

No. 19-1108

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In The  
**Supreme Court of the United States**

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DERAY MCKESSON,

*Petitioner,*

v.

JOHN DOE,

*Respondent.*

—◆—  
**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

—◆—  
**BRIEF AMICUS CURIAE OF NATIONAL  
ASSOCIATION FOR THE ADVANCEMENT OF  
COLORED PEOPLE IN SUPPORT OF PETITIONER**

—◆—  
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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

Since its founding in 1909, the National Association for the Advancement of Colored People (NAACP) has worked to fulfill this nation's twin commitments to the First Amendment and to the equal treatment of all persons. As the country's largest and oldest civil-rights organization, the NAACP led and supported leaders of the Civil Rights Movement, who often resorted to peaceful civil disobedience in the face of intransigent and violent white supremacy. Despite the Civil Rights Movement's accomplishments, much work remains, as exemplified by the repeated and unjustifiable killing of unarmed African Americans by police. Today, the NAACP continues to work in every state in the United States to eliminate racial hatred and discrimination in all forms, including discriminatory policing practices.

Throughout its history, the NAACP has withstood efforts by opponents to chill its activities through misuse of civil and criminal liability. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), white merchants sought civil damages against the NAACP for boycotting white-owned businesses in the wake of the killing of a young African-American man by police. This Court recognized that lawsuit for what it was: an attempt to silence and bankrupt the NAACP. Now—as then—the NAACP has a strong interest in preserving

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<sup>1</sup> All parties have been timely notified of and have consented to the filing of this brief. This brief was not written in whole or in part by any party, and no person or entity other than the NAACP or its counsel made any monetary contribution toward the preparation or submission of this brief.



the rights to freedom of speech and assembly for the current generation of civil-rights activists.



### **SUMMARY OF ARGUMENT**

Civil disobedience has long played a crucial role in securing the civil and political reforms that the participants in the Civil Rights Movement fought for a half-century ago and that Americans of all races, faiths, and political persuasions cherish today. From the lunch counter sit-ins, to the freedom rides, to the Birmingham campaign, to the march from Selma to Montgomery, participants in the Civil Rights Movement conscientiously and peacefully broke segregation and assembly laws to protest discrimination and to generate national discourse on democratic ideals. These acts of civil disobedience proved critical for shifting the tide in favor of racial equality and, ultimately, led to the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Today, civil-rights activists—from Ferguson to Baton Rouge to Minneapolis to Baltimore—continue that legacy of nonviolent struggle and civic participation.

The Civil Rights Movement of the 1950s and 1960s faced significant, and often extreme, resistance from state actors and private individuals. In addition to turning a blind eye to mob violence, law enforcement officials often worked in concert with groups such as the Ku Klux Klan to inflict violence on peaceful demonstrators. As Jim Crow began to crumble,

segregationists increasingly turned to facially neutral laws to attempt to cripple the Movement. A favored tool of state officials was to seek to impose liability—both civil and criminal—against the Movement’s leaders. These attempts were often successful, and they threatened to derail efforts to protest the deprivation of rights, especially in the South.

This Court has historically seen through these attempts at sabotage. Throughout the Civil Rights Movement, the Court rejected segregationists’ attempts to chill peaceful speech and political activity by imposing criminal and civil liability. The Fifth Circuit’s opinion in the present case—imposing civil liability on a protest organizer for harms committed by someone else—stands plainly at odds with this Court’s precedent and invites harassment and silencing of today’s civil-rights activists and leaders.

The NAACP respectfully urges this Court to honor its legacy of protecting nonviolent, civil disobedience, which in the words of Dr. Martin Luther King, Jr., will help all of us “rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood.”<sup>2</sup>



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<sup>2</sup> Martin Luther King, Jr., *Letter from Birmingham Jail*, 26 U.C. Davis L. Rev. 835, 836 (1963; 1993).

## ARGUMENT

### I. The Vital Role of Nonviolent Civil Disobedience in the Civil Rights Movement

The employment of civil disobedience<sup>3</sup> by Civil Rights Movement leaders and participants has been critical in securing the social and political reforms our nation enjoys today. Courageous individuals nonviolently asserted their civil and human rights by directly challenging the established laws and policies of racism, discrimination, and segregation. As an integral actor in the Civil Rights Movement, NAACP members across the country used civil disobedience to confront Jim Crow, and NAACP lawyers defended the men and women who put their bodies on the line in the struggle for racial equality.

Act of civil disobedience —like the lunch counter sit-ins, the Freedom Rides, the Birmingham campaign, and the march from Selma to Montgomery (among many others)—helped garner the nation’s attention and channel public momentum into government action, including the Civil Rights Act of 1964, and the Voting Rights Act of 1965.<sup>4</sup> These demonstrations were disruptive, unlawful, and prompted fierce criticism

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<sup>3</sup> A widely accepted account of “civil disobedience” is “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.” Michael Patrick Wilt, *Civil Disobedience and the Rule of Law: Punishing “Good” Lawbreaking in A New Era of Protest*, 28 Geo. Mason. U. C.R. L.J. 43, 44 (2017).

<sup>4</sup> Archibald Cox, *Direct Action, Civil Disobedience, and the Constitution*, 78 Proc. Mass. Hist. Soc’y 105 (1966).

when they occurred. Yet, Movement leaders such as Rosa Parks, an NAACP branch official in Birmingham, and Rev. Dr. Martin Luther King, Jr. are now revered for their tactics of nonviolent, direct action that helped achieve the advancement of equal civil and human rights. Their legacy has inspired democratic, peaceful movements across the globe.<sup>5</sup>

### **A. 1960 Lunch Counter Sit-Ins**

In February 1960, four African-American students violated a department store's segregation policy by sitting down at the whites-only lunch counter of a store in Greensboro, North Carolina.<sup>6</sup> After being denied service, they refused to leave. Within a week, approximately 200 students joined them in protest and all were refused service.<sup>7</sup>

By risking their own physical safety, the four students inspired what Americans today recognize as the lunch counter sit-ins of the 1960s.<sup>8</sup> These protests, beginning as a localized act of civil disobedience with few student participants, ultimately garnered the

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<sup>5</sup> The United States, through the U.S. Institute of Peace and other agencies, has promoted civil disobedience as a foundational tool for democratic movements in other countries. *See, e.g.*, Nonviolent Action, U.S. Inst. Peace, <https://www.usip.org/issue-areas/nonviolent-action>.

<sup>6</sup> Christopher W. Schmidt, *Why the 1960 Lunch Counter Sit-Ins Worked: A Case Study of Law and Social Movement Mobilization*, 5 Ind. J.L. & Soc. Equality 281, 282 (2017).

<sup>7</sup> *Id.* at 283.

<sup>8</sup> *Ibid.*

attention of the country and sparked a nationwide movement of peaceful demonstrations protesting discriminatory service policies.

By the end of Spring 1960, there were lunch counter sit-ins in thirteen Southern states.<sup>9</sup> By September 1961, approximately 70,000 protestors had participated, and many were arrested, convicted, and jailed.<sup>10</sup>

The sit-ins provoked a national conversation, energizing and expanding the Movement. One study estimates that during a ten-week period in Spring 1963, there were 758 demonstrations and over 13,000 arrests.<sup>11</sup> The protests drew in expansive and significant external support from important figures such as civil-rights lawyers who were able to channel the activists' grievances into legal demands.<sup>12</sup> The sit-ins also created divisions among those opposed to desegregation, as business owners were chiefly concerned about profitability, whereas white, local political leaders focused on black voter disenfranchisement.<sup>13</sup>

The lunch counter sit-ins led to significant social changes that advanced equal rights for African Americans. By December 1963, 65% of the country reportedly

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<sup>9</sup> *Id.* at 284.

<sup>10</sup> David Lance Goines, *The Free Speech Movement: Coming of Age in the 1960s* (1993).

<sup>11</sup> Kenneth T. Andrews & Sarah Gaby, *Local Protest and Federal Policy: The Impact of the Civil Rights Movement on the 1964 Civil Rights Act*, 30 Soc. F. 509, 510 (2015).

<sup>12</sup> Schmidt, *supra* note 6, at 289.

<sup>13</sup> *Id.* at 284.

lived under state or local laws requiring nondiscriminatory access to public accommodations, a significant increase from the time period before the sit-ins occurred.<sup>14</sup>

## **B. Freedom Rides**

In 1961, the Congress of Racial Equality (CORE) organized the first Freedom Ride in response to the continued segregation of interstate transportation vehicles and facilities and the enforcement of local and state statutes mandating that segregation. Even though the first riders knew their actions would make them susceptible to arrests, they set out on an interracial bus ride, determined to fight for equality in interstate transportation.

That first ride had 13 passengers, departing from Washington, D.C. on May 4, 1961 and scheduled to arrive in New Orleans on May 17, 1961.<sup>15</sup> As they progressed through the South, the Freedom Riders experienced police harassment and state-sanctioned, mob violence.<sup>16</sup> On May 14, 1961, the group arrived in Anniston, Alabama, where local law enforcement had granted permission to the Ku Klux Klan to attack the

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<sup>14</sup> *Ibid.*; *Survey Shows Rights Laws Now Cover 65% of Nation*, Wash. Post, Dec. 26, 1963, at A17.

<sup>15</sup> Raymond Arsenault, *Freedom Riders, 1961 and the Struggle for Racial Justice* 75 (2011).

<sup>16</sup> The Martin Luther King, Jr., Research and Education Institute, *Freedom Rides*, Stan. U. (May 21, 2018), <https://kinginstitute.stanford.edu/encyclopedia/freedom-rides> [hereinafter King Institute, *Freedom Rides*].

riders without fear of arrest.<sup>17</sup> A violent crowd of over 100 people burned the bus to the ground.<sup>18</sup> In response, CORE Director James Farmer made the difficult decision to terminate the rides.<sup>19</sup>

Inspired by the first Freedom Ride, the Student Nonviolent Coordinating Committee (SNCC) organized the second Freedom Ride and boarded a bus in Nashville on May 17, 1961.<sup>20</sup> All of the riders were arrested for violating local segregation statutes. Concerned with the violent suppression the first Freedom Riders endured, President John F. Kennedy contacted Alabama Governor John Patterson and mandated he protect the Freedom Riders.<sup>21</sup> A police escort and Department of Justice representative accompanied the riders to Montgomery, where state troopers disappeared and a group of 300 Southerners attacked the riders. President Kennedy then ordered the National Guard to escort the riders. In Jackson, Mississippi, the Freedom Rides came to a climax as the entire group was arrested for disobeying segregation laws.<sup>22</sup> Four hundred additional Freedom Riders flocked to Jackson, where they were also arrested.<sup>23</sup>

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<sup>17</sup> *Ibid.*

<sup>18</sup> Arsenault, *supra* note 15, at 75.

<sup>19</sup> Arsenault, *supra* note 15, at 75.

<sup>20</sup> King Institute, *Freedom Rides*, *supra* note 16.

<sup>21</sup> *Ibid.*

<sup>22</sup> Arsenault, *supra* note 15, at 190.

<sup>23</sup> *Id.* at 211.

On May 29, 1961, President Kennedy directed the Interstate Commerce Commission (ICC) to ban segregation in all ICC-regulated facilities, but the Freedom Rides continued throughout the summer and repeatedly endured violent mobs and local arrests as the ICC mulled over the ban.<sup>24</sup> On September 22, 1961, the ICC finally issued an order banning segregation for all vehicles and facilities under its jurisdiction.<sup>25</sup> Despite enduring white supremacist mob violence and repeated arrests by local law enforcement, the Freedom Riders' determined acts of civil disobedience culminated in federal enforcement of desegregation on interstate buses and transportation facilities.<sup>26</sup>

### C. The Birmingham Campaign

In March 1963, civil rights leaders in Birmingham, Alabama organized a nonviolent campaign of civil disobedience.<sup>27</sup> As Dr. King noted, Birmingham was “probably the most thoroughly segregated city in

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<sup>24</sup> King Institute, *Freedom Rides*, *supra* note 16.

<sup>25</sup> Arsenault, *supra* note 15, at 271.

<sup>26</sup> *Id.* at 271.

<sup>27</sup> The Martin Luther King, Jr., Research and Education Institute, *Birmingham Campaign*, Stan. U. (May 30, 2019), <https://kinginstitute.stanford.edu/encyclopedia/birmingham-campaign> [hereinafter King Institute, *Birmingham Campaign*].



the United States.”<sup>28</sup> Despite the fact that African Americans accounted for 40% of the population,<sup>29</sup> the local government rigidly enforced multiple laws mandating the segregation of everything from restaurants to theaters to card games.<sup>30</sup> The city also suffered from racist hiring practices for police officers, department store clerks, bus drivers, bank tellers, and store cashiers.

Participants sought to confront the city government into action by staging sit-ins, white church kneel-ins, downtown business boycotts, and disruptive marches.<sup>31</sup> These confrontations were designed to garner attention by inducing local law enforcement into arresting the demonstrators. Between April 3, 1963, and April 9, 1963, the campaign waged a series of actions, including multiple marches from 16th Street Baptist Church to Birmingham City Hall.

More than 150 protestors were arrested and, on April 10, 1963, the city government, headed by white supremacist Commissioner of Public Safety Eugene “Bull” Connor, obtained an Alabama Circuit Court injunction barring future demonstrations and significantly

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<sup>28</sup> King, Jr., *supra* note 2, at 836.

<sup>29</sup> *Birmingham’s Population 1880-2000*, Birmingham Public Library (Mar.10 2016), <https://www.bplonline.org/resources/government/BirminghamPopulation.aspx>.

<sup>30</sup> City of Birmingham, Alabama, *Birmingham, Alabama Issues Racial Segregation Ordinances*, HERB: Resources for Teachers, <https://herb.ashp.cuny.edu/items/show/866>.

<sup>31</sup> King Institute, *Birmingham Campaign*, *supra* note 27.

raised the bail bond for arrested activists.<sup>32</sup> Dr. King, along with others, marched from the church to City Hall on Good Friday, April 12, 1963, and they were subsequently arrested.<sup>33</sup>

While in jail, Dr. King penned his famous “Letter from Birmingham Jail,” clarifying the democratic basis for the campaign of civil disobedience:

You may well ask: “Why direct action? Why sit-ins, marches and so forth? Isn’t negotiation a better path?” You are quite right in calling for negotiation. Indeed, this is the very purpose of direct action. Nonviolent direct action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue \* \* \* I have earnestly opposed violent tension, but there is a type of constructive, nonviolent tension which is necessary for growth.<sup>34</sup>

James Bevel ambitiously heeded this charge and organized the May 2, 1963, “Children’s Crusade,” where some 800 students—from first graders to high-schoolers—marched to protest segregation.<sup>35</sup> In response, local law enforcement clubbed the children,

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<sup>32</sup> Aldon D. Morris, *Birmingham Confrontation Reconsidered: An Analysis of the Dynamics and Tactics of Mobilization*, 58 *Am. Soc. Rev.* 621, 627-628 (1993).

<sup>33</sup> *Id.* at 628.

<sup>34</sup> King, Jr., *supra* note 2, at 837-838.

<sup>35</sup> Erin Cook & Leanna Racine, *The Children’s Crusade and the Role of Youth in the African American Freedom Struggle*, 19 *OAH Mag. Hist.* 31, 32 (2005).

doused them with high-pressure firehoses, unleashed vicious dogs, and arrested more than 500 of them.<sup>36</sup> Over the next few days, newspapers around the world circulated these images and sparked worldwide outrage.<sup>37</sup> Facing international backlash, Birmingham's political and business leaders relented to Movement demands on May 10, 1963, by reversing racist hiring practices and desegregating public schools and many other public settings.<sup>38</sup>

Taken together, these operations of civil disobedience, including the sit-ins, Freedom Rides, the Birmingham Campaign and many other, less-well-known direct action campaigns, critically paved the way for the passage of the Civil Rights Act of 1964, which, among other things, prohibited racial discrimination in employment practices and barred segregation of public places.<sup>39</sup> In priming the country for his administration's proposal of the legislation, Kennedy proclaimed, "Now the time has come for this nation to fulfill its promise. The events in Birmingham and elsewhere have so increased the cries for equality that no

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<sup>36</sup> Steven Levingston, *Children Have Changed America Before, Braving Fire Hoses and Police Dogs for Civil Rights*, Wash. Post (Mar. 23, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/02/20/children-have-changed-america-before-braving-fire-hoses-and-police-dogs-for-civil-rights>.

<sup>37</sup> Morris, *supra* note 32, at 631.

<sup>38</sup> *Id.* at 632-633.

<sup>39</sup> *Id.* at 633.

city or state or legislative body can prudently choose to ignore them.”<sup>40</sup>

#### **D. The March from Selma to Montgomery**

After the passage of the landmark Civil Rights Act of 1964, activists increasingly turned their attention to voting rights in the South. In Dallas County where Selma, Alabama, is located, African Americans constituted over half of the total population but less than two percent of its registered voters.<sup>41</sup> The SNCC and SCLC conducted African-American voter registrations for months but did not achieve any material success because of racist voting laws.<sup>42</sup>

Local civil-rights groups conducting peaceful demonstrations in Selma and neighboring communities were met with thousands of arrests, including that of Dr. King.<sup>43</sup> On February 18, 1965, racial tensions escalated at a demonstration in nearby Marion when state troopers attacked protesters and fatally shot

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<sup>40</sup> *Ibid.*

<sup>41</sup> See Jeff Wallenfeldt, *Selma March*, Encyclopedia Britannica (Mar. 14, 2020), <https://www.britannica.com/event/Selma-March>.

<sup>42</sup> Christopher Klein, *How Selma’s ‘Bloody Sunday’ Became a Turning Point in the Civil Rights Movement*, Hist. (Mar. 4, 2020), <https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement>.

<sup>43</sup> *Ibid.*

Jimmie Lee Jackson, a demonstrator who was attempting to shield his mother from harm.<sup>44</sup>

In response, civil-rights leaders organized a 54-mile march from Selma to Montgomery where they would illegally block Highway 80 and directly take their voting rights cause to Alabama Governor George Wallace.<sup>45</sup> On March 6, 1965, Governor Wallace forbade the march and mandated state troopers “to use whatever measures are necessary to prevent a march.”<sup>46</sup>

Led by Hosea Williams representing the SCLC and John Lewis representing the SNCC, a group of over 600 protestors left from Brown Chapel African Methodist Episcopal Church in Selma on March 7, 1965.<sup>47</sup> They marched six blocks to the Edmund Pettus Bridge that oversaw the Alabama River on its route out of Selma.<sup>48</sup> There, they encountered law enforcement riding horseback and bearing clubs, surrounded by white spectators waving Confederate flags.<sup>49</sup>

“[O]rdered to disperse,” the marchers halted but stood their ground.<sup>50</sup> The police charged, deploying tactics “similar to those recommended for use by the

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<sup>44</sup> *Ibid.*

<sup>45</sup> See Burke Marshall, *The Protest Movement and the Law*, 51 Va. L. Rev. 785, 787-788 (1965).

<sup>46</sup> Klein, *supra* note 42.

<sup>47</sup> Wallenfeldt, *supra* note 41.

<sup>48</sup> Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 440 (2004).

<sup>49</sup> See Wallenfeldt, *supra* note 41.

<sup>50</sup> Klein, *supra* note 42.

United States Army to quell armed rioters in occupied countries.”<sup>51</sup> They clubbed, whipped, and tear gassed the marchers, who retreated without fighting back.<sup>52</sup> Two marchers were killed and more than 70 were hospitalized.<sup>53</sup>

That night, the American Broadcasting Company (ABC) interrupted its broadcast to show the violent events in Selma to nearly 50 million American viewers.<sup>54</sup> The march, which came to be referred to as “Bloody Sunday” for its violent suppression, captured the national consciousness and shifted public opinion in favor of demonstrators. Over the next two days, sit-ins, traffic blockades, and demonstrations took place in solidarity in over 80 cities.<sup>55</sup>

The Johnson Administration—which had been divided on whether to pursue voting rights legislation—resolved to push for sweeping change.<sup>56</sup> On March 15, 1965, just a week after Bloody Sunday, President Lyndon B. Johnson introduced the Voting Rights Act of 1965 to a joint session of Congress. He compared Selma to the Battles of Lexington and Concord in the

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<sup>51</sup> *Williams v. Wallace*, 240 F. Supp. 100, 104 (M.D. Ala. 1965).

<sup>52</sup> Klein, *supra* note 42.

<sup>53</sup> Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 Yale L.J. 1411, 1417 (1995).

<sup>54</sup> Klein, *supra* note 42.

<sup>55</sup> Wallenfeldt, *supra* note 41.

<sup>56</sup> Klarman, *supra* note 48, at 440-441; Krotoszynski, Jr., *supra* note 53 at 1427-1428.

American Revolution and declared the first march as a turning point in U.S. history as “part of a far larger movement which reaches into every section and State of America \* \* \* [to] overcome the crippling legacy of bigotry and injustice.”<sup>57</sup>

Beginning on March 21, 1965, over 25,000 people participated in the 54-mile march from Selma to Montgomery. Lasting five days, the march marked one of the nation’s greatest demonstrations.<sup>58</sup>

On August 6, 1965, President Johnson signed the Voting Rights Act into law. The Act mandated federal preclearance of voting procedure amendments in particular jurisdictions (requirements that have since been lifted by this Court) and generally combatted literacy tests, poll taxes, and other racist voting blockades.<sup>59</sup> In just two months, “the number of black voters in counties subject to Justice Department monitoring programs more than doubled, and within a decade black voters would increase their numbers from 1.5 million to 3.5 million.”<sup>60</sup> The unlawful demonstrations on March 7, 1965, spurred seismic changes to political participation and governance, forever changing the scope of American voting access and democratic participation.

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<sup>57</sup> Wallenfeldt, *supra* note 41.

<sup>58</sup> Klein, *supra* note 42.

<sup>59</sup> Krotoszynski, Jr., *supra* note 53, at 1412.

<sup>60</sup> *Id.* at 1427.

## **II. Opponents of the Civil Rights Movement have tried to chill the Movement and its leaders by seeking to impose excessive civil and criminal liability**

Recognizing the significant impact that civil disobedience could have on advancing change, opponents of the Civil Rights Movement historically used different tools to try to undermine the Movement's ability to resort to civil disobedience. One of the most powerful tools at their disposal was their access to and control of the judicial system, and they repeatedly sought to harass leaders of the Movement by requesting imposition of disproportionate criminal and civil penalties against them. From lawsuits seeking massive civil damages to criminal penalties, opponents used any legal and illegal means available to chill expression seeking expansion of civil-rights protections and the striking down of segregation laws.

### **A. Segregationists Sought to Use Civil Liability to Chill Speech**

In 1962, a store owner in Savannah, Georgia brought suit against the NAACP, a member of the NAACP, and a local pastor for organizing a boycott of his store. The store owner stood accused of beating a 14-year-old African-American store clerk, who was hospitalized for 48 hours after the beating for "shock, \* \* \* head swelling, and stomach and back tenderness



and pain.”<sup>61</sup> After the police failed to intervene and the victim’s mother began to receive threatening phone calls,<sup>62</sup> the NAACP organized a picket, which continued for almost a month until it was temporarily enjoined.

In *Overstreet*, the store owner accused the NAACP and the individual defendants of organizing an “unlawful \* \* \* conspiracy” and sought a remedy of \$40,000 in actual damages and \$50,000 in punitive damages.<sup>63</sup> After the trial court found the NAACP liable, the Georgia Supreme Court affirmed, emphasizing that “[i]f [the store owner] \* \* \* committed an assault and battery upon an employee, that is a criminal act, the punishment for which rests with the courts and not with individuals,” warning that “[o]therwise, we have anarchy.”<sup>64</sup> The Georgia Supreme Court ignored the political context for the boycott and found that “the sole purpose of the picketing \* \* \* was to injure and damage [the plaintiff’s] business,” so it was “not protected” under the Constitution.<sup>65</sup> The Georgia Supreme Court affirmed the judgment and over \$85,000 in damages against the NAACP.

The message was clear: Opponents of the Civil Rights Movement could drown civil-rights activists

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<sup>61</sup> Pet. Br. at 4, *NAACP v. Overstreet*, 384 U.S. 118 (1966) (No. 505).

<sup>62</sup> *Ibid.*

<sup>63</sup> *NAACP v. Overstreet*, 142 S.E.2d 816, 822 (Ga. 1965).

<sup>64</sup> *Id.* at 823.

<sup>65</sup> *Id.* at 824.

and organizations in litigation fees and damages to chill their speech and activity. Other litigious white supremacists took note, and lawsuits were filed against the NAACP in Virginia<sup>66</sup> and Pennsylvania.<sup>67</sup>

The NAACP was not the only civil-rights organization that faced these kinds of suits. In 1966, a corporation sued the SCLC in Mississippi. As was the case in *Overstreet*, the corporation alleged that the SCLC conspired with others to boycott the corporation's business.<sup>68</sup> The SCLC had begun the boycott of white merchants after local police had beaten activists protesting the jailing of members of the African-American community.<sup>69</sup> The Mississippi Supreme Court, however, found that since the SCLC was not directly protesting an act by the plaintiff himself, it was liable for damages arising out of the boycott.<sup>70</sup> It was irrelevant that the SCLC was protesting police brutality and arbitrary arrests; the SCLC would not be safe from civil liability for its acts of disobedience. The Mississippi Supreme Court ultimately vacated the \$114,572.95 damages

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<sup>66</sup> *Jolted by Supreme Court: Damage Suits Seen as Big Threat to NAACP*, New J. & Guide (Norfolk), May 14, 1966, at C1.

<sup>67</sup> *\$85,000 DAMAGE SUIT AGAINST NAACP UPHOLD: Bankruptcy Faces Every Civil Rights Group in Country as Va. Store, Local Nursing Home Now file \$100,000 Lawsuits for Picket Activity*, Phila. Trib., June 11, 1966, at 1.

<sup>68</sup> *S. Christian Leadership Conference, Inc. v. A.G. Corp.*, 241 So. 2d 619, 620 (Miss. 1970).

<sup>69</sup> *Id.* at 623.

<sup>70</sup> *Id.* at 624.

award, but only based on the trial court's speculative calculation, not on the theory of liability.<sup>71</sup>

These cases left segregationists with a clear tactical advantage: all they needed to do was establish some unlawful activity—however attenuated to the NAACP's underlying actions—and they could seek crippling damages against civil-rights leaders, effectively chilling their speech. The NAACP continued its work, despite the fear that litigious white supremacists could “come to New York and collect the entire amount or seek to put the [NAACP] out of business, thus threatening the entire NAACP nationwide program.”<sup>72</sup>

### **B. State and private actors sought to disrupt the Civil Rights Movement and generate criminal liability**

State and private actors sought to disrupt the Civil Rights Movement with violence and clandestine methods, and at times, generate criminal liability. As discussed above, the sit-ins, freedom rides, and the Birmingham campaign resulted in a heavy-handed response from the authorities. Mass arrests and aggressive use of the criminal code was a common tactic. Protestors were brought up on charges such as

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<sup>71</sup> *Id.* at 629.

<sup>72</sup> Memorandum from Robert L. Carter, General Counsel, to All NAACP Branches and NAACP Personnel, at 4 (July 7, 1966).

breaching the peace, unlawful assembly, and violating state and local Jim Crow laws.

A concomitant strategy used by local and state authorities was to turn a blind eye to mob violence. White onlookers attacked and attempted to provoke demonstrators into committing violence, and it occasionally worked. Yet there were no attempts to hold entire groups of onlookers responsible for individual acts of violence. And at times, the authorities even worked in concert with violent groups to suppress the Movement. For example, during the 1961 freedom ride campaign from Birmingham to Montgomery, Public Safety Commissioner L.B. Sullivan promised the Ku Klux Klan the unimpeded opportunity to attack the riders for several minutes.<sup>73</sup> While Montgomery police looked on, an armed mob of hundreds attacked the riders as well as journalists covering the campaign.<sup>74</sup> Future U.S. Congressman John Lewis, then a 21-year-old activist, was hit in the head and left unconscious.<sup>75</sup> He described the events as “very violent” and said he “thought [he] was going to die.”<sup>76</sup>

Groups were also targeted by federal government efforts that sought to quell the exercise of these rights. In 1956, the FBI launched COINTELPRO, a domestic

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<sup>73</sup> *On This Day—May 20, 1961: White Mob Attacks Freedom Riders in Montgomery, Alabama*, A HISTORY OF RACIAL INJUSTICE, available at [https://calendar.eji.org/racial-injustice/may/20\\_](https://calendar.eji.org/racial-injustice/may/20_)

<sup>74</sup> *Ibid.*

<sup>75</sup> John H. Jordan, *Black Americans 17th Century to 21st Century: Black Struggles and Successes* 573 (2013).

<sup>76</sup> *Ibid.*

surveillance program. The program would go on to target perceived “threats to domestic tranquility”—including what the FBI termed the “Black Nationalist Hate Group” program,<sup>77</sup> a characterization later found to have no substantive meaning within the Bureau.<sup>78</sup> Individuals such as Dr. King and prominent organizations including the SCLC and the Black Panther Party were targeted by COINTELPRO.<sup>79</sup> According to an internal FBI memo, one of the broad stated goals of the program was “to prevent groups and leaders from gaining ‘respectability’ by discrediting them to the ‘responsible’ Negro community, to the white community \* \* \* and to Negro radicals.”<sup>80</sup>

The FBI employed agent provocateurs to discredit the Civil Rights Movement. Under COINTELPRO, the FBI used the covert actions of “wartime” justified by a belief that “dissident speech and association \* \* \* were incipient steps toward the possible ultimate commission of an act which might be criminal.”<sup>81</sup> The Bureau used methods such as encouraging violence between groups,<sup>82</sup> planting informants to raise controversial

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<sup>77</sup> S. Rep. No. 755 (III), 94th Cong., 2d Sess. 4 (1976).

<sup>78</sup> *Ibid.*

<sup>79</sup> *Id.* at 20-22.

<sup>80</sup> *Id.* at 21.

<sup>81</sup> *Id.* at 7, 27.

<sup>82</sup> *Id.* at 40.

issues,<sup>83</sup> deploying hostile third parties against target groups<sup>84</sup> and labelling targets as informants.<sup>85</sup>

The FBI shuttered COINTELPRO following widespread criticism, but those methods and tactics are a blueprint for those who wish to discredit a movement engaged in nonviolent protest activity. Nothing prevents opponents from sabotaging legitimate protests by engaging in violence and illegal activities in the hope of discrediting a movement. Attaching civil liability to third party actions would have a chilling effect and serves as a guide on how to bankrupt movements.

### **III. The Supreme Court has been especially cautious to extend civil or criminal liability in the context of the Civil Rights Movement**

This Court has served as a bulwark against efforts to quell political expression to right the historic wrongs against African Americans. This Court has historically seen through the use of state laws to silence or otherwise intimidate civil-rights leaders and their allies. Importantly, this Court has proceeded with special caution when considering civil and criminal liability in light of First Amendment interests in the civil-rights context. It has recognized that constitutionally protected activity imposes a special obligation on the Court to critically examine the basis of liability, even

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<sup>83</sup> *Id.* at 44-45.

<sup>84</sup> *Id.* at 49.

<sup>85</sup> *Id.* at 46.

where those actions would not otherwise be protected under the First Amendment.<sup>86</sup>

This Court has repeatedly reversed state convictions for acts of civil disobedience in the context of the Civil Rights Movement. In at least a dozen cases throughout the 1960s, this Court protected from criminal liability African-American activists engaged in nonviolent actions challenging racial inequality.<sup>87</sup>

In those cases, the Court intervened because authorities “may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights.”<sup>88</sup> The

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<sup>86</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-916 (1982).

<sup>87</sup> *E.g.*, *Brown v. Louisiana*, 383 U.S. 131 (1966) (reversing breach-of-peace convictions for a sit-in); *Barr v. City of Columbia*, 378 U.S. 146 (1964) (reversing trespass and breach-of-peace convictions for a sit-in); *Bell v. Maryland*, 378 U.S. 226 (1964) (reversing trespass convictions for a sit-in); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (same); *Griffin v. Maryland*, 378 U.S. 130 (1964) (reversing trespass convictions for a protest at an amusement park); *Robinson v. Florida*, 378 U.S. 153 (1964) (reversing misdemeanor convictions for a protest at a restaurant); *Avent v. North Carolina*, 373 U.S. 375 (1963) (remanding a case involving trespass convictions for a sit-in); *Gober v. City of Birmingham*, 373 U.S. 374 (1963) (reversing trespass convictions for a sit-in); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (reversing criminal mischief convictions for a sit-in); *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (reversing trespass convictions for a sit-in); *Taylor v. Louisiana*, 370 U.S. 154 (1962) (reversing breach-of-peace convictions for a sit-in); *Garner v. Louisiana*, 368 U.S. 157 (1961) (same).

<sup>88</sup> *Brown*, 383 U.S. at 143.

Court stated, “Even if the accused action were within the scope of the statutory instrument, we would be required to assess the constitutional impact of its application, and we would have to hold that the statute cannot constitutionally be applied to punish petitioners’ actions in the circumstances of this case.”<sup>89</sup> Protection was justified even where “the opinions which [protestors] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.”<sup>90</sup>

This Court has historically proceeded with similar caution in evaluating the selective imposition of civil liability by state officials on civil-rights leaders. Where state tort law is serving as a pretext to quash civil-rights activity, this Court “retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel.”<sup>91</sup>

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<sup>89</sup> *Id.* at 142.

<sup>90</sup> *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (reversing the breach-of-peace convictions of nearly two hundred African-American students during a nonviolent demonstration); *see also Barr*, 378 U.S. at 150 (“[B]ecause of the frequent occasions on which we have reversed under the Fourteenth Amendment convictions of peaceful individuals who were convicted of breach of the peace because of the acts of hostile onlookers, we are reluctant to assume that the breach-of-peace statute covers petitioners’ conduct here.”).

<sup>91</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (overturning libel award against New York Times for publishing advertisement on behalf of NAACP); *see also NAACP v. Alabama ex rel. Patterson*, 357 US 449, 462-463 (1958) (holding that an order compelling the NAACP to disclose its membership would entail “the likelihood of a substantial restraint upon the exercise by



Moreover, “[t]his Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”<sup>92</sup> In *Sullivan*, this Court recognized that “[t]he fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.”<sup>93</sup>

In *Claiborne*, white merchants sought to hold the NAACP, its Mississippi Field Secretary Charles Evers, and others, civilly liable for damages stemming from a boycott aimed at addressing racial inequality.<sup>94</sup> The merchants claimed that the boycott was not protected under the First Amendment because some participants attempted to enforce the boycott through threats and violence. This Court examined the boycott, which “included elements of criminality and elements of majesty,”<sup>95</sup> with “extreme care.”<sup>96</sup> The Court distinguished the NAACP and the boycott leaders—whom it determined did not incite or ratify violence—from individual

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petitioner’s members of their right to freedom of association” not justified by state interests”).

<sup>92</sup> *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964) (reversing a state court order enjoining the NAACP activity in Alabama).

<sup>93</sup> *Sullivan*, 376 U.S. at 277.

<sup>94</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

<sup>95</sup> *Id.* at 888.

<sup>96</sup> *Id.* at 927.

boycott participants who did engage in violence.<sup>97</sup> The Court concluded that Mr. Evers’ “organization of the boycott, \* \* \* [and] his ‘threats’ of vilification or social ostracism \* \* \* is constitutionally protected and beyond the reach of a damages award.”<sup>98</sup> Ultimately, the Court concluded that the boycott, whose aim was “to change the social, political, and economic structure of a local environment,” could not “be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts.”<sup>99</sup>

The Justices were mindful of the specific aims of the “movement whose existence and objectives are matters of the highest public interest.”<sup>100</sup> The Court understood that Movement leaders could not afford to play by the rules of Jim Crow “to change a social order that had consistently treated them as second-class citizens”<sup>101</sup> and “to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure.”<sup>102</sup> In that context, the Court assiduously guarded First Amendment protections so as to protect the ability of “gadflies to create the kind of tension in society that will help men rise from the dark depths of

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<sup>97</sup> *Id.* at 908 (“The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.”).

<sup>98</sup> *Id.* at 926.

<sup>99</sup> *Id.* at 933.

<sup>100</sup> *Sullivan*, 376 U.S. at 266.

<sup>101</sup> *Claiborne*, 458 U.S. at 912.

<sup>102</sup> *Id.* at 918.

prejudice and racism to the majestic heights of understanding and brotherhood.”<sup>103</sup>

*Claiborne* is one of a long line of cases where this Court has seen through attempts to use seemingly neutral laws to chill protest leaders’ ability to organize. Left alone, the Fifth Circuit’s interpretation of *Claiborne* sends the message to opponents of civil rights that they can use civil liability to bankrupt civil-rights organizers and activists, and thereby disrupt movements. The Supreme Court has rejected this imposition of such liability in the past, and it should do so again here.

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## CONCLUSION

For the foregoing reasons, the NAACP respectfully urges this Court to summarily reverse the Fifth Circuit opinion, or, in the alternative, to grant certiorari.

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<sup>103</sup> King, Jr., *supra* note 28, at 838.