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 PETITIONER

TEAM 99

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the University of Lantana should be allowed to take advantage of a renewed filing period afforded by the amended judgment given that the University's motion for judgment as a matter of law pertains solely to the original judgment.
2. Whether the University of Lantana's custom of allowing a "heckler's veto" unconstitutionally violated McMillians First Amendment rights, when that custom is arbitrarily applied to a designated public forum.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW viii
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1
STANDARD OF REVIEW 3
STATEMENT OF FACTS 4
SUMMARY OF THE ARGUMENT 7
ARGUMENT 9
I. This Court should reverse the Thirteenth Circuit because the deadline for post-judgment motions runs from the original final judgment, not the amended judgment, rendering the University's motion on unchanged portions of the original judgment untimely 9
A. The University's motion was untimely because it did not address the substance of the amendment and thus could not benefit from the renewed filing period allowed by the amended judgment. 10
i. Applying the Seventh Circuit's standard renders the University's motion untimely because the motion is entirely unrelated to the alteration in the amended judgment. 12
ii. In addition to the Seventh Circuit, the majority of federal circuits hold that the deadline for filing post-judgment motions is tied to the original judgment date if the motion challenges what was unchanged in the amended judgment. 14
B. The University's motion is untimely under the Fifth Circuit's rule, as neither the Fifth Circuit's standard nor the Supreme Court cases it relies upon can remedy the motion's tardiness. 25
II. The University's Custom of Allowing a "Heckler's Veto" Violates the Due Process Clause of the Fourteenth Amendment and is Actionable under 42 U.S.C. § 1983. 31
A. The University's customary "heckler's veto" falls under the broad definition of the "special danger" exception to the rule against protection. 35
i. The University's customary "heckler's veto" also falls under the narrow definition of the "special danger" exception to the rule against protection. 37
b. The lower Courts erred by failing to conduct a forum-based analysis as required by this Court's precedent. 39

ii. The "Heckler's Veto" is a content-based restriction on speech that should be subjected to strict scrutiny. 45

ii. The University's customary "heckler's veto" cannot survive strict scrutiny. 48

CONCLUSION 51

TABLE OF AUTHORITIES

Cases

Acad. Bank, N.A. v. AmGuard Ins. Co., 116 F.4th 768 (8th Cir. 2024) 8
Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011). 53
Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998). 45, 46
Bachellar v. Maryland, 397 U.S. 564 (1970) 51
Baker v. McCollan, 443 U.S. 137 (1979) 37
Balogh v. Virginia, 120 F.4th 127 (2024). 42, 52
Bank of Columbia v. Okely, 17 U.S. 235 (1819). 43
Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217 (2000) 17
Beckerman v. City of Tupelo, 664 F.2d 502 (5th Cir. 1981) 52
Bible Believers v. Wayne County, Mich., 805 F.3d 228 (2015) (en banc) 52
BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996). 18
Bowman v. White, 444 F.3d 967 (8th Cir. 2006) 48, 49
Brown v. Louisiana, 383 U.S. 131 (1966) 42
Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972) 37, 43
Charles v. Daley, 799 F.2d 343 (7th Cir. 1986). 16, 18
Chicago Acorn v. Metropolitan Pier & Exposition Auth., 150 F.3d 695 (7th Cir. 1998). 52
Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010) 50
Collins v. City of Harker Heights, 503 U.S. 115 (1992). 38, 39, 43
Concerned Women for Am. Inc v. Lafayette Cnty., 883 F.2d 32 (5th Cir. 1989) 49
Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985). 46, 48
Cornist v. Richland Par. Sch. Bd., 479 F.2d 37 (5th Cir. 1973) 29, 30
County of Sacramento v. Lewis¸ 523 U.S. 833 (1998) 40
Daniels v. Williams, 474 U.S. 327 (1986). 38
DeBose v. USF Bd. of Trustees, 811 F. App'x 547 (11th Cir. 2020). 28
DeShaney v. Winnebago County Dept. of Social Servs. 489 U.S. 189 (1989). 38, 39, 40

DiMarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978) 37
Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) 41
Fed. Trade Comm'n v. Minneapolis-Honeywell Regul. Co., 344 U.S. 206 (1952) 13, 14, 15, 16, 23, 31, 32, 33
Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986). 54
Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952) 30
Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). 44, 51, 53
Goodman v. Bowdoin Coll., 380 F.3d 33 (1st Cir. 2004) 19, 20
Harrell v. Dixon Bay Transp. Co., 718 F.2d 123 (5th Cir. 1983) 34, 35
Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071 (2024) 24
Healy v. James, 408 U.S. 169 (1972) 48
Holmes v. Reddoch, 117 F.4th 309 (5th Cir. 2024) 8
Hurtado v. California, 115 U.S. 516 (1884) 42
In re Dow Corning Corp., 255 B.R. 445 (E.D. Mich. 2000), *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002) 24
In re Dow Corning Corp., 280 F.3d 648 (6th Cir. 2002) 24
Ingraham v. Wright, 430 U.S. 651 (1977). 38
International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) 45
Keith v. Truck Stops Corp. of Am., 909 F.2d 743 (3d Cir. 1990) 22, 23
Koala v. Khosla, 931 F.3d 887 (9th Cir. 2009) 45
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 47
Lontex Corp. v. Nike, Inc., 107 F.4th 139 (3d Cir. 2024) 7
Martinez v. California, 444 U.S. 277 (1980). 38
McKinney ex rel. K.P. v. Huntsville Sch. Dist., 350 F. Supp. 3d 757 (W.D. Ark. 2018) 54
McNabola v. Chicago Transit Auth., 10 F.3d 501 (7th Cir. 1993) 14, 17, 18
Meinecke v. City of Seattle, 99 F.4th 514 (9th Cir. 2024) 37, 41, 42, 52
Minn. Voters All. v. Mansky, 581 U.S. 1 (2018). 45
Mitchell v. Duval Cnty. Sch. Bd., 107 F.3d 837 (11th Cir.1997) 39

Monell v. Dep't of Soc. Services of City of New York, 436 U.S. 658 (1978)..... 36, 37
Monroe v. Pape, 365 U.S. 167 (1961)..... 43
Morrissey v. Brewer, 408 U.S. 471 (1972). 38
Morse v. Frederick¸ 551 U.S. 393 (2007) 39
Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015). 52
Palin v. New York Times Co., 113 F.4th 245 (2d Cir. 2024)..... 7, 8
Papin v. Univ. of Miss. Med. Ctr., 109 F.4th 354 (5th Cir. 2024) 7
Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983)..... 45, 46
Pleasant Grove City, Utah v. Summum, 555 U.S. 460, (2009)..... 45, 46, 50
Progressive Indus., Inc. v. United States, 888 F.3d 1248 (Fed. Cir. 2018) 16
Reed v. Town of Gilbert, 576 U.S. 155 (2015). 50, 51
Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000)..... 8
Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, (1988) 44
Rochin v. California, 342 U.S. 16 (1952)..... 43
Rodriguez v. Se. Pa. Transp. Auth., 119 F.4th 296 (3d Cir. 2024)..... 7, 8
Rosenbaum v. City & Cty. of San Francisco, 484 F.3d 1142 (9th Cir. 2007)..... 51
Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) 48
Sanders v. Union Pac. R.R. Co., 108 F.4th 1055 (8th Cir. 2024)..... 8
Schlosser v. VRHabilis, LLC, 113 F.4th 674 (6th Cir. 2024) 7, 8
Scott v. Dyno Nobel, Inc., 108 F.4th 615 (8th Cir. 2024)..... 7
Seattle Mideast Awareness Campaign v. King Cty., 781 F.3d 489 (9th Cir. 2015)... 46
SOLIDFX, LLC v. Jeppesen Sanderson, Inc., 823 F. App'x 559 (10th Cir. 2020).... 25, 26, 27
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 46
Stormo v. State Nat'l Ins. Co., 116 F.4th 39 (1st Cir. 2024)..... 7
Taxinet Corp. v. Leon, 114 F.4th 1212 (11th Cir. 2024)..... 7, 8
Tru-Art Sign Co. v. Loc. 137 Sheet Metal Workers Int'l Ass'n, 852 F.3d 217 (2d Cir. 2017). 20, 21, 22
United States v O'Brien, 391 US 367 (1968)..... 55
United States v. Rundo., 990 F.3d 709 (9th Cir. 2021)..... 52

Vasquez v. D.C., 110 F.4th 282 (D.C. Cir. 2024) 7, 8
W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, (1943). 45
Walker v. Rowe, 791 F.2d 507 (7th Cir 1986) 43
Watson v. City of Memphis, 373 U.S. 526 (1963) 55
White v. Lemacks, 183 F.3d 1253 (11th Cir.1999) 39
Widmar v. Vincent, 454 U.S. 263 (1981) 46, 49
Williams–Yulee v. Florida Bar, 575 U.S. 433 (2015). 54
Wisconsin v. Yoder, 406 U.S. 205 (1972) 54
Wooley v. Maynard, 430 U.S. 705 (1977) 45
Youngberg v. Romeo, 457 U.S. 307 (1989) 39
Zimmern v. United States, 298 U.S. 167 (1936) 31

Statutes

42 U.S.C. § 1983 ..... 5, 36
Fed. R. App. P. 4(a) 22
Fed. R. Civ. P. 50(a)(1) 8
Fed. R. Civ. P. 50(b) 6, 14, 15, 25
Fed. R. Civ. P. 59(e) 20, 25
Fed. R. Civ. P. 6(b) 6, 14, 15
TEX. PENAL CODE Ann. § 28.03 (Westlaw 2024) 48

Other Authorities

Baptise, *Campus Cops: Authority without Accountability*, THE AMERICAN PROSPECT. 53
Causation in Constitutional Torts, 67 IOWA L. REV. 443, 479 (1982) 37
Custom Definition, *Black's Law Dictionary* (12th ed. 2024) 47
Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). 53
Hamilton and Madison, *Federalist No. 55* 55
Healy, *Return of the Campus Speech Wars*, 117 MICH. L. REV. 1063, 1082. 56

Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 55
Madison, *Federalist no. 46.* 43
Madison, *Federalist no. 51.* 44
Policy Definition, *Black's Law Dictionary* (12th ed. 2024) 47

Constitutional Provisions

U.S. CONST. amend. I. 5
U.S. Const. amend. XIV 36

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit is unpublished but may be found at *Board of Regents of City University of Lantana v. McMillan*, No. 22–0514 (13th Cir. May 10, 2023). The opinion of the United States District Court for the District of New Tejas is likewise unpublished but may be found at *McMillan v. Board of Regents of City University of Lantana*, No. 21–cv–1285 (E.D. New Tejas Mar. 29, 2022).

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

Section 1983 of Title 42 of the United States Code provides, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

Rule 6(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

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

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

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

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

Rule 50(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

(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.

STANDARD OF REVIEW

Appellate courts review a trial court's denial of a Rule 50 motion for judgment as a matter of law de novo. *Scott v. Dyno Nobel, Inc.*, 108 F.4th 615, 625 (8th Cir. 2024); *Papin v. Univ. of Miss. Med. Ctr.*, 109 F.4th 354, 362 (5th Cir. 2024); *Vasquez v. D.C.*, 110 F.4th 282, 290 (D.C. Cir. 2024); *Taxinet Corp. v. Leon*, 114 F.4th 1212, 1223–24 (11th Cir. 2024); *Schlosser v. VRHabilis, LLC*, 113 F.4th 674, 683 (6th Cir. 2024); *Palin v. New York Times Co.*, 113 F.4th 245, 263 (2d Cir. 2024); *Stormo v. State Nat'l Ins. Co.*, 116 F.4th 39, 45 (1st Cir. 2024); *Rodriguez v. Se. Pa. Transp. Auth.*, 119 F.4th 296, 298 (3d Cir. 2024).

The reviewing judge must view all evidence and reasonable inferences to be drawn therefrom in the light most favorable to the nonmovant and must not make credibility determinations or weigh the evidence. *Lontex Corp. v. Nike, Inc.*, 107 F.4th 139, 151 (3d Cir. 2024); *Papin*, 109 F.4th at 362 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)); *Vasquez*, 110 F.4th at 290; *Taxinet Corp.*, 114 F.4th at 1223–24; *Schlosser*, 113 F.4th at 683; *Palin*, 113 F.4th at 263; *Rodriguez*, 119 F.4th at 298. A court of appeals may not upset a jury verdict unless there is no substantial evidence to support the verdict. *Sanders v. Union Pac. R.R. Co.*, 108 F.4th 1055, 1060 (8th Cir. 2024); *Taxinet Corp.*, 114 F.4th at 1223–24; *Schlosser*, 113 F.4th at 683; *Palin*, 113 F.4th at 263 (quoting Fed. R. Civ. P. 50(a)(1)); *Holmes v. Reddoch*, 117 F.4th 309, 314–15 (5th Cir. 2024); *Acad. Bank, N.A. v. AmGuard Ins. Co.*, 116 F.4th 768, 776 (8th Cir. 2024). "Substantial evidence" is

evidence that would allow "reasonable and fair-minded [jurors]" to reach different conclusions. *Acad. Bank, N.A.*, 116 F.4th at 776.

STATEMENT OF FACTS

The City University of Lantana ("the University") is a public institution built upon strong local ties and proud traditions. *See* R. at 2a–3a. The University's once prestigious reputation has been muddied, however, by the "rowdy" behavior of students in recent years. Senior pranks have become increasingly disturbing—incidents of note include students leaving 100 chickens in an auditorium, constructing a "slip n' slide" leading from the central staircase to the front lawn, and placing a car on a campus building. *Id.* Parties run by students frequently interfere with classes and scheduled campus events. *Id.* The intensity of students' raucousness has reached a level that once resulted in a student's hospitalization after attempting to perform a "keg stand" during a graduation event. *Id.* Even though this poor behavior often disrupts official University business, none of the students involved in the previously mentioned incidents were penalized. R. at 4a.

The Dean of Student Affairs, Mason Thatcher, is responsible for disciplining students. *Id*. A well-known alumni, Dean Thatcher excels in the community-facing aspects of his role but falls short regarding student discipline. R. at 4a–5a. Dean Thatcher testified that "boys will be boys," and that students just "need a good talking to" rather than formal punishment. R. at 5a. Attributing misbehavior to students' need "to blow off a little steam," Dean Thatcher has established a hands-off approach that all employees within the Department of Student Affairs follow. *Id*.

In addition to diminishing the University's prestige, Dean Thatcher's permissive attitude has also allowed the student body to perpetuate a culture of exclusion. Students at the University habitually engage in a "heckler's veto," where they drown out the individual invited by the University to speak on a particular topic. R. at 5a. Speakers that have fallen victim to this practice include ones discussing institutional racism, Second Amendment rights, the legalization of marijuana, and climate change. *Id*. As a result of Dean Thatcher's hands-off policies, campus security failed to intervene in each of these incidents, and none of the students involved received disciplinary action. *Id*.

The instant suit arises out of a similar incident of minority view exclusion. On February 8, 2020, the University invited Dove McMillan ("Ms. McMillan") to speak on campus. R. at 5a–6a. Ms. McMillan testified that she intended to encourage people to consider veganism, and to share information about the global impacts of animal exploitation and the overconsumption of animal products. R. at 6a. Mere minutes into her speech, University students rushed the stage carrying banners and noisemakers, and some wore animal masks and costumes. *Id*. The noise of the hecklers drowned out any attempts by Ms. McMillan to speak. *Id*. Ms. McMillan pleaded with the hecklers to be quiet and asked other students to help, but her efforts were unsuccessful. *Id*. Despite causing significant damage to the auditorium and preventing Ms. McMillan from speaking, campus security present at the event did nothing to stop the rampage. R. at 6a–7a. The University identified the students

involved in the heckling but did not discipline any of them for their behavior. R. at 7a.

Ms. McMillan sued the Board of Regents of the University under 42 U.S.C. § 1983, alleging violations of the First Amendment. *Id*. During trial, the district court denied the University's Rule 50(a) motion for judgment as a matter of law on its liability to Ms. McMillan. *Id*. at 7a, 21a. The jury returned a verdict in Ms. McMillan's favor, holding the University liable for violating her First Amendment rights. *Id*. at 7a. The jury awarded Ms. McMillan $12,487 in compensatory damages and $350,000 in punitive damages. *Id*. The initial final judgment entered on January 20, 2022, awarded compensatory damages, prejudgment interest, post-judgment interest, and costs. Final Judgment, *McMillan v. Bd. of Regents of City Univ. of Lantana*, No. 21–cv–1285 (E.D. New Tejas Mar. 29, 2022). The University did not file any motions in the four weeks following. *See* R. at 7a, 21a.

On January 27, 2022, the District Court amended its judgment to include the punitive damages. Amended Final Judgment, *McMillan v. Bd. of Regents of City Univ. of Lantana*, No. 22–0514 (13th Cir. May 10, 2023). The District Court did not alter any other portions of the prior judgment. *Id*. On February 24, 2022, twenty-eight days from the date of the amended final judgment and thirty-five days from the date of the prior final judgment, the University filed a renewed Rule 50(b) motion challenging its liability. R. at 7a, 21a. The District Court ruled that the University's motion was untimely and denied it without considering the merits. *Id*. at 7a. The United States Court of Appeals for the Thirteenth Circuit then reversed the District

Court's decision. *Id*. at 14a. Ms. McMillan timely appealed, and this Court granted certiorari on the questions presented.

SUMMARY OF THE ARGUMENT

Promoting finality in litigation is an enduring principle upheld by numerous bodies of civil procedure and the judiciary. By precisely defining the rights of disputing parties throughout the course of litigation, the Federal Rules of Civil Procedure ensure that litigants are fully informed of when and how to seek rulings, reconsideration, amendments, or appeals. By enforcing these statutes in the courtroom, the judiciary safeguards these rights and preserves judicial resources. When a party attempts to proceed in a manner that would violate these rules, it is the court's responsibility to stop them from doing so. This Court should thus deny the University's renewed motion for judgment as a matter of law because the University has failed to file its motion within the twenty-eight-day timeframe required by statute.

It is undisputed that the University filed its motion more than twenty-eight days after the initial judgment on January 20, 2022. The only way that the University's motion could be saved is if the timeline were to begin running anew from the date of the amended judgment entered one week later. However, the weight of authority mandates that this exception apply only if the University challenged the amended portions of that subsequent judgment. The vast majority of federal circuit courts do not allow the filing window to restart upon entry of an amended judgment unless the motion specifically addresses the amendment's alteration. If the

University had moved for judgment as a matter of law as to the award of punitive damages, the Federal Rules of Civil Procedure would allow it. That is not what the University did. Instead, the University challenged its liability to Ms. McMillan for violating her First Amendment rights. Because this part of the judgment remained wholly unchanged and intact from the date of the initial judgment, that date governs the calculation of the filing window. As such, the University's motion fails due to untimeliness.

The University has not provided a well-founded nor compelling rule to the contrary. The Fifth Circuit authority the University relies on is weakly supported and directly contradicted by more recent case law from that jurisdiction. Likewise, denial of the University's motion would be consistent with this Court's precedent. The University nonetheless argues that its motion be granted and its tardiness excused. This argument, however, is an affront to the Federal Rules of Civil Procedure, and this Court should treat it as such.

The University's motion fails even if timely. Under Dean Thatcher, the University has established a custom of non-enforcement. Formerly a bastion of higher learning, the University now subjects speakers to a "heckler's veto." The result is simple. Unpopular speech is shouted down, while popular speech is allowed.

The University's conduct is unconstitutional because it is an arbitrary use of government power which denies persons their First Amendment rights. Because the University auditorium is a designated public forum, it is prohibited from adopting policies or customs that restrict access to the forum based on content. Instead, the

university has allowed the whims of the mob to dictate who can or cannot speak. The University has acted under the color of law to deny McMillan her rights. That makes it liable under 42 U.S.C. § 1983. A jury of her peers found as much. So should this Court.

ARGUMENT

I. This Court should reverse the Thirteenth Circuit because the deadline for post-judgment motions runs from the original final judgment, not the amended judgment, rendering the University's motion on unchanged portions of the original judgment untimely.

"Litigation must at some definite point be brought to an end." *Fed. Trade Comm'n v. Minneapolis-Honeywell Regul. Co.*, 344 U.S. 206, 213 (1952). This Court underscored that truth more than seventy years ago, and finality in litigation is just as imperative today. The Federal Rules of Civil Procedure allow parties to challenge or appeal a judgment, but mandates strict deadlines by which they must do so. Accordingly, a party may move for judgment as a matter of law within twenty-eight days of entry of judgment. Fed. R. Civ. P. 50(b). By statute, courts cannot extend this period. Fed. R. Civ. P. 6(b). However, case law has, over time, carved out a narrow exception where a judgment is later amended. The time period for post-judgment motions may restart upon entry of the amended judgment if the amendment materially revises or disturbs a party's legal rights or obligations. *Minneapolis-Honeywell Regul. Co.*, 344 U.S. at 212.

In addition to this Court, at least seven federal circuits maintain that this exception applies only when the motion challenges matters modified in the amended judgment. *See, e.g.*, *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 521 (7th Cir.

1993). If the motion instead challenges decisions unchanged between the original and amended judgments, the filing period runs from the original judgment as usual. The University argues for a more permissive application of this exception—one that allows for any material change to a judgment to restart the clock, regardless of what the motion seeks to challenge. Deciding this issue is, therefore, a question of which rule this Court chooses to adopt.

Fortunately, the overwhelming weight of the common law and this Court's own directive both point to one result—the University's motion is untimely. The amended judgment modifies only the amount of punitive damages that the University owes to Ms. McMillan. However, the University moved for judgment as a matter of law on its liability to Ms. McMillan, an issue that was fully disposed of in the original judgment and remained undisturbed in the amended judgment. Therefore, because the motion does not challenge the portions of the judgment subsequently amended, the clock does not restart, and the University's motion must be denied.

A. The University's motion was untimely because it did not address the substance of the amendment and thus could not benefit from the renewed filing period allowed by the amended judgment.

The District Court correctly held that the University's renewed motion for judgment as a matter of law was untimely. The University improperly relies on the amended judgment to excuse its tardiness, and this Court should not allow it.

Rule 50(b) of Federal Rules of Civil Procedure imposes a strict deadline for parties who wish to move for judgment as a matter of law after trial. It plainly states that any such motion must be filed "[n]o later than 28 days after the entry of

judgment." Fed. R. Civ. P. 50(b). Moreover, Rule 6(b)(2) explicitly provides 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). Accordingly, a motion for judgment as a matter of law must be filed within twenty-eight days of the judgment date, without exception.

The federal judiciary was eventually tasked with deciding the effect of amended judgments on these rules and those governing timely submission of other post-judgment filings, such as motions for new trial or petitions to appeal. In response, this Court put forth general rules on which most federal courts as well as the parties to this dispute agree. The first is that immaterial revisions do not restart the period within which to appeal. *Minneapolis-Honeywell Regul. Co.*, 344 U.S. at 211. Therefore, an amended judgment which alters an issue wholly collateral to the merits has no effect on the filing period. *Id.*; *See also Progressive Indus., Inc. v. United States*, 888 F.3d 1248, 1253 (Fed. Cir. 2018). The second rule provides that revisions which "change matters of substance" or "resolve[] a genuine ambiguity" can cause the timeline to reset from the date of the amendment. *Minneapolis-Honeywell Regul. Co.*, 344 U.S. at 211. Third, a substantive change is one that "disturb[s] or revise[s] legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.* at 212.

Both Ms. McMillan and the University agree that the District Court's amendment constitutes a material change to the original judgment. R. at 8a, 23a n.2. By adding punitive damages to Ms. McMillan's award, the court revised Ms. McMillan's legal rights and the University's legal obligations. R. at 8a, 23a n.2; *See*

also Minneapolis-Honeywell Regul. Co., 344 U.S. at 212. However, whether that fact alone is sufficient to cause the filing period to run anew from the amended judgment date is where the parties disagree and where the law diverges.

i. Applying the Seventh Circuit's standard renders the University's motion untimely because the motion is entirely unrelated to the alteration in the amended judgment.

The Seventh Circuit developed a test to answer that question. In *Charles v. Daley,* the Seventh Circuit Court of Appeals declared that, in the context of an amended judgment, the "alteration of one portion restarts the time with respect to all portions" when those "portions of [the] judgment are related." *Charles v. Daley,* 799 F.2d 343, 348 (7th Cir. 1986). The court emphasized that the purpose of this rule was to allow the party "aggrieved by the alteration [to] ask for correction." *Id.* Therefore, while the court of appeals allowed that an amended judgment could restart the filing period for all portions of the judgment, it added an important qualifier. Going forward, the court must assess the relationship between the portions altered and those unchanged to determine whether that relation was sufficient to restart the filing period for all.

The Seventh Circuit applied this test in *McNabola v. Chicago Transit Auth.*, 10 F.3d 501 (7th Cir. 1993). There, the court considered the timeliness of McNabola's motion for prejudgment interest. *McNabola,* 10 F.3d at 520. McNabola argued that his motion was timely because it was made within 10 days after the entry of an amended judgment lowering his damages award. *McNabola,* 10 F.3d at 521. The court disagreed. *Id.* It reasoned that, "though McNabola arguably was aggrieved by

[the] amended judgment . . . his motion for prejudgment interest did not address that harm." *Id.* Because his motion "was addressed to the initial and not amended judgment," it was untimely. *Id.*

Applying the Seventh Circuit's reasoning to this case leads to the same result. Here, as in *McNabola*, the University's motion did not address the subject of the alteration, the punitive damages, but rather an issue resolved in the original judgment—the University's liability. While the two are related in that liability can give rise to punitive damages, they rest on completely separate standards and analyses. Liability for a First Amendment violation generally depends upon whether the policy or state action in question is viewpoint neutral. *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 221 (2000). Meanwhile, assessing punitive damages requires considering whether doing so will further a state's legitimate interest in deterrence and punishment of unlawful conduct. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

The basis on which the District Court held the University liable for violating Ms. McMillan's First Amendment rights is in no way related to the basis on which the District Court awarded punitive damages. In moving for judgment as a matter of law as to liability, the University asks the Court to reevaluate whether the University's policies and actions are viewpoint neutral. However, by statute, the University should have requested reconsideration of that issue within the twenty-eight day period following the judgment in which that issue was disposed of. *See* Fed. R. Civ. P. 50. By arguing that the filing period began running from amended

judgment, the University seeks to take advantage of a revision the District Court made on entirely separate grounds. This Court should not permit the University to do so.

Because the alteration—the assessment of punitive damages—is not "related" to liability, the time restarted only with respect to the former. *See Charles,* 799 F.2d at 348. Moreover, because the University's motion contested liability rather than the punitive damages award, it was "addressed to the initial and not amended judgment." *McNabola,* 10 F.3d at 521. Finally, given that the University filed the motion more than twenty-eight days after entry of the initial judgment, the motion was untimely.

The rules clearly articulated by the Seventh Circuit mandate that the University's motion be denied for lack of timeliness. The University fails to satisfy the requirements necessary to restart the post-judgment motions filing period from the date of the amended judgment. For this reason, the University's motion cannot proceed.

ii. In addition to the Seventh Circuit, the majority of federal circuits hold that the deadline for filing post-judgment motions is tied to the original judgment date if the motion challenges what was unchanged in the amended judgment.

The Seventh Circuit is not alone. At least six other circuits also evaluate the timeliness of post-judgment motions and appeals by comparing the party's filing with the original and amended judgments. These circuits have consistently given weight to whether the claim addressed in the filing was altered by the amended judgment or not. While not all of these circuits articulate a clear test or standard, absolutely none follow the approach urged by the University. That is, they do not allow any and all

material amendments to restart the filing period or time to appeal. For the majority of the circuit courts, whether the amendment is material constitutes one consideration in the analysis, but is certainly not the sole consideration.

First Circuit. In *Goodman v. Bowdoin Coll.*, 380 F.3d 33 (1st Cir. 2004), the First Circuit Court of Appeals considered whether Goodman's motion for judgment as a matter of law was timely. *Goodman,* 380 F.3d at 46–47. Goodman argued in the affirmative based on the date of the amended judgment. *Id.* at 46. The amended judgment corrected a previous error failing to hold Goodman liable for negligence when he was in fact liable. *Id.* at 46 n.22. However, his motion addressed only his claim for breach of contract, not negligence. *Id.* at 46–47. Though the amended judgment likely disturbed or revised both parties' legal rights and obligations by holding Goodman liable for a claim he had prevailed on in the original judgment, the court's analysis did not end there. *See id.* at 46 n. 22. Rather, the court examined his motion and found that, though the motion would be timely if considered from the date of the amended judgment, the motion itself does not address that judgment. *Id.* at 47. The amended judgment "affected only his unrelated negligence count." *Id.* at 46. Meanwhile, the motion addressed his breach of contract claim, which had remained undisturbed since the original judgment. *Id.* at 46–47. Because Goodman's "renewed motion addressed only [the original] judgment, without qualification," the court affirmed the district court's finding that it was untimely. *Id.* at 47.

Applying the First Circuit's reasoning to today's dispute is straightforward. Here, as in *Goodman*, the University's motion disputes a claim undisturbed by the

amended judgment. Regardless of the materiality of the amendment, it cannot render the University's motion timely because the motion addresses only the original judgment. Like Goodman, the University "attempted to use the court's reconsideration [of a separate issue] to [its] advantage." *Id.* at 46–47. The First Circuit rejected that attempt, and this Court should do the same.

Second Circuit. In *Tru-Art Sign Co. v. Loc. 137 Sheet Metal Workers Int'l Ass'n*, 852 F.3d 217 (2d Cir. 2017), the Second Circuit expressly adopted the timeliness rule articulated by the Seventh Circuit in the *McNabola* case. *Tru-Art Sign Co.,* 852 F.3d at 221. The facts of the two cases are similar. In *Tru-Art Sign Co.,* Tru Art filed a Rule 59(e) motion over one year after the entry of the initial judgment. *Id.* at 222. The district court denied the motion as untimely pursuant to Rule 59(e) 's twenty-eight day filing requirement. *Id.*; Fed. R. Civ. P. 59(e). The motion would have been timely, however, if counting from the date of the amended judgment. *Id.* at 220. Citing *McNabola*, the court adopted the rule that "when a district court alters its judgment, a party aggrieved by the alteration must ask for correction of that alteration to have the timeliness of their correction determined from the date of the altered judgment." *Id.* at 221–22.

Applying *McNabola*, the court then considered Tru-Art's motion, which requested prejudgment interest. *Id.* at 222. The court found that Tru-Art's motion sought to amend the first judgment rather than the second because the first judgment did not award prejudgment interest and the amended judgment left that decision intact. *Id.* Therefore, the motion bore "no relationship to the district court's alteration

of the initial judgment." *Id.* Accordingly, the court held that "the motion's timeliness [was] determined from the date of the earlier judgment" and declared it untimely. *Id.*

Likewise, in this case, the University's motion bears no relationship to the District Court's alteration of the initial judgment. Here, as in *Tru-Art Sign Co.,* the District Court altered the initial judgment by modifying the damages owed. Whereas the amended judgment in *Tru-Art Sign Co.* decreased Tru-Art's damages award, the amended judgment in this case increased the damages award by adding punitive damages. *Id.* at 219. Both alterations revised or disturbed the parties' respective legal rights and obligations. However, in neither case is that fact dispositive.

The Second Circuit considered the relationship, if any, between the subject of the motion and the subject of the alteration to decide the issue. *Id.* at 222. Tru Art, though aggrieved by the alteration, did not "ask for correction of that alteration" such that "the timeliness of their correction [should be] determined from the date of the altered judgment." *Id.* Rather, it moved for prejudgment interest, a separate issue unrelated to the alteration. *Id.* Lacking the requisite relationship, the motion "was untimely in relation to the [initial] judgment." *Id.* Similarly, though the award of punitive damages aggrieved the University, the University did not ask the District Court to correct that modification. The University instead moved for judgment as a matter of law on liability, an issue unrelated to the alteration and unaffected by it. Applying the Second Circuit's approach, therefore, requires that the motion's timeliness be determined from the date of the original judgment. The result is that the motion must be denied.

Third Circuit. The Third Circuit also evaluates timeliness based on the relationship between the alteration and the motion. In *Keith v. Truck Stops Corp. of Am.*, 909 F.2d 743 (3d Cir. 1990), the Third Circuit Court of Appeals considered whether a notice of appeal was timely under Rule 4 of the Federal Rules of Appellate Procedure, which requires that appeals be filed within thirty days of the entry of judgment. *Keith*, 909 F.2d at 746; Fed. R. App. P. 4(a). The court entered the original judgment in favor of plaintiffs on August 15, 1989. Plaintiffs then moved to amend the judgment, seeking to add prejudgment interest to the award. *Keith*, 909 F.2d at 745–46. The district court granted the motion and added the interest in an amended judgment entered December 7, 1989. *Id.* at 746. Only twenty-eight days after the amended judgment, but several months after the original judgment, defendants filed a notice of appeal contesting the prejudgment interest award. *Id.*

The court of appeals began its analysis by declaring that "an order substantively changing a judgment constitutes a new judgment with its own time for appeal at least *where the change is the subject matter to be reviewed*." *Id.* (emphasis added). Because the defendant's notice of appeal addressed the subject of the alteration, the prejudgment interest award, the court of appeals moved on to consider whether the alteration was a substantive change. *Id.* at 746–47. Relying on this Court's rule in *Fed. Trade Comm'n v. Minneapolis-Honeywell Regul. Co.*, 344 U.S. 206 (1952), the court stated that it had "no doubt" that the prejudgment interest award disturbed or revised legal rights and obligations settled in the prior judgment. *Id.* at 746; *Minneapolis-Honeywell Regul. Co.,* 344 U.S. at 212. Having found that (1)

the notice of appeal addressed the change in the amended judgment and that (2) the change was substantive, the court held that the defendant's appeal was timely from the date of the amended judgment and proceeded to review the prejudgment interest award. *Keith*, 909 F.2d at 746–47.

The Third Circuit's analysis is slightly different from the Seventh Circuit's in that it considers whether the filing addresses the change in the amended judgment before considering whether that change is material. However, it is clear that the Third Circuit gives weight to both questions. Here, unlike in *Keith,* the University's filing does not address the change in the amended judgment. Though the change is substantive, the addition of punitive damages is not "the subject matter to be reviewed." *Id.* at 746. By failing to satisfy this prong of the test, the Third Circuit would reject the University's motion, and this Court should do the same.

Sixth Circuit. In *In re Dow Corning Corp.*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002), the U.S. District Court for the Eastern District of Michigan applied the Seventh Circuit's analysis in *Daley* and the Third Circuit's analysis in *Keith* to determine whether an amended judgment suspended the time for appeal. *In re Dow Corning Corp.*, 255 B.R. at 472. Relying on *Daley*, the district court held that the amended judgment "change[d] matters of substance or resolve[d] a genuine ambiguity" because it "clarified and substantively changed" the applicability of certain provisions to the parties. *Id.* at 472. Citing *Keith*, the district court found that the amended judgment created "its own time for appeal" because the appeal sought "review of the subject matter that was substantially

altered" by the amended judgment. *Id.* at 471, 472. The district court therefore concluded that the appeal would proceed. *Id.* at 472. On appeal, the Sixth Circuit Court of Appeals affirmed that the appeal was timely. *See In re Dow Corning Corp.*, 280 F.3d 648, 654 (6th Cir. 2002) ("A timely appeal to this Court followed."), abrogated by *Harrington v. Purdue Pharma L. P.*, 144 S. Ct. 2071 (2024).[1]

The Sixth Circuit's standard is therefore the same as those it has expressly adopted from the Seventh and Third Circuits. The court considers both whether the change in the amended judgment is material as well as whether the party's filing addresses that specific change. If so, the court allows the period of filing to restart from the date of the amended judgment. Compared to the Seventh and Third Circuits, the Sixth Circuit's standard applies no differently to the facts in this case. Though the District Court's addition of punitive damages to the amended judgment qualifies as a material change, the period of filing does not restart as to the University's motion because that motion does not address the addition of punitive damages. The University instead challenges its liability to Ms. McMillan for infringing on her First Amendment rights. The University does not dispute that the District Court made no alteration to its findings on liability in the amended judgment. Accordingly, the Sixth Circuit would not allow the deadline for the University's motion to proceed from that date.

[1] This Court later abrogated the Sixth Circuit's decision, but on unrelated grounds.

Tenth Circuit. The Tenth Circuit's timeliness analysis in *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 823 F. App'x 559 (10th Cir. 2020) differs slightly from the other circuits in its formulation, but rests on the same principles nonetheless. There, the court assessed the timeliness of a Rule 59(e) motion to alter or amend a judgment, which, like Rule 50(b) motions for judgment as a matter of law, must be filed within twenty-eight days of the entry of judgment. *SOLIDFX, LLC,* 823 F. App'x at 568; Fed. R. Civ. P. 50(b); Fed. R. Civ. P. 59(e). In a second amended judgment, the district court held Jeppesen liable to SOLIDFX for fraud. *SOLIDFX, LLC,* 823 F. App'x at 567–68. Jeppesen, believing that it had disposed of SOLIDFX's fraud claims in a previous successful motion for judgment as a matter of law, filed a motion to alter or amend. Jeppesen argued that the motion was timely because it was filed within twenty-eight days of the second amended judgment. *SOLIDFX, LLC,* 823 F. App'x at 568.

The basis of Jeppesen's motion was that "the findings of liability cannot remain intact because Colorado's economic loss rule barred SOLIDFX's fraud claims." *Id.* at 568. Agreeing with Jeppesen, the court reasoned that the second amended judgment "deviated substantially" from the previous judgments. *Id.* at 568. Furthermore, the previous judgments had not "alerted the parties to the fact that . . . [the district court] intended to enter a judgment of liability against Jeppesen on SOLIDFX's fraud claims." *Id.* at 569. Accordingly, Jeppesen "could not reasonably have known" of that finding "until the district court entered the [s]econd [a]mended judgment." *Id.* at 569. The court therefore allowed for the recommencement of the filing period from the date

of the second amended judgment and concluded that Jeppesen's motion was timely filed as a result. *Id.*

The Tenth Circuit's analysis turns primarily on when Jeppesen first received notice of the district court's judgment on the fraud claims. Having established that the second amended judgment deviated substantially from those prior, the court gave great weight to the fact that neither the district court's previous rulings nor its previous judgments alerted Jeppesen that the court would ultimately enter an unfavorable judgment on those claims. *See id.* at 586–69. The second amended judgment was thus "the first judgment in which the court explicitly stated" that the fraud claims remained intact. *Id.* at 562, 569. Therefore, while the Tenth Circuit's language differs slightly from the formulation put forth by the Seventh Circuit and adopted by many others, the Tenth Circuit nonetheless follows the same rule. Namely, that to restart the filing period from a subsequent amended judgment, the filing in question must be directed toward the change that constitutes the amendment.

Underlying this rule is, as the Tenth Circuit indicates, the notion that a party is responsible for challenging a judgment in compliance with statutory deadlines from the point at which they have been given "notice" or when they should "reasonably have known" of that judgment. *Id.* at 568, 569. Only upon entry of the second amended judgment did Jeppesen have notice of or could reasonably have known of the district court's findings. *Id.* As a result, Jeppesen was allowed to challenge those

particular findings beginning from the date of the second amended judgment. *Id.* at 569.

Unlike Jeppesen, however, the University had clear notice of its liability as of the date of the original judgment, January 20, 2022. On that date is when the clock began running for the issues disposed of in that judgment. Nonetheless, that critical twenty-eight day period passed without any action by the University. The University cannot dispute that it knew or should have known that it was liable to Ms. McMillan on January 20. The District Court's subsequent award of punitive damages alerted the University only to the amount it now owed Ms. McMillan. However, given that the University's motion makes no mention of these damages, the University cannot avail itself of any renewed filing period afforded by the amended judgment. In applying the Tenth Circuit's law, the University's motion fails once again.

Eleventh Circuit. Finally, the Eleventh Circuit addressed the timeliness of a post-judgment motion in *DeBose v. USF Bd. of Trustees*, 811 F. App'x 547 (11th Cir. 2020). There, the district court entered judgment against DeBose on her discrimination claim, but ruled in her favor on her retaliation claim. *DeBose*, 811 F. App'x at 552–553. USF then moved for judgment as a matter of law on the retaliation claim. The court granted the motion and entered an amended judgment in USF's favor with respect to that claim. *Id.* at 553. DeBose subsequently moved for a new trial on both claims and the court denied her motion. *Id*. at 553, 559.

On appeal, the Eleventh Circuit Court of Appeals quickly dispensed with the issue of timeliness. Without considering whether the amended judgment revised or

disturbed the parties' legal rights or obligations, the court held that DeBose's motion for new trial was timely as to the retaliation claim and untimely as to the discrimination claim. *Id.* at 559. The motion for new trial with respect to the retaliation claim was timely because DeBose filed the motion within twenty-eight days of the amended judgment and the motion addressed the alteration in that judgment—the district court's decision to overturn the jury's verdict on that claim. *Id.* However, the portion of the motion addressing the discrimination claim was untimely because that verdict "was not amended and went unchallenged" until the present motion, which "was filed well outside of the 28-day time frame." *Id.*

The Eleventh Circuit would likely dispose of the issue before this Court just as quickly. Looking solely to the relationship between the motion and the judgments, the court would find that the jury's verdict on the University's liability, like the verdict on DeBose's discrimination claim, was settled in the original judgment and not amended thereafter. As a result, the University, like DeBose, cannot rely on the amended judgment to restart the filing period. The University's motion comes after the statutory deadline has passed, and it must be denied on this basis. As a result, the Eleventh Circuit's timeliness standard falls neatly in line with that of the First, Second, Third, Sixth, Seventh and Tenth Circuits.

None of the aforementioned circuits would allow the University's motion to proceed as timely. If the University had challenged its liability within twenty-eight days of the original judgment or had instead disputed the punitive damages award, this issue would not be before the Court. However, unwilling to accept the

consequences of its late filing, the University attempts to make an end-run around the Federal Rules of Civil Procedure. This Court should allow it to succeed.

B. The University's motion is untimely under the Fifth Circuit's rule, as neither the Fifth Circuit's standard nor the Supreme Court cases it relies upon can remedy the motion's tardiness.

Even if this Court chooses to apply the Fifth Circuit's rule on timeliness, this does not necessarily save the University's motion. The Fifth Circuit's precedent is not nearly as conclusive nor supportive on the issue as the University represents. Neither is this Court's precedent.

The University relies heavily on the Fifth Circuit's decision in *Cornist v. Richland Par. Sch. Bd.*, 479 F.2d 37 (5th Cir. 1973) to argue that a material amendment revising or disturbing legal rights and obligations causes the filing period for post-judgment motions to begin anew. *See* R. at 9a. Indeed, the *Cornist* court does make a statement to this effect. *Cornist,* 479 F.2d at 39. The court also claims that this rule arises from "a long line of judicial authority." *Id.* However, in support of that statement, the court cites only three cases. *Id.* Of these three cases, two offer little to no support for the court's rule and the third happens to support denying the University's motion. Therefore, the University urges this Court to reject the standard followed by a majority of circuit courts in preference to a standard that is both unpopular and unsupported.

The *Cornist* court mischaracterizes the strength of the precedent on which it rests. For example, the 1952 Supreme Court decision *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952) ruled that a second judgment which restates only what

had been decided in the first does not restart the time for appeal. *Idaho Power Co.*, 344 U.S. at 20. However, this rule is not in dispute today. The Court's follow-up analysis is only that the district court "undertook to modify the license" in the second judgment. *Id.* While this statement may imply that the time to appeal began to run anew due to this modification, the Court does not explicitly resolve the issue of timelines because it immediately moves on to discuss whether the court usurped an administrative function by making that modification. *Id.* However, even assuming that the Court made this implication, the decision does not provide clear support because the opinion omits the basis on which the appeal was made. *Id.* If anything, the Court's abrupt shift to evaluating whether the lower court had the authority to modify said license in the amended judgment indicates that the petition to appeal was directed at that modification. This would provide further support in favor of the standard applied by the District Court in this case and followed by the majority of circuits.

The *Zimmern v. United States*, 298 U.S. 167 (1936) decision likewise provides scant support for the University's position. There, the Court evaluates whether the parties had an extended period to appeal in light of the court's statement after entering judgment that it was "dissatisfied" with the judgment and meant to make changes, without saying how significant those changes may be. *Zimmern*, 298 U.S. at 169. The Court held that this statement had the effect of suspending the finality of the judgment until an amended judgment could render "its vigor thus restored." *Id.* Because the parties appealed soon after the amended judgment, their appeals

were timely. *Id.* at 169, 170. However, the facts of this case are so peculiar that the Court's analysis is neither applicable to the resolution of the case before this Court today nor able to provide the kind of weighty support that *Cornist* suggests.

Finally, *Cornist* cites to *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator* Co., 344 U.S. 206 (1952). This case is the seminal decision from this Court on the issue at hand and is one both the University and Court of Appeals rely on. However, this case is far from being the "smoking gun" on which the University wishes to prevail.

There, the Federal Trade Commission ("FTC") issued a cease and desist order against the Minneapolis-Honeywell Regulator Company ("Honeywell") for three separate violations. *Id.* at 207–08. Honeywell petitioned the court of appeals to set aside the order on all three counts. *Id.* at 208. Upon commencing the litigation, however, Honeywell abandoned the first two counts and argued only the third. *Id.* On July 5, 1951, the Court entered judgment in favor of Honeywell on the third count but made no ruling on the first or second. *Id.* The FTC then asked the court to affirm and enforce the first and second counts of the cease and desist order, which resulted in an amended judgment entered on September 18, 1951. *Id.* at 209–10. The FTC proceeded to file a petition for certiorari challenging the Court of Appeals' decision on the third count. *Id.* at 210.

Though the Court considered the timeliness of an appeal, the Court was similarly tasked with deciding the issue based on whether the period of filing ran from the original or amended judgments. *Id*. While the Court found that the amended

judgment disturbed or revised the parties' legal rights, the Court's analysis did not end there. *Id.* at 212–13.

Rather, because the original judgment decided the third count, which was the only issue that the parties litigated in the lower court, the Court reasoned that the amended judgment did not restart the time to appeal since it did not disturb that decision. *Id.* "Since the one controversy between the parties related only to the matters which had been adjudicated on July 5," the Court could not "ascribe any significance, as far as timeliness is concerned, to the later judgment [on September 18]." *Id.* at 212. Holding that the period of appeal ran from the original judgment, the Court dismissed the FTC's writ of certiorari. *Id.* at 213.

This Court engaged in an analysis similar to that later adopted by the Seventh Circuit in *Charles v. Daley*. This Court rejected the FTC's attempt to reset the filing period from the amended judgment because the amended judgment differed from the original only by incorporation of the first and second counts, while the FTC's petition for review concerned the third count. *Id.* at 212–13. The Court therefore considered the basis of the petition in comparison with the substance of the modification to determine from which judgment the filing period should run.

Applied to the facts before the Court today, the original judgment likewise disposed of the sole controversy between the parties—liability for the infringement on Ms. McMillan's First Amendment rights. R. at 23a. The amended judgment modified only the amount of damages owed. The record does not show that the subject of punitive damages was ever a separate controversy litigated by the parties, nor does

the University challenge that award in its motion. Rather, the University moves for judgment only on its liability to Ms. McMillan. However, because the amended judgment left the University's liability undisturbed, this Court should not "ascribe any significance, as far as timeliness is concerned, to the later judgment." *Minneapolis-Honeywell Regulator* Co., 344 U.S. at 212–13. Like the FTC, the University cannot toll the time limitations prescribed by statute "because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with" on consideration of the motion. *Id.* at 213. In short, this Court's precedent urges that the University's motion be denied.

Though the University argues that both the Fifth Circuit and this Court's case law support the timeliness of its motion, neither assertion is true. As demonstrated, *Cornist* rests on an exceedingly weak foundation of Supreme Court cases that either provide no support or plainly contradict the standard the University advocates for. Not only that, the University's characterization of the Fifth Circuit's stance is itself inaccurate.

The Fifth Circuit decided *Harrell v. Dixon Bay Transp. Co.*, 718 F.2d 123 (5th Cir. 1983) ten years after *Cornist*, shedding much-needed light on where the Fifth Circuit stands. Contrary to what the University may claim, the court's analysis in this case reveals that the Fifth Circuit aligns with the standard articulated by the Seventh Circuit and followed by the majority.

In that case, Harrell moved to appeal the denial of his previous Rule 4(a)(4) motion for reconsideration in response to an amended judgment that reduced the

amount of damages owed him by Dixon Bay. *Harrell*, 718 F.2d at 125. Dixon Bay argued that this notice of appeal was untimely because it was filed more than thirty days from the amended judgment, while Harrell countered that Rule 4(a)(4) allowed for the appeal period to restart upon the grant or denial of the motion, rendering the appeal timely. *Id.* at 126.

The Fifth Circuit allowed Harrell to appeal the denial of his motion precisely because "the only judgment Harrell [sought] to appeal from . . . [was] the amended judgment." *Id.* at 129. That is, the Fifth Circuit's test considered whether the amended judgment made substantive changes adverse to the party seeking appeal of a Rule 4(a)(4) motion "directed to the amended judgment." *Id.* at 129. Because Harrell's motion was directed toward the modification made in the amended judgment reducing his damages, that motion could suspend the time for filing an appeal under Rule 4 until the lower court granted or denied it. *Id.* at 129.

Harrell reveals that the University's characterization of the Fifth Circuit's position is overly simplistic at best and plainly inaccurate at worst. The Fifth Circuit decided whether Harrell's notice of appeal was timely by examining which part of the judgment Harrell's motion addressed. *Id.* at 129. Because his motion challenged the adverse portion added in the amended judgment rather than an issue disposed of in the original judgment and undisturbed since, his Rule 4(a)(4) motion tolled the period of appeal and rendered his subsequent notice of appeal timely. *Id.* at 129. Far from opposing the Seventh Circuit's standard, the Fifth Circuit adopts a very similar one of its own.

Moreover, under that standard, the University's motion fails yet again. The Fifth Circuit allowed Harrell's notice of appeal to proceed as timely because his motion addressed the subject of the alteration in the amended judgment. *Id.* Stated plainly, he moved for the court's reconsideration of the reduction in his damages award. *Id.* In comparison, it is well established that the University's motion completely disregards the subject of the alteration in the amended judgment. The motion makes no mention of the additional punitive damages award and instead disputes a finding that has remained unchanged since the entry of the original judgment. Not even the Fifth Circuit would restart the filing period to render the University's motion timely, and this Court should rule no differently.

The University has not provided this Court with a well-supported rule of law that can save its motion. The Fifth Circuit does not supply such a standard, and both this Court as well as at least seven other circuits reject the University's argument entirely. For these reasons, this Court should deny the University's motion as untimely.

II. The University's Custom of Allowing a "Heckler's Veto" Violates the Due Process Clause of the Fourteenth Amendment and is Actionable under 42 U.S.C. § 1983.

The Due Process clause of the Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. 42 U.S.C. § 1983 imposes liability on any person who, acting under the color of state law, subjects another "to the deprivation of any rights,

privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (West 2021).

Municipalities which deprive persons of their rights can be sued for monetary, declarative or injunctive relief. *Monell v. Dep't of Soc. Services of City of* New York, 436 U.S. 658, 690 (1978). Monell liability is incurred when a government entity, acting under color of law, executes an unconstitutional "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id*. The unconstitutional course of action need not be officially approved. *Id*. "[L]ocal governments . . . may be sued for constitutional deprivations visited pursuant to governmental '*custom'* even though such a custom has not received *formal approval*." *Id*. (emphasis added). Neither party disputes that the University count as a "municipality" for the purposes of establishing *Monell* Liability. R. at 11a, n. 4.

The principal inquiry in a § 1983 claim is the existence of a protected right which may be alleged to have been violated or deprived. *Baker v. McCollan*, 443 U.S. 137 (1979). The protected right should then be distinguished from causation and foreseeability in light of that cause. *See* 1 Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 479 (1982) ("Resolving the threshold question of duty in terms of causation can only confuse both issues. Greater clarity and precision would be achieved if courts would recognize the distinction between duty and causation and analyze each in its own terms.").

Federal Courts have long recognized § 1983 liability when such a duty exists. *See*, *e.g.*, *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972) (police officers who stood without interfering during an assault had duty to enforce the law); *DiMarzo v. Cahill*, 575 F.2d 15 (1st Cir. 1978) (finding § 1983 liability when an official's failure to carry out state law duties resulted in prison conditions below the minimum standard of the Fourteenth Amendment). They continue to do so to this day. *Meinecke v. City of Seattle*, 99 F.4th 514, 522-23 (9th Cir. 2024) (failure to protect protestor from hecklers was actionable under § 1983).

Analysis of alleged Fourteenth Amendment violations proceeds in two stages. The first element asks whether an individual's interests are encompassed within the Amendment's protection of life, liberty and property. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). If that element is answered affirmatively, courts then decide what procedures constitute "due process of law." *Ingraham v. Wright,* 430 U.S. 651, 672 (1977).

Arbitrary denial of procedural fairness is a violation of procedural due process. *Fuentes v. Shevin*, 407 U.S. 67, 82 (1978). Substantive due process is violated when government power is exercised arbitrarily or oppressively. *Daniels v. Williams*, 474 U.S. 327, 331 (1986). McMillan's claim is that she was deprived of substantial due process. This is because the University's custom of allowing a "heckler's veto" arbitrarily deprived her of her First Amendment right to speak her view. *See* R. at 5a-6a.

The general rule is that states and municipalities have no duty to provide affirmative protection to citizens. *Martinez v. California*, 444 U.S. 277 (1980). One exception to this general proposition is when a state has a "special relationship" with the person alleging the rights violation. *DeShaney v. Winnebago County Dept. of Social Servs.* 489 U.S. 189, 197 (1989). For a "special relationship" to exist the state must have taken the person in question into custody. *Collins v. City of Harker Heights*, 503 U.S. 115, 127-128 (1992). When the state takes a person into custody against their will, the Constitution "imposes upon it a corresponding duty to assume some responsibility for [their] safety and general well-being." *Youngberg v. Romeo*, 457 U.S. 307, 317 (1989).

The second exception to the general rule is the "special danger" exception. The broad definition of a "special danger" is a danger the state either created or increased the risk thereof. *DeShaney*, 498 U.S. at 201. A "special danger" must be distinguishable from dangers faced by the public generally. *Mitchell v. Duval Cnty. Sch. Bd.*, 107 F.3d 837, 839 (11th Cir.1997).

Following this Court's decision in *Collins*, there is some debate about whether the broad definition "special danger" is good law. *See*, *e.g.*¸ *White v. Lemacks*, 183 F.3d 1253, 1257 (11th Cir.1999) (holding that the "special danger" exception was *dicta* which did not survive *Collins*). The *Collins* Court held that state actors only violate due process rights of a person not in custody when their conduct "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Collins*, 503 U.S. at 128. Call this the narrow definition of a "special danger." Yet references

to broad definition still persist in this Court's handling of § 1983 cases. *See*, *e.g.*, *Morse v. Frederick*¸ 551 U.S. 393, 424 (2007) (Alito, J., concurring) ("[e]xperience shows that schools can be places of special danger" because the school requires students to remain in close quarter).

McMillan's claim is sound on either definition. The "heckler's veto" is constitutionally arbitrary because it allows a smattering of loud voices to shout down unpopular views. R. at 4a-5a. A mob of students who break school property and linger for hours, increase the risk of harm to any unpopular speaker on campus. R. at 6a. The University either created or increased the risk of this harm by refusing to punish misconduct. R. at 5a. This Court should reverse and render judgment in McMillan's favor.

A. The University's customary "heckler's veto" falls under the broad definition of the "special danger" exception to the rule against protection.

Due process inquiries are necessarily fact specific. *See County of Sacramento v. Lewis*¸ 523 U.S. 833 (1998). To satisfy the broad definition, McMillan must show that the University's customary "hackler's veto" either (1) created a danger that she was subjected to; or (2) increased her risk of that danger. *DeShaney*, 498 U.S. at 201. The University's conduct in this case easily satisfies this standard.

Prior to Dean Thatcher's reign over the University's enforcement protocols, Lantana University had a proud and longstanding tradition of academic and athletic excellence. R. at 3a. That tradition now appears to be broken with respect to academics. *See* R. at 4a-6a. Dean Thatcher's *laissez faire* approach to governance had

emboldened many students to engage is mischief ranging from distasteful to dangerous. R. at 3a, 5a-6a. Students have released farm animals into buildings. R. at 3a. They have displaced cars to the tops of campus buildings. 3. at 4a. They eagerly shout down unpopular speakers. R. at 5a. And, after doing so, they remain in the auditorium for hours trashing property and generally being disruptive. R. at 6a.

Allowing such a vast array of misconduct to go unpunished could easily have severe consequences. The University's failure to enforce violations has already resulted in at least one student being hospitalized. R. at 3a, n. 2. While campus speakers, like McMillan, have escaped physical harm thus far, they may not be so fortuitous in the future. It is no stretch to imagine a group of masked, agitated students erupting into violence against a speaker of whom they disapprove. R. at 6a-7a. They know Dean Thatcher won't enforce the rules. Campus security is already content to standby while rooms are trashed. R. at 7a. The situation at the University is a tinderbox waiting for the match to be struck.

While physical harms have fortunately been limited, the situation on campus is already dire. McMillan and her fellow academics are routinely being denied their First Amendment right to peaceably engage in free expression and reasoned debate. McMillan's situation is similar to that in *Meinecke*. There, the speaker was verbally and physically assaulted while trying to read bible passages in the vicienty of protest of the *Dobbs* decision. *Meinecke*, 99 F.4th at 518; *See generally Dobbs v. Jackson Women's Health Org.,* 597 U.S. 215 (2022). Instead of arresting the protestors, police instead removed the speaker from the area. *Meinecke*, 99 F.4th at 518. The speaker

was subsequently arrested when he continued to return to the area of the protest. *Id*. at 519.

The Ninth Circuit held that the speaker was likely to succeed on his First Amendment claims for two reasons.[2] *Id*. at 525-26. First, the government may not arrest persons under the guise of public safety when their peaceful actions cause others to become agitated or violent. *Id*. at 525; *Brown v. Louisiana*, 383 U.S. 131 (1966). Second, "if speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly." *Meinecke*, 99 F.4th at 518; *Balogh v. Virginia*, 120 F.4th 127, 135 (2024).

Here, McMillian was deprived of her right to speak in the direct presence of campus security. R. at 7a. The evidence on record shows that the lack of enforcement is the result of Dean Thatcher's proclamation that violators ought not to be punished. *See generally* R. at 3a.-7a. That allowing student to act indiscriminately could result in speakers being shouted down, injured, or denied their rights is foreseeable. Security at universities around the nation is often called in to *protect* the security and sanctity of public speakers. Finally, had the University properly enforced its own rules, McMillan would have been able to speak freely. This Court should reverse.

i. The University's customary "heckler's veto" also falls under the narrow definition of the "special danger" exception to the rule against protection.

[2] The issue for the *Meinecke* Court was whether the officers were entitled to qualified immunity.

Protection from arbitrary government action is the touchstone of due process. *Hurtado v. California*, 115 U.S. 516, 527 (1884). The importance of guarding against arbitrary interference with liberty has roots stretching back to this Court's earliest exposition on the subject:

> "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

Bank of Columbia v. Okely, 17 U.S. 235 (1819). The Founders were equally clear, counseling that separation of powers was necessary to "prevent life and liberty" from being subjected to the "arbitrary control . . . of an oppressor." 2 Madison, *Federalist no. 46*.

To satisfy the narrow definition, McMillan must show that the "heckler's veto" is arbitrary, or conscience shocking. Government acts arbitrarily when it acts without a "rational decisionmaking process that takes account of competing social, political, and economic forces." *Collins*, 503 U.S. at 128; *cf. Walker v. Rowe*, 791 F.2d 507 (7th Cir 1986). Government can also act arbitrarily when it is "deliberately indifferent" to rights violations. *Collins*, 503 U.S. at 127 (citing *Rochin v. California*, 342 U.S. 16 (1952)).

As Justice Douglas wrote, "[42 U.S.C. § 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *rev'd on other*

grounds by, *Monell*, 436 U.S. 658. Police, therefore, "may not ignore the duty imposed by [their] office." *Byrd*, 466 F.2d at 11 (officers liable for acting as bystanders during an assault). Nor can city officials impose different requirements on speakers based on perceived reactions from the crowd. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992).

In Lantana, speakers who show up on campus to express their views and engage in reasoned debate are now unable to do so when the whims of the mob dictate otherwise. *See* R. at 5a-6a. Allowing such conduct would enable the "tyranny of the majority" that the Founders so urgently counseled us against. *See* 3, Madison, *Federalist no. 51*.

Dean Thatcher's conscious indifference to plight of speakers and, apparently, the rule of law is the definition of constitutional arbitrariness. By creating a culture of disobedience, Dean Thatcher has used his state-given authority in a manner which makes it impossible for many to express their views. R. at 5a. Free speech should be and has long been protected by this Court. Allowing it to be flagrantly discarded at an institution of higher learning shocks the conscious. This Court should reverse.

b. The lower courts erred by failing to conduct a forum-based analysis as required by this Court's precedent.

The First Amendment protects both the right to speak freely and the right to refrain from speaking altogether. *Riley v. Nat'l Fed'n of the Blind of N.C.,* 487 U.S. 781, 796–97 (1988). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943). Individuals may, therefore, hold unpopular points of view and reject ideas that they find objectionable. *Wooley v. Maynard,* 430 U.S. 705, 714 (1977).

When the government restricts private speech on property it owns, courts apply a "forum based" approach to assess those restrictions. *International Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678 (1992) ("*ISKON*"). This Court has recognized three types of government-controlled spaces: (1) traditional public forums, (2) designated public forums, and (3) nonpublic forums. *Minn. Voters All. v. Mansky*, 581 U.S. 1, 11 (2018). Traditional public forums include "parks, streets, sidewalks, and the like." *Id*. Designated public forums are spaces "not traditionally regarded as public forums" that the government has "intentionally opened up" for use by the general public or by a particular class of speakers. *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 46 (1983). Designated public forums include university meeting facilities, school board meetings, and municipal theaters. *Id*., at 45.

Nonpublic forums are spaces where the government intentionally grants only "selective access" for a specific purpose. *Arkansas Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 677–78 (1998). Polling places, airport terminals, and student activity funds are examples of nonpublic forums. *See*, *e.g.*, *Minn. Voters All.*, 581 U.S. at 12 (polling places); *ISKON*, 505 U.S. at 682 (airport terminals); *Koala v. Khosla*, 931 F.3d 887, 902 (9th Cir. 2009) (student activity funds). Content-based restrictions

on speech in traditional and designated forums are subject to strict scrutiny. *Pleasant Grove City, Utah v. Summum,* 555 U.S. 460, 469-70 (2009). For nonpublic forums, content-based restrictions are permissible so long as they are reasonable and viewpoint neutral. *Id*., at 470.

The distinction between a designated forum and a nonpublic forum is drawn by examining the government's intent. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 802 (1985). Designated forums are not created via inaction or by permitting only limited discourse. *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 497 (9th Cir. 2015) (citing *Cornelius*, 473 U.S. at 802). Instead, the government must intend to grant general access to the general public or a class of speakers. *Widmar v. Vincent,* 454 U.S. 263, 267–68 (1981). By contrast, a nonpublic forum is defined by government restrictions on specific speakers or subject matter. *Forbes*¸ 523 U.S. at 679.

Courts examine three factors to determine government intent. *Cornelius*, 473 U.S. at 802. The first factor is whether the government has adopted any policies regulating forum access. *Id*. If the government has adopted a policy governing access, courts then analyze the practical implementation of that policy. *Id*. In cases where access is granted "as a matter of course to all who seek [it]," this factor cuts in favor of finding the government has designated a forum. *Perry*, 460 U.S. at 47.

The final factor is the nature of the government property at issue. *Cornelius*, 473 U.S. at 802. If the property is dedicated to expressive activities, courts generally

infer the intent to designate a forum. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 555 (1975) (municipal theater is a designated forum). If the property is used for government-run commercial purposes and the permitted speech is merely incidental to that use, that fact supports finding a nonpublic forum. *See Lehman v. City of Shaker Heights,* 418 U.S. 298, 303 (1974) (advertising on public transit system constitutes a nonpublic forum).

Here, the *Cornelius* factors clearly support finding that the university auditorium is a designated forum. For one, nothing in the record suggests that the University has adopted a policy governing access to the auditorium. Admittedly, the Thirteenth Circuit, at times, characterized the University's refusal to discipline students as a "policy." R. at 11a. At other times, however, the failure to discipline students was described as a "custom." R. at 11a (noting that the jury had sufficient evidence to find that the University had a custom of not discipling students.

Black's Law Dictionary defines "policy" as "[a] standard course of action that has been *officially established* by an organization, business, political party, etc." Policy Definition, *Black's Law Dictionary* (12th ed. 2024), *available at* Westlaw (emphasis added). "Custom" is defined is defined as "[a] practice that by its common adoption and long, unvarying habit has come to have the force of law." Custom Definition, *Black's Law Dictionary* (12th ed. 2024), *available at* Westlaw.

The University's inaction in the face of serious misconduct is more aptly characterized as a custom because it applies to prohibited behaviors. There is no

question that property damage, releasing livestock inside an auditorium, and drunken antics that result in hospitalization are not activities authorized by the University. R. at 4a. Some of these acts (*e.g.* property damage) are outright illegal. *See* R. at 15a, n. 5 (noting that the New Tejas Penal Code is identical to the Texas Penal Code; TEX. PENAL CODE Ann. § 28.03 (Westlaw 2024) (providing that criminal mischief resulting in pecuniary losses is illegal).

Even if this Court finds the University's habitual inaction to be a policy, it is not a policy that governs who may access the forum. The record contains no evidence that speakers must (1) apply for access to the forum, (2) that only a "specific group of speakers" is allowed in the forum; or (3) that discussion was limited to "a very narrow topic." *Bowman v. White*, 444 F.3d 967, 979 (8th Cir. 2006); *See Cornelius*, 473 U.S. at 802 (nonpublic forums are defined by a lack of "general access").

In any case, the third *Cornelius* factor is decisive. Universities have traditionally and historically served as spaces designated for the free exchange of ideas. *Healy v. James,* 408 U.S. 169, 180 (1972) (stating the universities represent a "marketplace of ideas"). As Justice Kennedy eloquently wrote:

> Th[e] danger [of chilling speech] is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . [U]niversities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment.

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 835-36 (1995) (citations omitted). Universities have set the "stage for social debate" during some of the most pivotal times in our nation's history. *Bowman*, 444 F.3d at 979. Campus speakers, like McMillan, are often neither enrolled students nor university employees. R. at 3a, 5a. They are simply people who travel the country to spread their message and foster the free exchange of ideas. *See* R. at 6a.

The University will undoubtedly attempt to distinguish *Bowman* from the instant case. There, the Court's holding was limited to certain outdoor areas of campus. *Bowman*, 444 F.3d at 980. Such a distinction is irrelevant to the matter at hand.

The essence of *Bowman* is that university campuses are widely held to possess the defining characteristics of a designated forum. *See generally id.* at 778-780. Moreover, courts have held that university auditoriums *are* designated forums. *See*, *e.g.*, *Concerned Women for Am. Inc v. Lafayette Cnty.*, 883 F.2d 32 (5th Cir. 1989) (holding that library auditorium on campus was a designated forum); *but see Widmar,* 454 U.S. at 268 n. 5 ("We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.").

The record shows that the auditorium was opened to a cornucopia of different speakers. R. at 5a. These speakers were invited under the University's motto *Doctrina Perptrua*—"Forever Learning." R. at 3a. These facts clearly demonstrate

that the auditorium was a space designated by the government for the free exchange of ideas. The University's custom has changed all of that. Lantana student now are forever learning that unpopular ideas can be silenced without consequence.

ii. The "Heckler's Veto" is a content-based restriction on speech that should be subjected to strict scrutiny.

The next question this Court must consider is whether the University's custom of allowing student misconduct is a content-based restriction on speech. *See Pleasant Grove City,* 555 U.S. at 469. A regulation of speech is facially content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

The Thirteenth Circuit held that the University's custom was not content-based because the "heckler's veto" was wielded against a wide variety of campus speakers. R. at 11a. But the mere fact that a restriction applies to an entire class of speaker does not render it content neutral. *Reed*, 576 U.S. at 170. A restriction which, for example, limited the speech of all corporations is not render content neutral just because it singles out an entire class. *See Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 340-41 (2010).

In *Reed*, this court struck down a city ordinance which regulated the time and place signs which gave direction to temporary events could be posted. *Reed*, 576 U.S. 155. The ordinance was unconstitutional because the limits varied based on the content of the signs. *Id*. at 159. Signs displaying "ideological" content were treated differently than signs featuring "religious" or "political" content. *Id*. That the

ordinance applied to all temporary signs did not render it content neutral. *Id*. at 170. Despite being "entirely reasonable . . . it had to be struck down because of [its] content based nature." *Id*. (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (O'Connor, J., concurring)).

The instant case is, admittedly, less clear than *Reed*. The University's custom of allowing a "heckler's veto" is a speaker or subject matter based restriction. Unpopular speakers are summarily shouted down when they appear on campus. R. at 5a. Class-based restriction do not automatically render a restriction content neutral. *See Reed*, at 170. Therefore, this Court must determine whether the University's custom treats different types of speech differently. *Id*. at 170-71.

This Court has previously found "heckler's veto's" unconstitutional. *See, e.g., Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (observers reaction to demonstration was an unconstitutional restriction on speech); *Forsyth County*, 505 U.S. at 137 (1992) (city ordinance that allowed adjusting of parade permit fee was an unconstitutional "heckler's veto"). The Ninth Circuit has defined a "heckler's veto" as "an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience." *Rosenbaum v. City & Cty. of San Francisco*, 484 F.3d 1142, 1159 (9th Cir. 2007).

The Ninth Circuit's characterization of "heckler's vetoes" is the overwhelming approach in the Courts of Appeals. The Fourth Circuit has "recognized the heckler's veto as "one of the most persistent and insidious threats to [F]irst

[A]mendment rights." *Balogh*, 120 F.4th at 135 (2024). The Sixth Circuit, discussing "heckler's vetoes" highlighted to importantance of protecting "unpopular views" from majority oppression. *See Bible Believers v. Wayne County, Mich.*, 805 F.3d 228 (2015) (en banc). The Third circuit, has unequivocally stated that "[t]he First Amendment generally does not permit the so-called 'heckler's veto.'" *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 465 (3d Cir. 2015). "In almost every instance it is not acceptable for the state to prevent a speaker from exercising his constitutional rights because of the reaction to him by others." *Beckerman v. City of Tupelo*, 664 F.2d 502, 509-10 (5th Cir. 1981).

The precedent regarding "heckler's vetoes" is clear. *Accord*, *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695 (7th C ir. 1998). The government may not deny a speaker access to a forum based to the anticipated actions of others. *United States v. Rundo.*, 990 F.3d 709 (9th Cir. 2021). Nor may law enforcement sit idly by while persons peacefully expressing their views are assaulted. *Meinecke*, 99 F.4th at 522-23. "A police officer must take reasonable action to protect from violence persons exercising their constitutional rights." *Bible Believers*, 805 F.3d at 236-37.

The University will likely try to distinguish *Meinecke* and *Bible Believers* because those cases involve active duty police officers. Whether to hold university employees, like Dean Thatcher and campus security, to the same standard as police officers is an issue of first impression for this Court. Such a holding is consistent with "hackler's veto" precedent. This Court has previously held that city officials created

a "heckler's veto" when exercising enforcement powers. *Forsyth County*, 505 U.S. at 123 (city official who charged disparate booking fee based on anticipated security costs imposed unconstitutional "heckler's veto").

Campus security should be treated no differently than regular police officers. Most campuses around the country are secured by city police. 4, Baptise, *Campus Cops: Authority without Accountability*, THE AMERICAN PROSPECT.[3] If anything, it is sensible to hold campus security more accountable than police operating in different areas. The college experience is fundamental to many young people's development. Their special role in society's free exchange of ideas is worth of more protection, not less.

ii. The University's customary "heckler's veto" cannot survive strict scrutiny.

Because the customary "heckler's veto" is not content neutral, it must be subjected to strict scrutiny. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011). This is no small task. As Professor Gunther's catechism goes: "'strict' in theory, fatal in fact." 5, Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986). A

[3] Accessed November 17, 2024, at https://prospect.org/civil-rights/campus-cops-authority-without-accountability/.

compelling state interest is one that relates to vital roles traditionally held by government. *See Williams–Yulee v. Florida Bar*, 575 U.S. 433, 443 (2015). There is no such interest here. The University's custom is apparently motivated by Dean Thatcher's belief that "boys will be boys." R. at 5a. When they engage in misconduct a "good talking to" is all that is required. R. at 5a. In spite of an increase in campus misconduct, Dean Thatcher's *raison d'etre* has permeated University enforcement staff. R. at 5a.

Dean Thatcher's "interest" appears to be either a disdain for rules, or the misguided belief that a lack of discipline will improve his student's lives. Neither of those interests are compelling. In fact, oft asserted compelling state interests cuts against the University's custom. *See*, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (ensuring minors access to education is a compelling state interest). Under Dean Thatcher's lead, the University's ability to achieve to interest is backsliding. *See* R. at 5a.

Nor is it plausible for the University to claim that the custom is justified by its interests in protecting student safety. McMillan does not dispute that student safety is a compelling interest. *See*, *McKinney ex rel. K.P. v. Huntsville Sch. Dist.*, 350 F. Supp. 3d 757, 771 (W.D. Ark. 2018) (student-safety is a compelling state interest justifying restriction on speech). What McMillan contends is that the "hackler's veto" obvious does not serve that purpose. It is simply strains credulity to suggest that trashing auditorium, and

shouting down speakers makes student safer in any way. *See* R. at 5a. The far more logical inference is that student safety is made worse thanks to the custom.

> "In all very numerous assemblies, of whatever character composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."

6, Hamilton and Madison, *Federalist No. 55.* Even if this Court finds the University has a compelling interest, a "heckler's veto" is, by definition, not a narrowly tailored means. *See*, *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963). A "heckler's veto," after all, amounts to an arbitrary restriction enforced vicariously by a mob.

Dean Thatcher's lack of intent is no excuse either. This Court has made it resoundingly clear that "the purpose of [government] . . . is not a basis for declaring [] legislation unconstitutional." *United States v O'Brien*, 391 US 367, 383 (1968) ; *but see* 7, Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (acknowledging *O'Brian* but arguing in favor of a multifactor analysis that examines governmental motives in First Amendment cases). Therefore, The Thirteenth Circuit was in error when it held Dean Thatcher's lack of an "impermissible motive" to be a decisive factor. R. at 12a.

The University's message is clear. Unpopular speech simply is not tolerated at Lantana University. R. at 5a. If enough students disagree with your message, you will be shouted down. R. at 6a. Student will break things. R. at 6a. They may even

release farm animals. R. at 3a. And those students will remain in the room for hours, in case you decide to come back. R. at 6a.

In polarized times, "colleges will always be a flashpoint in [our] larger cultural and social battles". 8, Healy, *Return of the Campus Speech Wars*, 117 MICH. L. REV. 1063, 1082. It is incumbent on this Court strike down restrictions on speech that threaten the marketplace of ideas. This is especially true when that speech occurs on campus. Universities have long been a bastion for the reasoned debate of contentious subjects. This Court should protect that role by reversing the Thirteenth Circuit's judgment.

CONCLUSION

For these reasons, Ms. McMillan respectfully requests that this Court reverse the Thirteenth Circuit's decision.

Respectfully submitted,

TEAM 99

Counsel for Petitioner