motion was untimely.

I. THIS COURT SHOULD REVERSE THE THIRTEENTH CIRCUIT DECISION AND FIND THAT THERE WAS SUFFICIENT EVIDENCE AS A MATTER OF LAW FOR A REASONABLE JURY TO HAVE FOUND THE UNIVERSITY LIBALE FOR A 42 U.S.C. § 1983 CLAIM FIRST AMENDMENT CLAIM BASED ON THE UNIVERSITY'S UNCONSTITUTIONAL POLICY

a. A heckler's veto unconstitutionally allows for the suppression of minority Viewpoints and does not further the purpose of the first amendment.

i. Courts have recognized the necessity of state intervention to prevent violations of constitutional rights by private actors.

Allowing a loud majority to silence minority speech through intimidating and overpowering speech goes against basic First Amendment principles. This Court and lower courts have endorsed the notion that state actors cannot sit idly by while third parties take actions that have the effect of contravening fundamental rights. *See Cottonreader v. Johnson*, 252 F. Supp. 492, 496 (M.D. Ala. 1966) ("the defendants have failed to discharge their duty and the obligation imposed upon

them by the law in the following respects: (1) By failing to provide proper police protection to the plaintiffs and the members of their class in exercising their constitutional right to protest and to demonstrate against certain alleged grievances"). In the speech context, a heckler's veto cannot be sustained.

In *Smith v. Ross*, the Sixth Circuit noted that a failure to protect appellants from angry neighbors could give rise to § 1983 claims. *See* 482 F.2d 33 (1973). In *Smith*, members of an interracial band alleged they were threatened by neighboring citizens and eventually forced to leave the premises they used to rehearse music due to the threats. *Id* at 37. Those threats included claims that neighbors would burn down the building they were in and evidence that rocks were thrown at the premises. *Id* at 34. The officer responsible for protecting the band was alleged to have said he would be unable to protect the band, further encouraging the band to leave the premises based on the fear of reprisal from the community. *Id.* Smith and his band eventually vacated the premises voluntarily and brought a § 1983 claim over equal protection violations due to the officers' refusal to protect. *Id* at 35-6. While the district court disputed the factual record put forth by the plaintiffs, the court indicated that an officer's refusal to protect citizens in an effort to get them to leave premises could give rise to a § 1982 claim, stating that, "state officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights." *Id* at 37. The Sixth Circuit realized that constitutional protections would amount to a dead letter if the state was able to sit back and allow private citizens to achieve discriminatory ends that

they could not, while claiming there was no state action to warrant recovery from a plaintiff. The same reasoning should be applied to First Amendment protections in this case.

In *Ovadal v. City of Madison*, the Seventh Circuit dealt with a case where community reaction to speech caused potential First Amendment violations. *See* 416 F.3d 531 (2005). Ovadal, a protester on a highway overpass, caused alleged safety hazards on the road below him because drivers who saw his speech were outraged and drove recklessly. *Id* at 535. It is clear from case law that the police could not constitutionally stop Ovadal's speech purely based on the reaction from the crowd without evidence of incitement or use of other First Amendment unprotected speech. *Compare Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123 (1992) (holding that charging more for permitting a protest based on the content of speech causing a disturbance in the community is unconstitutional) with *Feiner v. New York*, 340 U.S. 315 (1951) (holding that police can criminalize a speaker who attempts to incite a riot and creates a clear and present danger). The Court in *Ovadal* noted that heckler's veto could not alone justify the suppression of a protester's speech. 416 F.3d 531, 537 (2005). They further asserted that, "[t]he police must preserve order when unpopular speech disrupts it; [d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto." *Id.* (internal quotations omitted). The case in *Ovadal* was remanded to decide whether there was in fact an actual heckler's veto in play, but the concern that the Seventh Circuit

noted is the same concern that the Court faces today; is it in line with the First Amendment to allow for upset listeners to suppress speech they disagree with, while the state sits back and does nothing? Petitioner asks that the Court find the state must maintain order when disruptors attempt to shut down speech.

In *Reno v. ACLU*, this Court found aspects of the Communications Decency Act to be unconstitutional because it amounted to a heckler's veto. *See* 521 U.S. 844 (1997). The statute at issue criminalized the transmission of indecent or obscene material if senders of the material knew that the recipient was under the age of 18. *Id* at 859. This Court struck down the provision because "[i]t would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17–year–old child…would be present." *Id* at 880. This Court was unwilling to so easily let offended viewers suppress and control the speech that otherwise would be protected by the First Amendment. This is similar to allowing disruptors to shut down constitutionally protected speech. The power of the heckler's veto is immense, and this Court has consistently been reluctant to empower listeners to control speech through their reaction to it. Petitioner asks that the Court continue to prevent heckler's vetoes from suppressing speech.

ii. A heckler's veto violates the purpose of the First Amendment.

The very purpose of the First Amendment is to foster constructive discourse in society and a heckler's veto works against this purpose. The modern understanding of the necessity of First Amendment protection can be traced back to

Justice Holmes' famous dissent in *Abrahms v. United States*, 250 U.S. 616 (1919). In his dissent, Holmes advocated for free transmission of ideas between disagreeing parties and drew upon the founding principles of the nation and enlightenment ideals that advocated a free marketplace of ideas. Holmes describes it best:

> [T]he ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

250 U.S. 616 (1919) (Holmes dissent).

This powerful logic still guides our understanding of the First Amendment today. Only through an open dialogue can we advance as a society in our search for truth. Later, in this same line of cases, Justice Brandeis described the free flow of ideas as both a means and an end in his concurrence in *Whitney v. People of California*. *See* 247 U.S. 357 (1927). He noted that the free flow of ideas is a good in itself, as freedom of speech is a fundamental right of humanity. But more than just being a good in itself for society and individuals, it also cultivates a more knowledgeable and truth-seeking populace. Freedom of speech allows for bad ideas to be proven wrong and good ideas to be proven right:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means… They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile… that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Id. at 375.

Suppression of speech through a heckler's veto distorts this process of discourse and does not allow for the achievement of the ends the First Amendment seeks. While Holmes and Brandeis were in dissent in *Abrams* and only a concurrence in *Whitney*, their defense of the First Amendment would later become dominant in the Court's jurisprudence. *See* David L. Hudson Jr., How 2 Supreme Court cases from 1919 shaped the next century of First Amendment law, ABA Journal (2019). Inherent in the understanding of the purpose of the First Amendment is not just the need for freedom of speech but also the necessity of the freedom to listen. *See e.g. Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 8 (1986) ("By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information.") Without the freedom to listen, there can be no marketplace of ideas. Ideas which are freely able to be sent out but not able to be received does not allow the marketplace to function. Scholars have noted that while, "[t]he First Amendment explicitly guarantees "freedom of speech."' Implicit in this guarantee is the right to listen." Leslie Gielow Jacobs, Is There an Obligation to Listen?, 32 U. MICH. J. L. REFORM 489 (1999). Allowing for a heckler's veto destroys half of the very intent of the First Amendment. Speech without listening is like allowing the right to own a car but disallowing the ability to use it. It goes against the very point one would have for buying it in the first place. The ability to listen must be protected to accomplish the purpose of the First Amendment.

Finally, the respondent may indicate that disallowing a heckler's veto amounts to suppression of valuable First Amendment speech, but this would be in error. This Court has noted on countless occasions that not all speech is created the same. *See e.g. Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). Speech that is obscene or incites violence is not the same as speech that offers thoughts and ideas about pressing political issues. Screaming and destroying property in an effort to stop disliked speakers from offering their views cannot be held in the same regard as speech that looks to convey ideas. Moreover, the speech that occurred in this case could have been voiced in other settings, allowing for both sides of the discussion to put forth their speech without one dominating the other. If the students at the University had merely looked to debate McMillan, this case would be different. The marketplace of ideas means that debate and discourse must occur and allowing for the shutdown of speech under the guise of protecting the marketplace of ideas would be foolish. For those reasons, this Court should hold the policy of the University to violate the First Amendment and allow for petitioner to recover under § 1983.

iii. The Court should find a First Amendment violation in the policy of the University because a heckler's veto limits the protections of the First Amendment for minority viewpoints and does not further its purpose.

The case at issue shows the very necessity of this Court to disallow the heckler's vetoes. There is support in the case law and the policy goals of the First Amendment for protecting an individual's rights against the tyranny of a mob veto

as outlined in *Smith*, *Ovadal*, and *Reno*. In *Smith*, the Sixth Circuit showed concern where an officer refused to protect members of an interracial band from private threats and discrimination. The court felt there could be a cognizable § 1983 claim if the officers lack of action prompted the band to leave the premises they legally occupied. This reasoning applies to the case at issue. The petitioner in this case was invited to the University and faced with a raucous mob who aimed to stop her ability to speak. Similarly to *Smith*, the security officers at the University stood by while students ravaged the room petitioner was invited to speak in and allowed students to shut down her ability to speak. The concern voiced by the Sixth Circuit in *Smith* is echoed in this case, and this Court can rectify those concerns in the First Amendment by allowing petitioner to recover from this heckler's veto. The effect of allowing recovery would be more speech and would allow for a more fruitful discourse.

Similar to the concerns of the Seventh Circuit in *Ovadal*, the petitioner here was a victim of the reaction to her speech. McMillan, like Ovadal, cannot control how people respond to what they have to say. But the state can step in and create order to allow for controversial speakers to get their point out to those who wish to listen. By standing by, the security guards at the University, pursuant to University policy, allowed for suppression of speech to occur. A policy that allows private citizens to achieve speech regulation with the passive consent of the state could water down the First Amendment until it has no force at all.

Finally, like in *Reno*, where this Court expressed concern over the power of offended listeners having the ability to regulate speech they don't like, this Court should not allow angry mobs to suppress speech that they don't agree with. *Reno* stood for the proposition that those who don't like speech should not get a disproportionate ability to control what is said by others based on their individual or collective feelings. That logic applies here just as well. The student mob should not be granted a veto over speech that they dislike, especially where the University could easily have stepped in and allowed for speech on both sides to occur by maintaining order.

Beyond just the law, the spirit and purpose of the First Amendment cuts against the heckler's veto. The purpose of the First Amendment, as described by justices, judges, and scholars over the decades is to promote a vibrant and lively open marketplace of ideas. The marketplace must include controversial speech that could make listeners uncomfortable. A heckler's veto throws a wrench in the marketplace of ideas. Far from contributing to the discourse, a heckler's veto truncates discourse to only include views that won't face blowback from would-be listeners. This in essence excludes the speech that might be most necessary; the speech that makes listeners uncomfortable or that could potentially change minds. By finding the policy of the University to be a violation of the First Amendment, this Court can create a more productive public discourse that furthers the goal of the First Amendment.

b. The University's policy of allowing students to disrupt speakers on campus favors majority approved speech over minority speech violates the First Amendment.

To require support of the majority of students in order to speak would make a mockery of the principles of the First Amendment. In *Board of Regents of the University of Wisconsin System v. Southworth*, this Court dealt with a campus policy that allowed for a majority vote of the student body to deny school funds to some campus organization. *See* 529 U.S. 217 (2000). In *Board of Regents*, the University of Wisconsin system was sued because it charged all students a nonrefundable activity fee that was later redistributed to campus organization on a viewpoint neutral basis. *Id* at 222. This Court found that a policy to redistribute funds on a viewpoint neutral basis survived First Amendment scrutiny because there was no discrimination in the distribution process and it furthered the interest of the university and the campus organizations. *Id* at 234. One aspect of the funding system that caught the attention of the Court was a referendum provision that allowed for the student body to defund some organizations on the basis of a majority vote. *Id* at 235. This Court noted that the "whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent." *Id.* While the factual record was not well enough developed for this Court to explicitly decide the issue, the Court heavily indicated that requiring majority consent for access to public forums would be an affront to First Amendment principles. *Id.*

Allowing for student organizations to have to be approved by a majority of students would defeat the necessary protections of the First Amendment for minority approved speech.

The Second Circuit came to the same conclusion in *Amidon v. Student Association of State University of New York at Albany*, where a similar student referendum system was in place that allowed the allocation of funds based on a majority vote. *See* 508 F.3d 94 (2005). Similar to this Court in *Board of Regents*, the Second Circuit held that "the referendum policy creates a substantial risk that funding will be discriminatorily skewed in favor of [registered student organizations] with majoritarian views. Favoritism of majority views is not an acceptable principle for allocating resources in a limited public forum." *Id* at 102. The court in *Amidon* went on to note that the referendum policy was a viewpoint discriminatory policy because it is clear that "any contrary or minority view is at a disadvantage" when predicated on the approval of the majority of students. *Id* at 101. Because the policy at issue in *Amidon* was determined to be viewpoint discrimination, it was subject to strict scrutiny and swiftly struck down. *Id* at 105. Allowing the majority to determine how resources are distributed to student organizations on campus is an affront to basic principles of the First Amendment.

The petitioner asks nothing more for the reasoning behind of *Board of Regents* and *Amidon* to be extended to the less formal referendum system that occurs under the University policy at issue in this case. The University's policy of allowing a portion of students to squelch speech that they disagree exposes

minorities' views to the same dangers that were at issue in both *Board of Regents* and *Amidon*. This and other courts have been clear that consent of the majority cannot be a barrier to speaking on campus. Without protections for controversial speech, majority rule will determine what speech occurs on campus. That policy cannot be sustained under the First Amendment. While it is clear that the referendum policies at issue in this case are not as formal as the referendums in *Board of Regents* and *Amidon*, the policy of the University to allow mob rule to determine what speech can exist on campus is formal and well established. The effect of both policies is the same and present the same concerns. This Court should extend the reasoning behind *Amidon* and *Board of Regents* to protect the minority viewpoint speech disrupted by a mob of students and find the University's policy of inaction a violation of the First Amendment.

Respondents may claim that based on the holding in *McRae v. Harris*, a case dealing with state subsidies for abortions, there is no affirmative right to speech and therefore the protections requested in this case are unwarranted. *See* 448 U.S. 297 (1980). *McRae* should not prevent this Court from granting relief in this case because the facts of *McRae* do not apply to the First Amendment violation that occurred in this case. First, speech is a distinct enumerated constitutional right that is well established and honored in the tradition of the United States. The right to abortion has not experienced the same well-established protections by this Court and the right to abortion was invalidated in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). Second, as shown by *Board of Regents* and

Amidon, this case is not about the affirmative right to speak but about the state's responsibility to not allow third parties to violate constitutional rights under the color of law. The case at issue would be more similar to the state refusing to prosecute those who prevented other citizens from getting an abortion, than to the courts mandating that states must subsidize abortions. *McRae v. Harris* should not be considered binding on this decision before the Court.

c. The University violated the First Amendment by indirectly regulating speech through its policy of not restraining students who disrupt campus speakers.

i. The University can be held accountable for the actions of their students for two reasons: not stopping student's disruption created a foreseeable constitutional violation and not punishing students for disrupting speakers' encouraged speech regulation.

State action is a requirement for constitutional challenges to be successful as the constitution and its provisions are primarily set up as a restraint on the state. State action "refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948). In the decision preceding this case, the Thirteenth Circuit found there to be no state action and therefore no cognizable First Amendment violation. This was in error, as there are multiple doctrines that allow for the state to be held accountable for constitutional violation even when they did not directly act. The state action doctrine has evolved to handle different ways that the state can affect fundamental rights beyond just direct actions. The First

Amendment is not solely concerned with direct regulations of speech, but also indirect regulation of speech by third parties coerced by the state. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175 (2024). Additionally, this Court has held that there can be liability for the state where a third-party acts, when the state can foresee that the third party will violate fundamental rights. *See Martinez v. State of California*, 444 U.S. 277 (1980). The state is not able to work around the First Amendment by finding creative ways to regulate speech and here the students acted as proxies for the University's violation of the First Amendment.

ii. The state can be held liable for the actions of third parties when there is foreseeability that a third party will violate constitutional rights.

In *Martinez v. State of California*, this Court held that the release of a parolee who later went on to murder someone did not amount to state action and justify a suit under § 1983 for violations of due process. 444 U.S. 277, 284–85 (1980). The parolee at issue in the case was a convicted rapist who was sentenced to a term of imprisonment of up to 20 years, with a recommendation that he not be paroled. *Id* at 279. After just 5 years, the parole board decided to release him, being fully aware "his propensities, and the likelihood that he would commit another violent crime." *Id*. Within 5 months of his release he would go on to commit murder. *Id*. The suit brought by the family of the victim was based on a violation of the Due Process Clause, specifically that the victim was deprived of her life without due process both

due to a state statute that provided immunity to the parole board and because of the decision to release the parolee after only 5 years. *Id* at 280-81, 283. The court noted that while the statutory protection may have "encouraged members of the parole board to take somewhat greater risks of recidivism in exercising their authority to release prisoners," that risk is always present in any release and dismissed the claim based on the California statute that gave immunity to parole boards. *Id* at 281.

The Court then looked at the § 1983 claim that the release itself was a violation of due process rights of the victim. In considering whether there was a constitutional violation, this Court noted that "the decision to release Thomas from prison was action by the State, [but] the action of Thomas five months later cannot be fairly characterized as state action." *Id.* The factors that this Court looked to in determining whether there was state action were things like foreseeability and proximate cause to the injury. *Id.* at 285. This Court stated that "under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law." *Id.* But the court noted that they were not deciding in this case whether a parole board could *ever* be held accountable for the release of a prisoner and were only basing their decision off of the specific facts of this case. *Id.* Moreover, the court noted in *Imbler v. Pachtman*, §1983 claims are a "species of tort law that on its face admits of no immunities." 424 U.S. 409, 417 (1976). This would imply that where there was requisite foreseeability there could be state

responsibility for the actions of third parties who go one to violate constitutional rights of others.

Here it is undisputed that the school knew what the effect of their 'hands off' policy was on speech. There is no question of foreseeability or attenuation like there was in *Martinez*. The Court in *Martinez* did not find a § 1983 claim because the decision to parole could not be fairly traced to a murder that happened several months later. Here, the University cannot hide behind that same defense. The University's policy of inaction repeatedly caused speakers on their campus to have their ability to speak suppressed and they were well aware of its impact. R. at 5a. It was not so attenuated like was the case in *Martinez*. Moreover, the security officials who work for the University were present at the events where the petitioner's speech was suppressed and were likely there for other instances of speech suppression. R. 7a. This directly ties the respondents to the First Amendment violation at issue. Because the suppression of speech had an entirely foreseeable impact on speakers' First Amendment activities and the University's policy had repeatedly affected controversial speech in a similar manner, the school should be held liable for a § 1983 claim for a First Amendment violation.

iii. This Court should extend the doctrine that prohibits state coercion of third parties that results in suppression of speech to cover state encouragement of third parties that results in suppression of speech.

This Court has held that a state actor coercing a third party to violate fundamental rights can be subject to a § 1983 claim for First Amendment violations.

See Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175 (2024), *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). In *Nat'l Rifle Ass'n of Am. v. Vullo*, this Court allowed a First Amendment challenge to survive a motion to dismiss where a government official allegedly coerced insurance companies to stop dealing with the National Rifle Association ("NRA") or face potential increased scrutiny from the New York Department of Financial Services which prosecuted civil infractions committed by insurance companies. 602 U.S. 175, 180-84 (2024). This Court held the actions of Vullo, an official in the Department of Financial Services, to be a potentially unconstitutional abridgement of the First Amendment. *Id.* This was because the NRA advocated viewpoints that Vullo disfavored and she attempted to coerce insurance companies to disassociate with the NRA to accomplish what she could not directly, limit advocacy of disfavored views. *Id* at 198. Coercing insurance companies to distance themselves from the NRA violated their freedom of association as protected by the First Amendment.

Similarly, in *Bantam Books, Inc. v. Sullivan*, this Court held that the Rhode Island Commission to Encourage Morality in Youth violated the First Amendment when they encouraged a distributor to end their relationship with a publisher of allegedly obscene materials through a threat of recommending prosecution of the distributor to the Attorney General. 372 U.S. 58, 67 (1963). The Court enjoined the Rhode Island Commission's actions because they were attempting to regulate speech through third parties, without "conform[ing] to procedures that will ensure against the curtailment of constitutionally protected expression." *Id* at 66. In both

Bantam Books and *Vullo*, this Court was concerned with state action that resulted in third parties changing behavior which resulted in effects on others First Amendment rights. This Court has consistently provided aggressive safeguards to any potential infringements on First Amendment rights, even when done indirectly.

The holdings in *Bantam Books* and *Vullo* show that the state cannot do indirectly through coercion what it cannot do directly. *Vullo*, 602 U.S. 175, 190 (2024). Petitioner asks this Court to extend the reasoning behind those holdings to state based encouragement of speech regulation. The University's policy of guaranteeing no punishment for disruptive speech and destruction of property that leads to silencing controversial speakers should be found to be unconstitutional for the same reasons as the coercive conduct in the aforementioned cases. By guaranteeing a license to shut down speech, all controversial speakers on campus have their speech rights taken away. R. at 5a. This accomplishes the same evil that this Court hoped to stop in *Vullo* and *Bantam Books*. If Vullo had instead guaranteed that insurance companies would not be investigated for their alleged financial misconduct if they distanced themselves from controversial organizations, the same insidious speech regulation would have occurred in effect. Under current First Amendment law, this could be allowed if done in a manner that doesn't violate the Equal Protections Clause. It bends reason to allow the state to encourage speech censorship through selective application of laws or policies, but for the court to step in when there is coerced First Amendment violations. Under the current law, the state can in essence indemnify would-be censors and achieve the censorship goals

they would be unable to achieve through coercion. If the court extends the reasoning of *Vullo* and *Bantam Books* to include a prohibition on promoting and protecting censorship, the goals of *Vullo* and *Bantam Books* will be more effectively achieved, and freedom of speech will benefit. The state should not be allowed to achieve speech regulation through coercion or selective enforcement of laws and the Court should find the policy of the University to be unconstitutional.

d. The University's hands off policy is content based speech discrimination and should be presumed invalid because it treats controversial speech differently than non-controversial speech.

When finding a First Amendment violation based on regulating based on the content of speech, it is not necessary for the explicit goals of the legislature to be discriminatory or aimed to regulate speech based on content. *See Minneapolis Star & Trib. Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 592 (1983). Even if a statute is not intended to be outwardly targeted towards a specific kind of speech, "legislative intent is the not *sine qua non* of a violation of the First Amendment." *Id*, *See also Simon & Schuster v. Members of New York State Crime Victims Board,* 502 U.S. 105 (1991), *Reed v. Town of Gilbert, Az.,* 576 U.S. 155 (2015). Courts must look beyond the stated intent of legislatures or government actors to see what the effect of a given law or rule is to understand its interaction with the First Amendment. Similarly, the policy choice held by the University here need not be intentionally discriminatory or targeted at specific speech to fail to stand up to First Amendment scrutiny, and more specifically to be considered a regulation based on

content. The University's "hands off" approach to disciplining students who disrupt speaking events is a government regulation that affects only some speech content because the policy only affects controversial speech. R. at 5a. Looking to record, controversial issues across the political spectrum have been silenced by the policy guaranteeing no enforcement against disruptors. *Id.* The government inaction to not punish disruptors students has resulted in the silencing of content specific speech, specifically those with controversial content.

In *Police Dept. of Chicago v. Moseley*, this Court held that any government entity including a city government, may not regulate speech because of its "message, its ideas, its subject matter, or its content." 408 U.S. 92, 95 (1972) (analyzing a statute that allowed peaceful picketing of labor organizers near schools, but no other peaceful protests). The Court held this restriction on protesting to be invalid because "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id* at 96. The central thrust behind this limitation on state intrusion is to foster an active public discourse where controversial ideas are discussed, and deeming some speech controversial and thus unworthy of protection would defeat that purpose. *Id.* The aim of the First Amendment is to protect speech that is controversial, not that which is deemed safe and agreeable, as those that are non-controversial will likely not face scrutiny.

This specific policy to not discipline students who otherwise would be violating school policies is a content-based regulation on speech because it only

affects controversial speech that has opposition in the student body. In *Reed v. Town of Gilbert*, this Court analyzed a city code that aimed to regulate signs put up within the city limits. 576 U.S. 155, 169 (2015). When analyzing the city code, this Court determined the statute to be facially content based because it subjected categories of speech to regulations that other categories were exempt from. *See id* at 168. In *Reed*, the regulation at issue differentiated between temporary directional signs, ideological signs, and political signs, among other categories. *See id* at 159. This regulation was determined to be content based, even though it did not discriminate on something more invidious such as a particular political persuasion, because it treated entire categories of speech differently. *Id* at 164. This court has rejected laws that "though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the content of the regulated speech,"' *Id*. Put more clearly,

> The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election…We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

Id at 164–65. That same style of regulation is in play here, where discussing noncontroversial speech and controversial speech will be treated differently by the policy, even if there isn't specific topics of speech that are subject to different treatment.

Similarly, in *Minneapolis Star & Trib. Co.*, this Court found there to be a category based First Amendment violation in relation to a tax imposed on ink and paper used when printing newspapers, even though it did not target specific viewpoints. 460 U.S. 575, 577 (1983). This tax had an exemption for the first $100,000 of ink and paper purchased and used by newspaper companies. *Id.* The exemption led to only some newspapers, with large circulations and need for more ink and printing, paying the tax while many others did not. *Id* at 591. This differential treatment was held to be unconstitutional because the goals to have an economically equitable tax system cannot overcome the unequal treatment of the larger news entities. The Court noted that the "ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers." *Id.* Facially the law in *Minneapolis Star* discriminated between large and small newspapers and was therefore unconstitutional, even though the statute was not intending to target a specific newspaper or a specific viewpoint within some newspapers.

Moreover, this Court has stated that "we expressly rejected the argument that discriminatory ... treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (internal quotations omitted), *see also Simon and Schuster v. Members of NY*, 502 US at 117 (1991). In *City of Cincinnati*, this Court found an outright ban on news racks that contain commercial handbills but not news racks that contained newspapers was unconstitutional because it

treated two categories of speech drastically differently. 507 U.S. 410, 429 (1993). This was wrong, "[r]egardless of the mens rea of the city" because the regulation depended on the nature of what was being disseminated, even if the differentiation was not based on specific viewpoints. *Id.*

The University's policy is content based on its face because it only affects controversial speech and leaves uncontroversial speech to be treated the same as it would be absent this policy. The policy to be hands off and refuse to discipline those that disrupt speakers will only impact speech that will elicit a disruptive reaction, similar to the unconstitutional laws put forward in *Reed* and *Minneapolis Tribune*. In *Minneapolis Tribune*, the tax provision at issue set a non-viewpoint targeted limit on what news entities would pay the tax on ink and paper, those that used more than $100,000. The Court nonetheless found that the statute violated the First Amendment because it singled out some news entities and created differential treatment between members of the press. Here, the University's policy of allowing disruptive actions in response to controversial speakers has a similar effect. The policy will have no impact on speech that does not have significant opposition to it, or that is approved by the vast majority of its students. But ideas that have significant opposition will face significantly different treatment comparatively. This cannot stand under the First Amendment.

Additionally, creating different categories of speech has been held to be unconstitutional, even if not based on viewpoints. Like treating commercial handouts different from newspapers in *City of Cincinnati*, or directional signs

different from political signs in *Reed*, the University is unable to treat controversial and uncontroversial speech so differently through their policy. Creating broad categories that have nothing to do with the specific viewpoint of the speaker does not save an ordinance or statute from strict scrutiny. Therefore, it is immaterial if the Dean of the school or his wife happen to not have animus for veganism or any particular speaker's viewpoint. R. at 12a. If the entity regulating speech treats categories of speech differently, there must be strict scrutiny applied as is the case here.

In order to sustain a viewpoint discriminatory law or policy under strict scrutiny, it must be narrowly tailored to achieve a compelling state interest. *See Reed,* 576 U.S. 155, 172 (2015). While most laws fail under the narrow tailoring prong of the test, here the University policy fails because it is not furthering a compelling government interest. The policy's underlying principle is to hamper controversial speech on campus. It creates the conditions where controversial speakers are unable to communicate their points and non-controversial speakers are left untouched by the policy. This doesn't come close to the requisite purpose to maintain a statute that treats categories of speech so radically different. This Court should find the University's policy to be a content-based speech regulation and strike it down as a violation of the First Amendment.

Respondent will likely claim that there is no viewpoint discrimination because speech from all sides of the political spectrum were suppressed by the actions of the students and that the Dean has shown no discriminatory intent

behind the policy. R. at 12a. But this is immaterial to the case at issue. As noted in *Reed*, treating categories of speech is an invalid under the First Amendment, even if there is no discrimination on the basis of viewpoint. *See id at* 164–65. Additionally, this Court has repeatedly noted that discriminatory purpose is not the only critical element to a First Amendment violation. *See Simon & Schuster v. Members of New York State Crime Victims Board,* 502 U.S. 105 (1991), *Reed v. Town of Gilbert, Az.,* 576 U.S. 155 (2015). While it is comforting to know that the Dean of the University is not attempting to target speech he personally dislikes, that does not protect his policy of treating some speech drastically differently than other speech.

e. The case at issue is different from *Deshaney v. Winnebago County Dept. of Social Services* and thus the Court should hold that restraining someone's ability to protect their right to speak while also refusing to protect speech is a violation of the First Amendment.

i. New Tejas prevents speakers on campus from protecting their right to speak through use of self-help remedies.

New Tejas prevents speakers on campus from using self-help methods to protect their right to speak. *See* New Tejas Penal Code § 9.31(b)(1) (stating that the use of force against another is not justified in response to verbal provocation alone). Section 9.31(b)(1) of the penal code prevents would be speakers from responding to verbal provocation, even yelling or disruptive screaming, with force that would allow them to speak. *Id.* In light of the statute, when a speaker is attempting to communicate something, they will be unable to speak if they are faced with outrage and disruption. Courts have often considered self-help measures preferable to

government limitation on speech. *See* Douglas Gary Lichtman, How the Law Responds to Self-Help, COASE-SANDOR WORKING PAPER SERIES IN LAW AND ECONOMICS, (2004). This is exemplified in *Cohen v. California*, where this Court held that instead of penalizing speech that was abrasive, it was preferable to simply have people look away. 403 U.S. 15 (1971). This is because reasonable self-help remedies don't require government censorship or regulation of speech and can still often abate whatever problem speech may be causing. *Id.* Instead of having the state make judgment calls to decide what speech is and is not permissive, the government can defer to the judgements of individuals using self-help methods and remain outside of the debate. Often self-help remedies provide the easiest and most efficient solution to problems regarding speech. By disabling self-help measures to protect their right to speak, speakers on the University campus are left to the will of the mob.

ii. The University refuses to punish those who disrupt speakers on campus.

The University undoubtedly has a policy of not punishing or discouraging disruptive protesters who prevent speech from occurring on campus. R. at 5a. Voices from all across the political and social spectrum are consistently silenced by the rowdy students at the University. *Id.* The person responsible for holding the disruptive students accountable, Dean Thatcher, has openly embraced a policy of inaction. *Id.* This lack of punishment has permeated to the student body where they

are undoubtedly fully aware there will be no consequences for their disruptive actions. This policy effectively prevents all controversial speakers from speaking.

iii. The combination of not allowing self-help measures and not restraining those who disrupt speech is a violation of the First Amendment because there is a restraint on liberty that triggers protections of the Due Process Clause of the 14th Amendment.

Given that the University maintains a policy of inaction when disruptive students shut down speakers and the state criminalizes self-help methods that would allow speakers to stop disruptors, a speaker on campus is left without alternatives to respond to a heckler's veto. In *Deshaney v. Winnebago County Dept. of Social Services*, this Court analyzed similar issues in a case surrounding child abuse. *See* 489 U.S. 189 (1989). In *Deshaney*, the Court had to decide whether releasing a child back to a home where he had likely been abused, and which resulted in further abuse that caused permanent brain damage, could be the grounds for a § 1983 constitutional rights violation claim. *See id*. Section 1983 allows for redress when constitutional rights are violated under the color of any statute, ordinance, or custom. 42 U.S.C.A. § 1983 (West).

In *Deshaney*, the Court found there to be no § 1983 claim for the actions of the Department of Social Services because the Constitution does not confer an affirmative right to have the state protect individuals from private harms. 489 U.S. 189, 198 (1989). The Court instead found that the protections of the Constitution and the 14th amendment Due Process Clause only limits the *power of the state to act* in a manner that contravenes life, liberty and property without due process. *Id*

at 195. This Court differentiated the situation in *Deshaney* from 8th Amendment violations that arise during incarcerations, such as in *Estelle v. Gamble* where there was insufficient medical care, because the state *does* accept an affirmative duty to protect individuals when those individuals are under state control. *Id* at 198, *see also Estelle v. Gamble*, 429 U.S. 97 (1976). The Court encapsulated their reasoning in regard to 8th amendment challenges by individuals who have received subpar care while incarcerated by stating that,

> when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Deshaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 200 (1989).

Moreover, the Court noted that it is the restraint on liberty that triggers the protections of the Due Process Clause and not the failure to act to protect from harms inflicted by others. *Id*. In other words the state is not held liable for their failure to give care necessarily, but instead they are held liable for taking the action to deprive liberty which lead to cruel and unusual treatment when one is unable to take steps to care for themselves. Comparing 8th Amendment challenges to the cause of action at issue in *Deshaney*, this Court held that because the victim in *Deshaney* was not in the custody of the city when he was brutally beaten, the city had no obligation to protect his health and therefore did not violate his constitutional rights. *Id*. Additionally, there was no special relationship developed between the state actors in *Deshaney* that would create an affirmative duty to care

for the victim just because they had held him in custody for a brief amount of time before releasing him again to the custody of his abuser. *Id* at 197. The case at bar has several critical differences that make it more ripe for finding a § 1983 violation.

The state restrained the liberty of the petitioner when limiting her ability to use self-help methods that could have provided her the ability to speak. As noted above, New Tejas law prevents the use of force when confronted with verbal provocation. *See* New Tejas Penal Code § 9.31(b)(1). When faced with overwhelming noise and disruption, the petitioner was not at liberty to stop students from disrupting her. She had to idly sit by while her ability to speak was suppressed by the crowd. Security officers, under the guidance of school policy, were required to stand by and observe the suppression of petitioners' right to speak. Unlike in *Deshaney*, where the city was unsure of whether releasing the child back to his father would result in further abuse, the University was aware of the disruptive behaviors of their student body and what would come from their lack of action. R. at 5a. Members of the student body had consistently disrupted controversial speakers from all sides of the political spectrum and had a reason to believe that they would not be punished for doing so again. *Id*. The school was well aware of these incidents and refused to act, making them complicit in the suppression of the petitioner's speech. This is different from the social services officials in *DeShaney* who were not certain that abuse was occurring and were certainly not sure it would rise to the level of causing permanent injury. Th University's understanding of the inevitable speech suppression by the students, combined with a limitation on the liberty of the

petitioner, is a violation of the First Amendment and should warrant recovery under § 1983.

Moreover, the petitioner's case is more like § 1983 claims resulting from inadequate medical care in prisons like in *Estelle* than the facts in *Deshaney*. The inaction by university security officials occurred at the University, after an invitation had been extended to McMillan to speak. She was there at the whim of students and not fully outside the purview of government control like was the case in *Deshaney*. The University had security officers at her speech, from McMillan's perspective, presumably to maintain order. The officers did not maintain order and in fact their policy of nonengagement encouraged students to disrupt her speech, knowing there would be no recourse or punishment. Additionally, the injury occurred at the University, a public forum controlled by the municipality, unlike in *Deshaney* where the injury at issue occurred away from any state facility. For all the aforementioned reasons, the case today is different from *Deshaney* and warrants § 1983 recovery for a First Amendment violation due to the University policy of inaction in the face of suppression of speech.

CONCLUSION

The Court should find that the Respondants Rule 50(b) motion was not timely and reverse the Thirtheenth Circuit and remand the case to renenter judgment for McMillan. Alternatively, if this Court decides respondents appeal was timely, this Court should hold that the University policy that permits students to

disrupt speakers who are invited to campus, without facing any recourse amounts to a violation of the First Amendment and warrants recovery under § 1983.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief for Petitioner, Dove McMillan, contains 13,386 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Compliance. The brief complies with all competition rules.

/s/ Team #92

Counsel for Petitioner

November 21, 2024

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.

STATUTORY PROVISIONS

42 U.S.C. § 1983. Civil action for deprivation of rights

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 Rules of Civil Procedure Rule 6. Computing and Extending Time; Time for Motion Papers

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Period Stated in Hours.* When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Inaccessibility of the Clerk's Office.* Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) *"Last Day" Defined.* Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) *"Next Day" Defined.* The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) *"Legal Holiday" Defined.* "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

(b) Extending Time.

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

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

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

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

(c) Motions, Notices of Hearing, and Affidavits.

(1) *In General.* A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order—which a party may, for good cause, apply for ex parte—sets a different time.

(2) *Supporting Affidavit.* Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time.

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

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

(a) Judgment as a Matter of Law.

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

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

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

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

(2) order a new trial; or

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

(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.

Federal Rules of Civil Procedure Rule 59. New Trial; Altering or Amending a Judgment

(a) In General.

(1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Federal Rules of Civil Procedure Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing*. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Federal Rule of Appellate Procedure Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the

motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.