No. 19-1108

IN THE

# Supreme Court of the United States

DERAY MCKESSON,

*Petitioner,*

v.

JOHN DOE SMITH, ET AL.

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## BRIEF OF RESPONDENT BLACK LIVES MATTER GLOBAL NETWORK, INC. IN SUPPORT OF CERTIORARI


Sonya D. Winner
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105
(415) 591-6000

Neha Jaganathan
Ryan A. Partelow
Michael D. Rebuck
COVINGTON & BURLING LLP
The N.Y. Times Building
620 Eighth Avenue
New York, NY 10018
(212) 841-1000

David M. Zionts
*Counsel of Record*
Megan C. Keenan
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
dzionts@cov.com
(202) 662-6000

Lindsey Barnhart
COVINGTON & BURLING LLP
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306
(650) 632-4700

*Counsel for Black Lives Matter Global Network, Inc.*

## PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

DeRay Mckesson (Defendant-Appellee below) is the Petitioner. John Doe Smith[1] (Plaintiff-Appellant below) is a Respondent.

Respondent Black Lives Matter Global Network, Inc. ("the Network")[2] was not named as a defendant in the operative complaint. The operative complaint only named Black Lives Matter, alleged to be a "national unincorporated association," as a defendant. Doe nevertheless attempted to draw the Network into the case by serving the Network as purported service on "Black Lives Matter." The Network therefore participated in proceedings before the district court to dismiss the original complaint. Doe also sought leave to amend the complaint to add factual allegations and name additional defendants, including the Network. The district court denied the motion for leave to amend. In the Fifth Circuit, the court of appeals identified the Network as an appellee on the case docket and caption, and the Network accordingly filed a party

---

[1] Both the district court and the Fifth Circuit held that Respondent Doe is not entitled to proceed pseudonymously, but the Fifth Circuit did not alter its caption and Respondent has yet to identify himself, so this brief refers to him as "Doe." *See* Pet. App. 28a.

[2] During the proceedings below, the Network's legal name was "Black Lives Matter Network, Inc." The Network has since changed its name and Delaware corporate registration to "Black Lives Matter Global Network, Inc."

brief. The Network was therefore a "part[y] to the proceeding" below and is a Respondent in this Court. Rule 12.6.

Pursuant to Rule 29.6, the Network states the following:

Black Lives Matter Global Network, Inc. is a Delaware corporation. The Network has no parent corporations, and no publicly held company owns more than 10 percent of the Network's stock.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## INTRODUCTION

In 1965, Dr. Martin Luther King, Jr. led a historic march for voting rights from Selma to Montgomery. That march is rightly celebrated as one of the most consequential acts of protest in American history, and ultimately led to the passage of the Voting Rights Act. It also "occupied public roadways, including the full width of the bloodied Edmund Pettus Bridge." Pet. App. 52a–53a & n.67 (Willett, J., dissenting). Governor Wallace seized on this aspect of the march in opposing it, claiming to defend "the orderly flow of traffic."[3]

Measured against this Nation's history, it is all the more remarkable that a court of appeals has given constitutional blessing to a tort best described as "negligent protest." Pet. App. at 53a (Willett, J., dissenting). According to the Fifth Circuit, by alleging that a protester committed a misdemeanor traffic offense, Respondent Doe successfully pled his way around the First Amendment, allowing a protest leader to be sued for some unidentified individual's violent act. In fact, in the panel majority's view, because this misdemeanor was alleged, "no First Amendment protected activity is suppressed" at all. Pet. App. 22a.

This crabbed view of the First Amendment cannot stand, and certainly not without this Court's review. It is entirely inconsistent with this Court's landmark

---

[3] United Press Int'l, *Wallace Orders Troopers to Stop Negro Marchers* (Mar. 6, 1965), https://www.upi.com/Archives/1965/03/06/Wallace-orders-troopers-to-stop-Negro-marchers/2541162885347/.

precedent in *NAACP v. Claiborne Hardware Company*, which prohibits holding a protest leader liable for "the unlawful conduct of others." 458 U.S. 886, 927 (1982). The very premise of the court of appeals' evasion of *Claiborne*—that one should *assume* violence whenever protesters are confronted by police—is offensive to First Amendment values.

The notion that alleging a *misdemeanor traffic violation* causes First Amendment protections to unravel is just as shocking. Surely Dr. King's speech rights did not vanish because Governor Wallace regarded blocking the Edmund Pettus Bridge as a traffic violation. Even granting the premise that a peaceful demonstration conducted in technical violation of a local ordinance has diminished protection, the Fifth Circuit's rule will chill far more speech than that. Much political speech "is intended to provoke emotive and spontaneous action, and this is where its virtue lies." *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005). Where spontaneous protest might otherwise have arisen, those with a political message have now been instructed to scour the law books to decide whether they are about to commit a "negligent protest." Faced with unclear ordinances or ambiguous messages from local authorities, a would-be peaceful protester might be willing to chance a misdemeanor citation to express a point of view, but not years of civil litigation and potentially ruinous financial liability. At a bare minimum, the Fifth Circuit has sent the message to "think twice before you speak." It is hard to imagine a message more anathema to the First Amendment.

Respondent Doe's attempt to involve Black Lives Matter Global Network, Inc. ("the Network") in this lawsuit epitomizes the First Amendment dangers. His sole basis for trying to hold the Network liable is that it is associated with speech—the phrase "Black Lives Matter"—which was chanted at a rally in which some unknown person injured him. This theory of liability has a host of problems, but the First Amendment defect is fundamental, and even the prospect of having to defend such cases works constitutional injury.

The very success of the political speech of the Network, its related entities, and its co-founders, and the unpopularity of that speech in some quarters, is why the Network has been targeted. In a world where there is fear of liability for "negligent protest," that will be the price to pay for much politically contentious speech, whether it be a demand that Black lives matter, that abortion ought to be banned, that climate change ought to be addressed, or that the federal budget ought to be cut.

This remarkable use of private tort litigation to target and chill speech led to truly unusual proceedings below, in which the court of appeals issued three different opinions, became divided on the last one, and then stalemated on whether the full court should review the case. Now this Court's immediate review is warranted.

## OPINIONS BELOW

The operative Fifth Circuit opinion (Pet. App. 1a) is reported at 945 F.3d 818 (5th Cir. 2019). The district court's opinion (Pet. App. 55a) is reported at 272 F. Supp. 3d 841 (M.D. La. 2017). The Fifth Circuit's order denying rehearing en banc via an 8–8 split (Pet. App. 79a) is reported at 947 F.3d 874, 875 (5th Cir. 2020).

## JURISDICTION

On January 28, 2020, the Fifth Circuit issued an order denying rehearing en banc of its December 16, 2019 decision. Petitioner Mckesson timely filed a petition for writ of certiorari on March 5, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Louisiana Civil Code article 2315(A) provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

Louisiana Revised Statutes § 14:97 provides: "Simple obstruction of a highway of commerce is the

intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult. Whoever commits the crime of simple obstruction of a highway of commerce shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both."

## STATEMENT

### A. Black Lives Matter Global Network, Inc.

In 2013, the co-founders of the Network and its related entities—Alicia Garza, Patrisse Cullors, and Opal Tometi—created a movement-building project called #BlackLivesMatter in response to George Zimmerman's acquittal for his killing of Trayvon Martin. Cullors wrote messages on Facebook that used the hashtag "#BlackLivesMatter." Tometi and Garza, each of whom had also posted messages in response to the acquittal, connected with each other and with Cullors to form a political and ideological intervention to campaign against the violence and institutional racism experienced by the Black community.

The phrase "Black Lives Matter" is meant to convey the unique and disproportionate risks associated with being a Black person in twenty-first century America, and was developed in response to the overwhelming message heard by many in the Black community that their lives are not valued.

Cullors, Tometi, and Garza eventually created the Network and other related entities to

affirm the humanity of Black people, support the development of Black leaders, and stop the violence inflicted on Black communities.

But the reach of the co-founders' message has reverberated far beyond the Network itself. Today, several organizations and individuals unaffiliated with the Network or its co-founders have used the phrase "Black Lives Matter" in the context of their own activism.

Protest is central to these organizations and to the Network's affiliates, as it was to organizations that preceded the Network in the civil rights movement. Black Lives Matter organizations have protested police killings of Black people, police brutality, and racism in the criminal justice system.

### B. Baton Rouge Protest Following the Killing of Alton Sterling

On July 5, 2016, police officers responding to an anonymous 911 call shot and killed Alton Sterling, a Black resident of Baton Rouge, Louisiana. This case stems from events at a protest in Baton Rouge in response to that killing, at which protesters chanted "Black Lives Matter."

The complaint alleges that on July 9, 2016, petitioner DeRay Mckesson and others protested in front of police department headquarters, and that they blocked a public thoroughfare as part of this protest.

John Doe, a police officer who filed the instant lawsuit, alleges that he suffered loss of teeth and injuries to the jaw and brain during that protest when

an unknown assailant threw a piece of concrete or "similar rock[-]like substance" at officers making arrests. That assailant is not a party to the case. The complaint does not allege that the assailant was affiliated with Mckesson, with the Network, or with any specific Black Lives Matter organization. The complaint also does not allege that Mckesson, any member of the Network or other Black Lives Matter organization, or anyone else directed, authorized, or ratified the conduct of the assailant, or otherwise intended the assailant's actions.

### C. District Court Proceedings

Doe filed this lawsuit on November 7, 2016 against Mckesson and "Black Lives Matter," alleging it to be a "national unincorporated association" subject to suit. The complaint asserts Louisiana state law tort claims for negligence, civil conspiracy, and vicarious liability. On January 25, 2017, Mckesson filed a motion to dismiss Doe's complaint. On June 18, 2017, Doe filed a motion to amend his complaint to add factual allegations and to name additional defendants—the Network and #BlackLivesMatter. The Network filed a motion to dismiss on August 7, 2017, arguing that Doe did not effectuate service and that he failed to state a claim for relief.

The district court dismissed Doe's original complaint on September 28, 2017. Pet. App. 55a. After concluding that the civil conspiracy and vicarious liability claims failed on state law grounds, the district court held that Doe's negligence claim is foreclosed by this Court's decision in *Claiborne*, because Mckesson could not be held liable in tort "for the consequences

of nonviolent, protected activity." Pet. App. 61a (quoting *Claiborne*, 458 U.S. at 918). The Court also noted the absence of any allegation that Mckesson made any statements or engaged in any conduct that "authorized, directed, or ratified" the unidentified assailant's conduct. Pet. App. 62a (quoting *Claiborne*, 458 U.S. at 927). The district court held that Doe's tort claims against Mckesson therefore failed. Pet. App. 63a. The district court also held that the claims against Black Lives Matter failed because Black Lives Matter, as that term was used in the original complaint, is a social movement not capable of being sued. Pet. App. 66a–69a.

The court also denied Doe's motion for leave to amend the complaint to add the Network as a defendant, concluding that the proposed amended complaint did not state a claim for relief against the Network and contained only conclusory allegations that were foreclosed by the First Amendment. Pet. App. 75a–76a. Citing *Claiborne*, the district court noted that Doe failed to allege that the assailant is an agent of the Network, and also failed to plead that the Network had knowledge of and ratified the assailant's conduct. The district court further found, citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), that Doe's allegations were "[n]ot only . . . conclusory statements," but also did not "identify any connection between this particular entity—Black Lives Matter Network, Inc.—and the particular tortious activity." Pet. App. 76a. Ultimately, the district court found that *Claiborne* foreclosed Doe's claim: "allowing Plaintiff to proceed against [the Network] . . . . would 'impermissibly burden the rights of political association that are protected by the First Amendment." Pet. App. 76a

(quoting *Claiborne*, 458 U.S. at 931). Concluding that amendment would be futile, and that the original complaint was brought only against a social movement, the district court did not reach the Network's separate motion to dismiss. Pet. App. 77a.

**D. Fifth Circuit Proceedings**

Doe appealed the district court's ruling. In an unusual sequence of events, a panel of the Fifth Circuit issued three separate opinions disposing of the appeal, ultimately dividing 2–1 in favor of reversal, before a tied vote of the full court caused a *sua sponte* call for rehearing *en banc* to be denied.

The panel, initially unanimously, issued an opinion affirming the district court's ruling on the civil conspiracy and vicarious liability claims, but reversing the district court's ruling on Doe's negligence claim. *See* Pet. App. 125a. The panel then granted panel rehearing and issued a substitute opinion confirming the reasoning and conclusion in its original opinion. *See* Pet. App. 107a–109a. The Fifth Circuit subsequently issued a third and superseding opinion, with Judge Willett explaining that he had reconsidered and issuing a separate dissenting opinion. *See* Pet. App. 30a.

In the third, now-operative opinion of the Fifth Circuit panel, the majority held that Doe "plausibly alleged that Mckesson breached his duty of reasonable care in the course of organizing and leading the Baton Rouge demonstration," based on allegations that Mckesson led demonstrators onto a public

thoroughfare outside of the police station, a misdemeanor traffic violation under Louisiana law. Pet. App. 11a, 12a (citing La. Rev. Stat. § 14:97). The Fifth Circuit found that the complaint plausibly alleged "Mckesson should have known" that leading protesters onto the street outside the police station was "likely to provoke a confrontation between police and the mass of demonstrators," because the misdemeanor traffic violation made it "patently foreseeable" that police would respond "by clearing the highway and, when necessary, making arrests." Pet. App. 12a.

From this premise, the Fifth Circuit concluded that the protest Mckesson organized was "foreseeably violent" and, consequently, that Mckesson could be held liable for the actions of the unidentified person who injured Doe at the site of the protest. Pet. App. 16a. Because the Fifth Circuit found that Doe "adequately alleged that his injuries were the result of Mckesson's own tortious conduct in directing an illegal and foreseeably violent protest," Pet. App. 16a, it concluded that *Claiborne* did not "insulate [Mckesson] from liability for his own negligent conduct." Pet. App. 22a. The majority acknowledged that Doe made no allegation that Mckesson called for violence or "intended that violence would result." Pet. App. 16a.

Concluding that Doe's operative complaint stated a claim for negligence, the Fifth Circuit also found that the district court erred by determining that amendment of the complaint would be futile. Pet. App. 27a.

Judge Willett, who had joined the first two majority opinions in full, explained in his dissenting opinion

that "further reflection" caused him to "see this case differently" and to sharply disagree with the majority's reasoning on both the tort liability and First Amendment issues. Pet. App. 30a. His dissent rejected the majority's theory of a "negligent protest," noting that even if "Mckesson could be sued under Louisiana law for 'negligently' leading a protest at which someone became violent," such a claim would be "foreclosed—squarely—by controlling Supreme Court precedent" and "constitutional fundamentals." Pet. App. 53a. In particular, Judge Willett reasoned that, "under *Claiborne Hardware*, protest organizers cannot be held strictly liable for the violent actions of rogue individuals," and he "disagree[d] with the suggestion that directing any tort would strip a protest organizer of First Amendment protection," because "*Claiborne Hardware* held that [the defendant]'s leadership of an intentionally tortious and foreseeably violent boycott did not forfeit his First Amendment defense." Pet. App. 51a. Accordingly, Judge Willett concluded that "[r]eading *Claiborne Hardware* as authorizing liability for violence on the basis of urging any unlawful activity—no matter how attenuated from the violence that ultimately occurred—paints with startlingly broad strokes." Pet. App. 51a.

To highlight the seriousness of the majority's error, Judge Willett reviewed the pro-democracy demonstrations taking place in Hong Kong and the rich history of protest in the United States, from "peaceful picketing to lawless riots," noting the similarity between the facts of this case and a number of historically significant protests that involved both violent confrontation and illegal action. Pet. App. 52a. Judge Willett also described "political uprisings" such

as the Sons of Liberty "dumping tea into Boston Harbor" and Dr. King's Selma-to-Montgomery March, which "occupied public roadways." Pet. App. 52a. Judge Willett explained that the majority's reasoning would have "enfeebled America's street-blocking civil rights movement" and subjected its leaders to "ruinous" personal liability for "exercising core First Amendment freedoms" if any individual protester resorted to violence. Pet. App. 53a.

Six weeks after the panel issued its third opinion, the Fifth Circuit issued an order *sua sponte* denying rehearing en banc by a tied 8–8 vote, over dissenting opinions by Judges Higginson and Dennis. Pet. App. 79a–80a.

## REASONS FOR GRANTING THE PETITION

### I. IMMEDIATE REVIEW IS NECESSARY TO PREVENT A GRAVELY WRONG DECISION FROM CHILLING THE FREE EXERCISE OF CORE POLITICAL SPEECH.

The Fifth Circuit's opinion imposes the specter of tort liability for peaceful protesters, and in so doing, curtails and chills the exercise of free speech. Its rule —that even a bare allegation of blocking a highway is sufficient to remove speech from the protection of the First Amendment—will have far-reaching consequences if not immediately reviewed. Indeed, the premise of the Fifth Circuit's opinion—that citizens and courts alike should *assume* that violence is a likely result if political speech is expressed in the presence of police officers—is antithetical to fundamental First Amendment values. For these reasons, this

Court should immediately review the Fifth Circuit's decision.

### A. The Fifth Circuit's "Negligent Protest" Theory Violates the First Amendment under *Claiborne*.

As this Court set forth in *Claiborne*, "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." 458 U.S. at 916–17. Indeed, under *Claiborne*, damages liability in the context of speech must be "restricted to those directly and proximately caused by wrongful conduct chargeable to the defendant[]" and cannot be used to "compensate for anything more than the direct consequences" of the defendant's actions. 458 U.S. at 918 (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 729 (1966); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 248 n.6 (1959)). Based on those guiding principles, *Claiborne* makes clear the constitutional limit on when a protest leader may be held liable for the actions of a follower: he or she may be held "responsible for the consequences" of a follower's activity only with "a finding that he [or she] authorized, directed, or ratified [that] *specific* tortious activity." 458 U.S. at 927 (emphasis added); *see also In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1290 (3d Cir. 1994) (citing *Claiborne* for the proposition that a company could not be held liable in tort for the actions of their trade association without a finding that the company's actions were "specifically intended to further *such* wrongful conduct" (emphasis added)).

The Fifth Circuit departed from this principle set forth in *Claiborne*. Under the Fifth Circuit's rule, a protester can be held liable for injuries stemming from any conduct that is alleged to be a consequence of tortious activity, even if that conduct itself was not intended, authorized, directed, or ratified by the protester. But *Claiborne*'s reference to "specific tortious activity" plainly refers to the final act of violence and not to any preceding state law violation, however minor or nonviolent. "Reading *Claiborne Hardware* as authorizing liability for violence on the basis of urging any unlawful activity—no matter how attenuated from the violence that ultimately occurred—paints with startlingly broad strokes." Pet. App. 51a (Willett, J., dissenting); *see also* Pet. App. at 45a ("I disagree with the suggestion that directing any tort would strip a protest organizer of First Amendment protection.").

In *Claiborne* itself, the protester's speech was protected under the First Amendment even though he did something the Mississippi Supreme Court had held "unlawful"—organization of a boycott that included violent acts—because there was no evidence "that [the leader] authorized, ratified, or directly threatened *acts of violence*." *Claiborne*, 458 U.S. at 895, 929 (emphasis added). It is therefore untenable to suggest that a protest leader loses First Amendment protection if she allegedly advocates for something "unlawful" in the context of a protest—even nonviolent civil disobedience such as "simple obstruction of a highway of commerce," La. Rev. Stat. Ann. § 14:97—and can constitutionally be held liable for any act of violence by any other protester, without any evidence

or allegation of authorization, ratification, or direction.

In the related incitement context, this Court and other circuits have similarly held that protest leaders do not lose First Amendment protections based on foreseeable violent acts of a third party without also intentionally contributing to that specific violent conduct. *See Claiborne*, 458 U.S. at 927–28 (drawing upon this Court's incitement cases). Without a showing that a speaker's "words were *intended to produce*, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had a tendency to lead to violence." *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (emphasis added) (internal quotation marks omitted); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (defining incitement as speech that is "*directed to* inciting or producing imminent lawless action and is likely to incite or produce such action" (emphasis added); *see also Nwanguma v. Trump*, 903 F.3d 604, 612 (6th Cir. 2018) (imposing liability for incitement requires "intent to encourage violence," "tendency of [the] statement to result in violence," *and* "words [that] specifically advocated the use of violence").

### B. A Rule That Allows an Allegation of a Nonviolent Misdemeanor to Defeat *Claiborne* Will Have Profound Consequences for Constitutionally Protected Speech.

The panel majority's basis for avoiding *Claiborne* is the stark assertion that "no First Amendment activity is suppressed." Pet. App. 22a. That is so,

according to the panel, because of an alleged violation of "a reasonable time, place, and manner restriction," *i.e.*, the misdemeanor infraction of blocking a public highway. Pet. App. 22a. That is not a sound basis for allowing nonviolent protesters to be held liable for the violence of others. Absent review, such a rule will chill constitutionally protected speech, for at least three reasons.

*First*, protests are often spontaneous and responsive to current political events—indeed, a political march "is intended to provoke emotive and spontaneous action, and this is where its virtue lies." *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 611. Speaking effectively and expressing timely opinions in response to an event often requires moving quickly. Yet mobilizing to express speech rapidly in this way necessarily enhances the risk of making a mistake about what conduct is legal. It takes no legal education for a protest leader to decide to eschew violence and protest peacefully. But identifying and parsing the strictures of, say, Section 14:97 of the Louisiana Statutes, may be more to ask of a citizen stirred to immediate action and speech. Moreover, protest leaders are often unlikely to control or determine who attends a protest, or what actions they engage in, further increasing the risk that speakers will be held liable for actions they did not intend or direct. This risk is even more salient when, as is commonly the case, the protest relates to a broad political movement.

This case provides one such example. Following the use of the phrase "Black Lives Matter" by the Network's co-founders, the phrase has been employed by

several organizations and individuals, many with distinct and even conflicting ideologies and political agendas. Other political movements like the March for Life or the Women's March are similarly comprised of several organizations with distinct views. The March for Life organization, for example, states that "tens of thousands" of protesters join the national protest on an annual basis.[4] That number of protesters includes distinct groups such as Alice Paul Group, Franciscan University of Steubenville, Pregnancy Center Fundraising Academy, and Susan B. Anthony List.[5] The Women's March similarly describes itself as a "collaborative effort" of several organizations, many of which have distinct goals, including Rainforest Action Network, League of Women Voters, and League of United Latin American Citizens.[6] Under the Fifth Circuit's holding, protest organizers from any of these organizations could be chilled due to fear that unplanned and spontaneous political activity could create an opportunity for third parties to act unlawfully, resulting in liability to the protest organizers for those third parties' actions.

*Second*, the potential to chill constitutionally-protected speech is made more salient by the plethora of criminal laws and traffic offenses that can create the hook for tort liability under the Fifth Circuit's reasoning. *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1730

---

[4] *See* March for Life, *National March For Life* (last visited Apr. 8, 2020), https://marchforlife.org/national-march-for-life/.

[5] *See* March for Life, *2020 Exhibitors* (last visited Apr. 8, 2020), https://marchforlife.org/expo-booth/.

[6] Women's March 2020, *Women's March 2020 Collaborators* (last visited Apr. 8, 2020), https://womensmarch.com/2020-partners-2.

(2019) (Gorsuch, J., concurring) ("[C]riminal laws have grown so exuberantly [that] . . . almost anyone can be arrested for something."). These omnipresent traffic and related laws might be enforced unevenly or selectively, especially when protests are directed at the very government actors who have the authority to determine whether and when protest crosses from legal to illegal activity. Or that vast body of laws might be genuinely unclear, such that someone deciding whether to protest might not be able to know with reasonable certainty whether an act is illegal. The breadth of the traffic and other offenses on the books consequently exacerbates the threat posed by the Fifth Circuit's ruling to free speech and political activism, whether that activity takes the form of marches that obstruct thoroughfares, sit-ins that could be characterized as criminal trespassing on government or private property, or many other common methods of protest.

*Third*, under the Fifth Circuit's rule, plaintiffs could *plead* a case that would survive a motion to dismiss, and subject protesters to expensive and burdensome litigation, simply by *alleging* that they violated some misdemeanor traffic law. Prosecutors have obligations that, at least in theory, limit the criminal cases they bring. While a public prosecutor should not factor in the content of a protester's speech in deciding whether it is in the public interest to prosecute a traffic violation, a private plaintiff decidedly *can* choose to bring a claim to chill a protester's political speech. And in doing so, a civil litigant can plead a plausible (but not necessarily actual) criminal violation, exposing a protester to the cost and burden of defending a civil claim, including discovery.

The dangerous breadth of the Fifth Circuit's decision is illustrated by the facts of this case. There is no allegation that Mckesson was actually convicted of the cited misdemeanor offense. Indeed, Baton Rouge has agreed to pay for the costs of expunging the record of Mckesson's arrest. Pet. 24–25 n.7. But none of that prevented Respondent Doe from launching a civil action and now gaining access to full civil discovery. It follows that if the Fifth Circuit's ruling stands, plaintiffs seeking to undermine a political movement will be able to force a protest leader to incur the costs of litigation based on nothing more than generic and conclusory allegations of lawbreaking conduct.[7]

These chilling effects on constitutionally protected speech are real, and will be felt most profoundly by nascent movements lacking the resources to respond to the use of civil litigation to silence speech. The origins of the Network and its related entities itself highlight the impact this decision could have on core political speech. In 2013, Alicia Garza, Patrisse Cullors, and Opal Tometi created a "Black-centered political will and movement building project called #BlackLivesMatter" in response to the acquittal of George Zimmerman.[8] Their use of the hashtag began

---

[7] Worse yet, under the Fifth Circuit's decision, instead of counter-protesting, private litigants could seek to undermine opposing political protests by intentionally instigating violence at rallies and then finding willing plaintiffs to sue those movements for negligence. This could further chill political speech and protest, and overwhelm both protesters and courts with negligence suits against peaceful protesters.

[8] Black Lives Matter, *Herstory* (last visited Apr. 8, 2020), https://blacklivesmatter.com/herstory/.

as a spontaneous "call to action in response to state-sanctioned violence and anti-Black racism."[9]

The co-founders have described their goal as "building 'real political power' from the bottom up," drawing inspiration from Black leaders in the 1960s.[10] Since 2013, several other organizations and individuals have identified with a "Black Lives Matter movement," but are not affiliated with the Network or its co-founders.

The Network does not advocate for violence.[11] Cullors does not "condone the behavior of people who take up violent action as a way to have agency," but as a result of the myriad of Black Lives Matter organizations, has expressly disclaimed any ability to "speak for the movement" as a whole.[12]

This is a deeply American free-speech success story. But if *Claiborne* had been replaced with a regime of "negligent protest" liability in 2013, under which a leader with a message should fear liability for

---

[9] Black Lives Matter, *What We Believe* (last visited Apr. 8, 2020), https://blacklivesmatter.com/what-we-believe/.

[10] Olivia Goldhill, *"We Can Feel Sad, Hurt, Demoralized. But We Can't Give up": A Black Lives Matter Founder on Trump's Presidency*, Quartz (Nov. 15, 2016), https://qz.com/837747/black-lives-matter-founder-patrisse-cullors-on-how-to-respond-to-donald-trump/.

[11] Nikita Vladimirov, *Black Lives Matter Group Condemns Dallas Attack,* The Hill (July 18, 2016), https://thehill.com/blogs/blog-briefing-room/287022-black-lives-matter-group-condemns-dallas-attack.

[12] Goldhill, *"We Can Feel Sad, Hurt, Demoralized. But We Can't Give Up": A Black Lives Matter Founder on Trump's Presidency*, Quartz (Nov. 15, 2016).

the violent actions taken by any individual in the course of a protest they led, the Network and its related entities, and the many organizations and activists inspired by its founders, might never have come to exist.

Today, for activists all over the country who identify with the call "Black Lives Matter" and desire to respond by engaging in the most protected forms of political speech, the threat of the Fifth Circuit's ruling could at a minimum cause would-be protesters to think twice before protesting. The same is true of anti-abortion protesters, Tea Party members, and many more.[13] Perhaps most worrisome is the prospect that new protest movements may never be organized, for fear of being accused of "negligent" speech. Any rule that results in a "think twice before you speak"

---

[13] A narrower assumption that this particular group of protesters was likely to become violent in response to police confrontation does not suffice to reconcile the Fifth Circuit's decision with this Court's First Amendment jurisprudence. Rather, any such argument that turns on the nature of the march would only exacerbate the problem by adding a content-based distinction that disfavors certain types of protests based on their target and their message. Drawing a content-based distinction to create liability in the context of a demonstration outside police headquarters to protest a police shooting is especially problematic, because it would require weaponizing the distinction to disfavor speech about political change, government officials, and public affairs—the very speech that ordinarily rests "on the highest rung of the hierarchy of First Amendment values." *Claiborne*, 458 U.S. at 913; *see also Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964); *N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964); *Roth v. United States*, 354 U.S. 476, 484 (1957) ("[The First Amendment] was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

mentality is incredibly dangerous to the First Amendment and deserves prompt review.

### C. Assuming Protesters Will Become Violent When Confronted by Police Offends Long-Standing First Amendment Values.

These ruinous consequences for constitutionally-protected speech rest on an assumption that only compounds the grave problems with the decision below: that protesters will become violent if approached by police. Treating a protest leader's[14] commission of a nonviolent traffic offense as the basis for imposing liability for an unidentified third party's decision to throw an object at a police officer necessarily requires embracing a remarkable premise: if a nonviolent misdemeanor offense takes place during a protest, and police would foreseeably approach protesters in response to that misdemeanor, the protest leader should have known that the protest would become violent. That reasoning necessarily adopts the assumption that protesters will become violent if confronted by police. *See* Pet. App. 12a ("Given the intentional lawlessness of this aspect of the demonstration,

---

[14] Although the Fifth Circuit focused on Doe's allegation that Mckesson "led" the protest onto a public thoroughfare, the cited statute is not limited to those who "led" others onto a road or highway, and instead applies to anyone who may have blocked a road or highway. Thus, under the Fifth Circuit's opinion, anyone who is alleged to have marched or protested on the road during the date of the protest—potentially thousands of protesters—could ostensibly be held liable for Doe's injuries. This highlights yet another way the Fifth Circuit's expansive theory of tort liability stands to severely curtail peaceful protesters' First Amendment rights.

Mckesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators, and notwithstanding, did so anyway.").[15]

This assumption, embedded in the Fifth Circuit majority's reasoning, is irreconcilable with First Amendment values because it leaves vulnerable the very forms of speech that are typically afforded the highest levels of First Amendment protection. "There is scarcely a more powerful form of expression than the political march." *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 611. And the threat to free speech posed by the Fifth Circuit's assumption extends beyond marches. Police officers frequently monitor or are called to the site of protests on all sorts of topics and in all sorts of places, including protests on university campuses, protests that occupy a public park, and sit-ins.

---

[15] This remarkable assumption extends well beyond the facts of this case. Indeed, the only "intentional lawlessness" the Fifth Circuit cites in support of its conclusion that Doe's injury was foreseeable is the allegation that "Mckesson planned to block a public highway." Pet. App. 11a–12a. The majority "credit[ed] Doe's abstract, one-sentence contention that Mckesson 'knew or should have known that violence would result.'" Pet. App. 44a (Willet, J., dissenting); *see also id.* ("Doe's complaint contains no specific allegations that Mckesson advocated imminent violence, just this bald, conclusory assertion that he negligently allowed violence to occur.").

Assuming protesters will become violent when confronted by police is offensive to the historical importance of peaceful protest in this nation. Indeed, throughout American history, peaceful protest has been held up as the model for spurring social change, even when it involves nonviolent illegal activities. Under the Fifth Circuit's decision, if the leaders of the Boston Tea Party, who protested taxation without representation by throwing over 90,000 pounds of tea into Boston Harbor in 1773, organized the same event today, they would have been stripped of all First Amendment protections because they authorized destruction of private property.[16] The leaders of the Bonus March, who protested the government's delay in providing promised compensation to World War I veterans in the summer of 1932, would have been stripped of all First Amendment protections because they ratified occupation of government-owned property.[17] And leaders of civil rights sit-ins of the 1950s and 1960s, who protested restaurant owners' refusal to serve Black patrons by refusing to leave their establishments, would have been stripped of all First Amendment protections because they directed criminal trespass. *Bell v. Maryland*, 378 U.S. 226, 227 (1964) (citing Md. Ann. Code, art. 27, § 577 (1957), which criminalized "enter[ing] upon or cross[ing] over the land, premises or private property of any person

---

[16] CBS Boston, *Tea from Around the Country to be Part of Boston Tea Party Reenactment* (Dec. 15, 2017), https://boston.cbslocal.com/2017/12/15/boston-tea-party-reenactment-anniversary/.

[17] Nat'l Park Service, *Bonus Expeditionary Forces March on Washington* (Sept. 3, 2019), https://www.nps.gov/articles/bonus-expeditionary-forces-march-on-washington.htm.

or persons in this State after having been duly notified by the owner or his agent not to do so").

The act of blocking a public road has long been an especially important tactic of protest and civil disobedience. Movements from all across the ideological spectrum have used this tactic for decades. As Judge Willett noted in dissent, the 54-mile "march from Selma to Montgomery" to protest Black voter suppression in 1965 "was no sidewalk stroll"; rather, it "occupied public roadways, including the full width of the bloodied Edmund Pettus Bridge." Pet. App. 52a, 53a n.67 (Willett, J., dissenting). On May 3, 1971, anti-Vietnam protesters shut down "21 vital traffic circles and bridges" in Washington, D.C., after distributing pamphlets stating that "[t]he overall discipline will be nonviolent, the tactic disruptive, the spirit joyous and creative."[18] On January 14, 1989, abortion opponents "stopped traffic" to protest outside a Manhattan abortion clinic for multiple consecutive days.[19] On September 12, 2009, the Tea Party movement and other conservative groups orchestrated a Taxpayer March that "completely blocked Pennsylvania Ave.

---

[18] Hannah Natanson, *Protesters Shut Down D.C. Traffic Before. It Helped End the Vietnam War — and Reshaped American Activism*, Wash. Post (Sept. 23, 2019), https://www.washingtonpost.com/history/2019/09/23/protesters-shut-down-dc-traffic-before-it-helped-end-vietnam-war-and-reshaped-american-activism/.

[19] Constance L. Hays, *685 Are Arrested Opposing Abortion*, N.Y. Times (Jan. 15, 1985), https://www.nytimes.com/1989/01/15/nyregion/685-are-arrested-opposing-abortion.html.

from 14th Street, NW, to the U.S. Capitol."[20] On July 7, 2018, hundreds of protesters restricted traffic by "partially shut[ting] down a major freeway" in Chicago to call for an end to gun violence.[21] And as recently as September 2, 2019, more than a thousand people took to the streets to protest a healthcare provider's treatment of its employees and patients, "block[ing] a downtown Sacramento intersection" and "taking up the entire width of the roads" as they marched from the State Capitol to the provider's building.[22]

Under the Fifth Circuit's rule, leaders of any one of these efforts should have known that their protest tactics were "likely to provoke a confrontation [with the] police." Pet. App. 12a. Certainly such actions create a possibility of arrest; indeed, a basic tenet of peaceful civil disobedience is that some causes are worth that consequence. But it is a much different and more troubling matter to assume that peaceful protesters engaging in this time-honored practice will become *violent* when confronted with police. Doing so dishonors this Nation's tradition of treating peaceful

---

[20] Asha Beh, *Thousands of Anti-Obama Protestors March in D.C.*, NBC News (Sept. 12, 2009), https://www.nbcwashington.com/news/local/Taxpayer-Protestors-Get-Party-Started-Early-59126782.html.

[21] Miesha Miller, *Anti-Violence Protesters Block Major Freeway in Chicago*, Reuters (July 7, 2018), https://www.reuters.com/article/us-chicago-protests/anti-violence-protesters-block-major-freeway-in-chicago-idUSKBN1JX0UI.

[22] Elaine Chen, *Downtown Sacramento Intersection Blocked as Kaiser Workers Protest*, Sacramento Bee (Sept. 2, 2019), https://www.sacbee.com/site-services/newsletters/local-news-crime/article234639707.html.

protest as a laudable and effective method of political speech. The assumption that protesters would violate the law and harm a police officer also runs counter to this Court's default presumption in other contexts, where it assumes people will conduct themselves within the law, even when "tensions are high." *See, e.g.*, *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) ("Accepting that they are deeply involved in a program to eliminate racial discrimination . . . and that tensions are high, we . . . assume that respondents will conduct their activities within the law[.]"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102–03 (1983) (same). This Court should review and reject the extraordinary assumption that speech will lead to violence embraced by the Fifth Circuit.

## II. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH RULINGS OF STATE COURTS OF LAST RESORT AND THE THIRD CIRCUIT.

These sweeping implications for free speech rights are more than enough reason for this Court to grant review. But there is more. In holding that a protester can be held liable for the wrongful conduct of another that he did not intend, let alone direct, authorize, or ratify, Pet. App. 15a–16a, the Fifth Circuit deviated from the decisional uniformity of other circuit courts and state courts of last resort that have addressed this issue. The reason for what had been uniformity among courts is straightforward: the Supreme Court has already resolved this issue. In *Claiborne*, this Court ruled that applying state tort law to authorize liability based on a protest leader's negligence—*i.e.*, proof that another person's violence was a foreseeable,

but not intended, result of the protest—is unconstitutional.[23] 458 U.S. at 927–28, 933–34. In holding otherwise, the Fifth Circuit not only contravened the reasoning of this Court in *Claiborne*, but also created a conflict with the decisions of other courts.

In *Juhl v. Airington*, 936 S.W.2d 640 (Tex. 1996), the Texas Supreme Court addressed a very similar set of facts and reached the opposite result. There, the court reviewed a decision reversing summary judgment of a police officer's negligence claim, which the officer brought against a dozen protesters after he was injured during a protest outside an abortion clinic. The vast majority of defendants did not directly cause the officer's injury, but the officer alleged they were nevertheless negligent, including because they "creat[ed] a situation which they knew or should have

---

[23] This Court's rejection of the heckler's veto as a basis for liability also bolsters an intent requirement for the imposition of liability for the violent conduct of third parties. In that context, this Court has held that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969); *see also Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). Acknowledging that "[a]ny departure from absolute regimentation may cause trouble," and "[a]ny word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance," this Court held that "our Constitution says we must take this risk[,] and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Tinker*, 393 U.S. at 508–09 (citations omitted).

known would create a danger of injury to officers who had to physically remove the protestors." *Id.* at 641.

Notwithstanding evidence that the defendants blocked clinic entrances and subjected themselves to arrest—illegal conduct that made the officer's injury foreseeable under the Fifth Circuit's reasoning, *see* Pet. App. 12a—the Texas Supreme Court, citing *Claiborne*, held that the demonstrators could not be held liable for the actions of others. *Juhl*, 936 S.W.2d at 642–43. That court set forth a narrower standard for liability than the standard adopted by the Fifth Circuit: "the liability of members of a group should be analyzed in terms of *the specific actions undertaken, authorized or ratified by those members*." *Id.* at 643 (emphasis added).

The Third Circuit has also held that a member of an association cannot be held liable for the association's wrongful conduct absent an intent to further that conduct. In *In re Asbestos School Litigation*, 46 F.3d 1284 (Alito, J.), the Third Circuit addressed whether Pfizer could be held liable for civil conspiracy and concert of action for selling asbestos-containing building products. *Id.* at 1286. Plaintiffs sought to hold Pfizer liable in part on the basis that it was associated with a trade association that itself engaged in tortious conduct. *Id.* at 1286–87. The Third Circuit, relying on *Claiborne*, held that Pfizer could not be held liable for "any wrongful conduct committed by the [trade association] . . . unless it can be shown that Pfizer's actions taken in relation to the [trade association] were specifically intended to further such wrongful conduct." *Id.* at 1290. Applying this standard, the Court found Pfizer's financial contribution to

the trade association was insufficient evidence of specific intent to further a wrongful act where the donation "could have been specifically intended to further one or more of the [association]'s many constitutionally protected activities" or for "the general purpose of helping the [association]." *Id.* The Third Circuit reasoned that a standard that would create liability without a demonstration of specific intent would transform "activities that enjoy substantial First Amendment protection" into "unjustifiably risky" behavior, "and would undoubtedly have an unwarranted inhibiting effect upon them." *Id.* at 1294. Thus, unlike the Fifth Circuit, the Third Circuit applied *Claiborne* to require an exacting intent standard to hold a member of an association liable for the conduct of another.

The Alabama Supreme Court has similarly held that organizations that do not authorize or ratify the wrongful actions of their members cannot be held liable for those actions. In *Rothman v. Gamma Alpha Chapter of Pi Kappa Alpha Fraternity*, 599 So. 2d 9 (Ala. 1992), plaintiffs brought suit against a fraternity and two of its members after sustaining injuries during a fight with the members. *Id*. at 10. The court affirmed the lower court's entry of summary judgment for the fraternity. Citing *Claiborne*, the court held that "in the absence of authorization or ratification by its members, an association is not liable for intentional torts by a member or members." *Id*. at 11. And in *United Steelworkers of America AFL-CIO-CLC v. O'Neal*, 437 So. 2d 101 (Ala. 1983), also citing *Claiborne*, the Alabama Supreme Court held that a union could not be held liable for the violent acts of its

members unless it was shown that the union "authorized or ratified acts of violence." *Id*. at 103.

The Fifth Circuit's decision thus not only contravenes *Claiborne* itself, but also the decisions of other courts that have properly interpreted and applied *Claiborne* for decades.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Sonya D. Winner
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105
(415) 591-6000

Neha Jaganathan
Ryan A. Partelow
Michael D. Rebuck
COVINGTON & BURLING LLP
The N.Y. Times Building
620 Eighth Avenue
New York, NY 10018
(212) 841-1000

David M. Zionts
*Counsel of Record*
Megan C. Keenan
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
dzionts@cov.com
(202) 662-6000

Lindsey Barnhart
COVINGTON & BURLING LLP
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306
(650) 632-4700

*Counsel for Respondent Black Lives Matter Global Network, Inc.*

April 9, 2020