Case No. 23-373

In the Supreme Court of the United States

DERAY MCKESSON
Petitioner,

v.

JOHN DOE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT SCHOLAR JOHN D. INAZU IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Professor John D. Inazu is the Sally D. Danforth Distinguished Professor of Law and Religion at Washington University in St. Louis. He is widely considered one of the nation's leading authorities on the First Amendment's Assembly Clause. In his twelve years as a law professor, he has published two books on the subject: *Liberty's Refuge: The Forgotten Freedom of Assembly* (Yale University Press, 2012) and *Confident Pluralism: Surviving and Thriving Through Deep Difference* (University of Chicago Press, 2016). He has also authored numerous articles analyzing the Assembly Clause and related rights.[2]

This case presents a critical opportunity to recognize the role that the Assembly Clause has

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[1] No counsel for a party authored any portion of this brief, and no person or entity other than amicus or his counsel made any monetary contribution to its preparation or submission. Counsel for both parties were timely notified in advance of the filing of this brief.

[2] *The Strange Origins of the Constitutional Right of Association,* 77 Tenn. L. Rev. 485 (2010); *The Forgotten Freedom of Assembly,* 84 Tul. L. Rev. 565 (2010); *The Unsettling "Well-Settled" Law of Freedom of Association,* 43 Conn. L. Rev. 149 (2010); *Factions for the Rest of Us,* 89 Wash. U. L. Rev. 1435 (2012); *Virtual Assembly,* 98 Cornell L. Rev. 1093 (2013); *The Freedom of the Church (New Revised Standard Version),* 21 J. Contemp. Legal Issues 335 (2013); *The Four Freedoms and the Future of Religious Liberty,* 92 N.C. L. Rev. 787 (2014); *More is More: Strengthening Free Exercise, Speech, and Association*, 99 Minn. L. Rev. 485 (2014); *The First Amendment's Public Forum,* 56 Wm. & Mary L. Rev. 1159 (2015); *A Confident Pluralism,* 88 S. Cal. L. Rev. 587 (2015); *Re-Assembling Labor,* 2015 U. Ill. L. Rev. 1791 (2015) (with Marion Crain); and *Unlawful Assembly as Social Control,* 64 UCLA L. Rev. 2 (2017).

historically played, and should continue to play, in protecting the rights of protestors and protest leaders throughout the country. Accordingly, Professor Inazu urges the Court to consider the Assembly Clause dimensions of this case and grant the petition for writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment's Assembly Clause guarantees the right to assemble in public spaces and non-violently express dissenting political views. DeRay Mckesson, an activist and organizer of a Black Lives Matter protest, took to the streets to protest police misconduct, and neither encouraged nor engaged in any violence that led to Officer Doe's injuries.

While there may be legitimate debate as to what counts as reasonable restrictions on the fundamental right to assemble and whether the First Amendment immunizes conduct such as highway blocking, the Fifth Circuit's articulation of the "negligent protest" standard is drastically overbroad. The decision below threatens to impose nearly unlimited tort liability on any protest leader as soon as the protest crosses the highly subjective and malleable line of "foreseeably violent." In fact, the dangers the Fifth Circuit highlights to justify Mckesson's potential liability here could apply to nearly any large public gathering, and certainly apply to almost any charged political protest. The First Amendment does not tolerate such a sweeping and

amorphous standard governing liability for the exercise of the core right of assembly.

Further, the decision below directly contradicts this Court's holding in *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), that an assembly "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." *Id.* at 908. The Fifth Circuit's overly broad opinion allowing Mckesson to be held liable merely because he led a protest that resulted in Officer Doe's injuries through an attenuated chain of but-for causation violates this long-standing rule. This Court should grant certiorari to prevent other circuits from adopting the "negligent protest" theory and stop the resulting chill the decision will have on First Amendment rights throughout the country if left in place.

ARGUMENT

I. The Negligent Protest Leader Theory of Liability Violates the Right to Freedom of Assembly and Will Deter Legitimate Exercises of First Amendment Rights.

The Fifth Circuit erred on a matter of exceptional importance in holding that a protest leader can be liable for negligent protest, even when he did not direct or engage in any violent conduct. Imposing liability here violates the First Amendment's protections of freedom of assembly and will drastically chill protestors' exercise of First

Amendment rights based on the threat of liability for any and all damage caused by the protest, even when the event organizers never intended anything but a peaceful protest.

The Fifth Circuit applied Louisiana law to determine that Officer Doe adequately pleaded that Mckesson was negligent in organizing the protest in which Officer Doe sustained his injuries, and further concluded that the First Amendment did not limit Mckesson's liability in any way. Specifically, in the decision below, the court held that Mckesson breached his duty of care for the same reasons it did in its 2019 decision in this case, a decision which this Court vacated. *See McKesson v. Doe*, 141 S. Ct. 48 (2020). The Fifth Circuit explained: "It was patently foreseeable that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and, when necessary, making arrests. . . . 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." Pet.App.16a (quoting *Doe v. Mckesson*, 945 F.3d 818, 827 (5th Cir. 2019)). In other words, under the Fifth Circuit's logic, Mckesson can be liable for Officer Doe's injuries simply because there was a chance that the protest could lead to injuries, even though he did not direct, encourage, or engage in *any* violent conduct.

This decision is astonishingly broad and could apply to nearly any public gathering—a protest, a

concert, or a sports event, among others. It also rests on an incorrect application of the First Amendment. The court's ruling that the First Amendment does not protect Mckesson's leadership in the protest here contradicts the proper textual and historical understandings of the Assembly Clause, which recognize a core right to assemble in public spaces to express dissenting views, even when that assembly leads to social discomfort and instability. Additionally, the Fifth Circuit's rule allowing negligence liability for protest leaders is overly broad and will dramatically chill protests throughout the country, due to the specter of potentially ruinous tort liability for nearly any protest leader. This Court should grant certiorari and reverse the Fifth Circuit's decision to prevent the suppression of legitimate peaceful assemblies.

A. The Text and History of the Assembly Clause Demonstrate the First Amendment Protects Gatherings in Public Spaces for Non-Violent Protests.

The text and history of the Assembly Clause demonstrate that the First Amendment protects assembling in public spaces for non-violent protests. To determine whether an activity is protected by the First Amendment, courts look "to historical evidence about the reach of the First Amendment's protections." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022). Correctly understood, freedom of assembly protects, at the very least, the rights of citizens to assemble to discuss political questions, express dissenting political views,

protest, and even engage in some civil disobedience, as long as the assembly remains "peaceable."[3] As this Court has recognized, the right to peaceably assemble is "fundamental" and "cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions." *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937). Contrary to this admonition, the Fifth Circuit's decision here too easily sweeps Mckesson's protected activities aside and offers too little protection to the core right of assembly.

1. The text of the First Amendment protects the right of the people to peaceably assemble.

The First Amendment states that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I. While the right of assembly has at times been improperly limited to protecting individuals' rights to assemble only in furtherance of petitioning the government for a redress of grievances, the text clearly supports reading assembly and petition as

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[3] The Assembly Clause in fact protects much more than just political assembly. It protects all manners of "self-expressive, nonviolent, noncoercive conduct from majority norms or political balancing." John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (Yale University Press, 2012), at 5 (hereinafter, *Liberty's Refuge*). The Assembly Clause protects traditional political demonstrations, as well as "parades, strikes," and "more creative forms of engagement like pageants, religious worship, and even the sharing of meals." *See* John D. Inazu, *The Forgotten Freedom of Assembly,* 84 Tul. L. Rev. 565, 570 (2010).

separate rights. Inazu, *Liberty's Refuge*, *supra*, at 21–25 (showing that textual and historical evidence suggests that the framers understood assembly and petition as two separate rights).[4]

While this Court's precedent has allowed restrictions on protected assemblies, governments may not regulate the right out of existence; rather, "precision of regulation is demanded" when attempting to impose tort liability for constitutionally protected assemblies. *Claiborne*, 458 U.S. at 916 (internal quotation marks omitted). Mckesson's right to assemble, so long as that assembly was "peaceable," is thus presumptively protected by the First Amendment's text.

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[4] This Court has on one occasion suggested otherwise. *See Presser v. Illinois*, 116 U.S. 252, 267 (1886) (indicating that the First Amendment protects the right of assembly only if "the purpose of the assembly was to petition the government for a redress of grievances"); *see also* Inazu, *Liberty's Refuge*, 39–40 (critiquing *Presser's* interpretation). Scholars have repeated that erroneous interpretation, but this Court has never reinforced it. *See Thomas v. Collins*, 323 U.S. 516, 530 (1945) (referring to "the rights of the people peaceably to assemble and to petition for redress of grievances"); *McDonald v. Chicago*, 130 S. Ct. 3020, 3031 (2010) (referring to "the 'right of the people peaceably to assemble for lawful purposes'" (quoting *United States v. Cruikshank*, 92 U.S. 542, 551 (1875)); *cf. Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (the First Amendment "has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances").

2. History and tradition demonstrate that the Assembly Clause protects the right to assemble in public spaces, such as streets and sidewalks.

The First Amendment's history and tradition also demonstrate that individuals have the right to assemble in public spaces, such as the sidewalks and streets on which Mckesson led the protest here. The right of peaceable assembly includes a right to "use . . . the streets and public places" for "purposes of assembly . . . and discussing public questions," as "a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. CIO*, 307 U.S. 496, 515–16 (1939) (Roberts, J., concurring); *see also* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 11–12 (1965) ("[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.").

At the time the First Amendment was ratified, the Assembly Clause was understood to include the right to assemble in public spaces. During the debates over the Bill of Rights in the House of Representatives, Theodore Sedgwick of Massachusetts objected to including a separate right of assembly as redundant, given the inclusion of the Speech Clause. Sedgwick argued, "If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is

certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae." 1 Annals of Cong. 759 (1790).

John Page of Virginia recognized the significance of assembly and responded:

> [Sedgwick] supposes [the right of assembly] no more essential than whether a man has a right to wear his hat or not; but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights.
>
> *Id.* at 760.

Page's "mere reference" to a man's right to wear his hat was "equivalent to half an hour of oratory" before the First Congress, as his contemporaries would have understood him to be referring to the trial of William Penn. Irving Brant, *The Bill of Rights: Its Origin and Meaning* 55 (1965). In 1670, Penn and fellow Quakers had sought to enter their London meetinghouse to worship, only to find their entrance blocked by a company of soldiers enforcing an English law that forbade religious gatherings by "Nonconformists." Undeterred, Penn began preaching

his sermon to the Quakers assembled in the street, at which point he was arrested, taken to the courthouse, and charged with unlawful assembly. *Id.* at 56–57; *see also* Joseph Barker, *Life of William Penn: The Celebrated Quaker and Founder of Pennsylvania* 42–43 (1847). Penn was convicted of contempt of court for refusing to remove his hat in the courthouse, due to his Quaker belief that hats should be removed only before God and not before other men. *See id.* at 44. The jury eventually acquitted Penn of the unlawful assembly charge, but not without drama: the judge forced Penn to sit hidden from view of the jury and then imprisoned the jury for failing to return a guilty verdict. Brant, *supra*, at 61.

Following Page's reference to Penn's trial for unlawful assembly, the House defeated Sedgwick's motion to strike the Assembly Clause by a "considerable majority." 1 Annals of Cong. 761 (1790). With the significance of Penn's case in mind, the First Congress thus contemplated two important functions of the Assembly Clause. First, Congress meant the Assembly Clause to protect assemblies in public spaces, sometimes even when those assemblies might be deemed unlawful under applicable laws. Second, the Clause was not duplicative of rights guaranteed by the Free Speech Clause, but served as a separate, important safeguard. As Page put it, "[i]f the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause." *Id.* at 760.

The post-ratification history of assembly confirms this understanding. Not long after the ratification of the First Amendment, gatherings of Democratic-Republican societies in public spaces were common, underscoring that the original understanding of the Assembly Clause included the right of the people to gather in such spaces. Inazu, *Liberty's Refuge*, *supra*, at 26–29. Specifically, these societies involved "dissenting groups" "joined in the extraordinarily diverse array of . . . feasts, festivals, and parades that unfolded in the streets and public places of American cities" to discuss, develop and express dissenting political views. *Id.* at 27. This historical evidence is particularly notable because it demonstrates that "declaration of a freedom of assembly was a break from [English] history," because in Britain, "the people were not free to assemble in the streets and parks without official permission." Michael McConnell, *Freedom by Association*, First Things (Aug. 2012), https://tinyurl.com/w3ebodt. The original understanding of the Assembly Clause thus included protections to assemble in public spaces and express dissenting views—and modern First Amendment doctrine should also protect such assemblies.

3. The right to "peaceably" assemble protects more than just the right to engage in already lawful behaviors.

The history and tradition of the First Amendment also elucidate the meaning of the Amendment's use of "peaceable." The right to "peaceable" assemble includes a core right to non-

violent protests. Importantly, and contrary to the Fifth Circuit's holding, "peaceable" does not equate to "lawful," but also protects many non-violent assemblies, even if they violate other ordinances.

At the time of the founding, many Americans considered even raucous and disruptive assemblies and protests legitimate forms of political expression, sometimes even tolerating assemblies up to the point of property destruction. *See* Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Speech*, 80 Mo. L. Rev. 962, 968–972 (2015). One notable example is the Boston Tea Party, which could be construed as both a legitimate protest, shaping the views of protected speech and assembly, or an unlawful mob, depending on whether viewed from an American or British colonial perspective. *Id.* at 968 & n.38. Indeed, eighteenth-century examples of early American protests demonstrate that significant moments of instability and disorder were tolerated as legitimate expressions of dissenting political views. *Id.* at 968–970.

Early versions of the offense of unlawful assembly also establish that certain levels of civil disobedience were tolerated, if not wholly protected, as important mechanisms to voice political dissent. For example, while English common law formulations of unlawful assembly split on whether the offense required an intent to commit violence as an element, they typically required at least some element of "terror" that could endanger the public. William Blackstone endorsed a narrow view of liability for

unlawful assembly that required intent to commit a violent act, and closely connected the offense with riot. *See* William Blackstone, 4 Commentaries On The Laws Of England 146 (1769). William Hawkins, on the other hand, endorsed a broader form of unlawful assembly liability, expressing that "any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly." William Hawkins, 1 A Treatise Of The Pleas Of The Crown 516 (8th ed. London, n. pub. 1824); *see also* Inazu, *Unlawful Assembly as Social Control*, *supra*, at 10–11. Thus, even assuming a narrower degree of protection for assemblies, unlawful assembly still required more than just simple unlawfulness—it required an act of "terror."

Early American laws defining unlawful assembly follow the same trend. The Territory of Louisiana, for example, adopted an unlawful assembly statute that followed Blackstone's narrower approach, prohibiting assemblies with an intent to commit an "unlawful act, with force and violence, against the person or property of another," or "against the peace and to the terror of the people." 1 Laws Of A Public And General Nature, Of The District Of Louisiana, Of The Territory Of Louisiana, Of The Territory Of Missouri, And Of The State Of Missouri, Up To The Year 1824, at 215 (Jefferson City, W. Lusk & Son 1842). Likewise, Maine's version of unlawful assembly, while prohibiting assembling "together to commit an unlawful act," still required that the unlawful act be done "in an unlawful, violent or

tumultuous manner, to the terror or disturbance of others." Me. Rev. Stat. tit. XII, ch. 159, § 2 (1840). It was not until the twentieth century that common law definitions of unlawful assembly "pushed the underlying offense of unlawful assembly further away from any tangible social harm, broadening the scope of liability beyond either Blackstone's or Hawkins's approaches," Inazu, *Unlawful Assembly as Social Control*, *supra*, at 18.

Early sources thus demonstrate that the original understanding and early history of the First Amendment tolerated assemblies that engaged in unlawful behaviors as a legitimate form of political expression. An assembly had to create circumstances of "terror" to the public before it amounted to an unlawful assembly. This history suggests that the First Amendment protects a right to assemble to express dissenting political views, including some civil disobedience, and cannot be regulated away in its entirety by ordinances or state negligence liability.

This Court's precedent confirms this understanding. In *Claiborne*, for instance, this Court held that "[t]he First Amendment does not protect violence," but the "nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment," 458 U.S. at 915–916. Despite the Fifth Circuit's assertion that the only tortious conduct at issue in that case was violent, Pet.App.31a, the *Claiborne* Court specifically addressed the *nonviolent* elements of the protest in relation to the tort claims for malicious interference with plaintiff's businesses, and held they were protected. 458 U.S. at 891–92 &

n.7. This holding thus confirms that the First Amendment protects at least some conduct that would otherwise be deemed tortious, and therefore unlawful, if not taken for the purpose of engaging in core political activity. *See* Pet.App.47a–52a (Willett, J., dissenting) (explaining that *Claiborne* holds the First Amendment protects some unlawful activity short of violence).

Indeed, the Fifth Circuit's conclusion that a protest leader may not participate in or direct any activity that is unlawful under state law would mean the First Amendment offers only illusory protections. There must be core activities that cannot be rendered unprotected simply by passing an ordinance prohibiting them. To hold otherwise would mean that a state could easily rid itself of Charles Evers's dissenting political conduct considered and established as protected in *Claiborne*. Mississippi simply could have passed a law prohibiting a person from loitering outside a store (*e.g.*, one of the white-owned stores subject to the boycott) without purchasing anything. Evers then would have been wholly unprotected under the Fifth Circuit's reasoning, because he would have encouraged and directed the protest's store watchers to engage in unlawful conduct. The First Amendment is not so flimsy as to allow states to strip dissenting political activity of constitutional protection simply by declaring it unlawful.

B. Allowing Negligence Liability for Protest Leaders Will Chill the Exercise of Assembly Rights.

It is well established that speech and assembly require "breathing room," and this Court should invalidate state rules that sweep so broadly as to "deter or 'chill' constitutionally protected" First Amendment activities. *United States v. Hansen*, 143 S. Ct. 1932, 1939 (2023); *see also Cox v. State of La.*, 379 U.S. 559, 574 (1965) ("[R]egulation of conduct that involves freedom of speech and assembly [should] not . . . be so broad in scope as to stifle First Amendment freedoms, which need breathing space to survive."). Because the First Amendment "can serve as a defense in state tort suits," the Court should invalidate overly broad articulations of state tort law. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). The standard endorsed by the Fifth Circuit here—the negligent protest theory—is overly broad and chills the exercise of constitutionally protected assembly rights.

The Fifth Circuit's articulation of the Louisiana negligence standard is overly broad and will undoubtedly deter protected assemblies. Because Mckesson was participating in core First Amendment activities—non-violently protesting on public streets and sidewalks to express dissenting political views—any regulation of his conduct must be narrowly tailored to protect the state's legitimate interest and may not sweep so broadly as to deter protected conduct. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 479, 485 (1988) (subjecting anti-picketing ordinance to "careful scrutiny" and determining it must be

"narrowly tailored" because the challenged ordinance "operates at the core of the First Amendment") (internal quotation marks omitted). The negligence standard the Fifth Circuit applied is too low a bar to forfeit the core assembly protections described above for a number of reasons.

First, the tort of "negligent protest" has too low of a mens rea for protest leaders such as Mckesson to lose First Amendment protections. As this Court recognized just last term, the First Amendment does not allow punishment for political speech absent a *specific intent* to incite violence. *Counterman v. Colorado,* 600 U.S. 66, 76 (2023) ("Like threats, incitement inheres in particular words used in particular contexts: Its harm can arise even when a clueless speaker fails to grasp his expression's nature and consequence. But still, the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were 'intended' (not just likely) to produce imminent disorder.") (citing *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Claiborne*, 458 U.S. at 927–929). *See also Counterman,* 600 U.S. at 112 (Barrett, J., dissenting) ("Speakers must specifically intend to incite violence before they lose First Amendment protection. . . . A specific intent requirement helps draw the line between incitement and political rhetoric lying at the core of the First Amendment.") (internal quotation marks omitted).

Similarly, this Court has held that public figures bringing defamation suits must establish that

a speaker acted with actual malice instead of merely showing that the statements were false and defamatory. "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). Imposing liability for merely negligent conduct "deter[s] [critics] from voicing their criticism," and "thus dampens the vigor and limits the variety of public debate." *Id.* The same is true for imposing liability for negligent protest; it deters would-be protestors from assembling for fear that their conduct, although intended to be peaceable, will fall into an "unlawful zone" subject to civil liability. *Id.* Indeed, this Court has even determined that individuals may not sue protestors for *intentional* infliction of emotional distress where liability turns on the "highly malleable" standard of "outrageous" conduct because it is likely to deter the exercise of protected First Amendment rights. *Snyder*, 562 U.S. at 458. *See* Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 G.W. L. Rev. 233, 270–73 (2021) (explaining that "negligence tort's 'reasonable care' and 'foreseeability' standards are far too imprecise to offer the requisite protection for protest organizing" based on this Court's First Amendment precedents).

While these cases apply this Court's free speech precedent, there is no reason the standard governing political assembly should be lower than for political speech. Accordingly, a protest leader should not be held liable when he engaged in peaceful assembly

that, at most, negligently led to injuries. Under this Court's recent First Amendment precedents, a protest leader such as Mckesson cannot be held liable unless he *specifically intended* for the assembly to result in violence. Judge Willett's dissent below recognized this requirement, which the majority below improperly rejected: "If negligence is not constitutionally protected, then I don't know what conduct would be. Negligence sits at or near the far end of the 'unlawfulness' spectrum that begins with violent crimes before running through property crimes, civil torts like battery, intentional-but-nonviolent civil torts such as trespass, and torts that require recklessness." Pet.App.57a (Willett, J., dissenting).

Moreover, the Fifth Circuit's articulation of negligent protest sweeps in protected conduct, and its decision will improperly chill the exercise of core First Amendment rights. The Fifth Circuit relied on three points to determine that Mckesson's conduct was negligent and that he forfeited First Amendment protection: 1) that he "organized the protest to begin in front of the police station"; 2) that he "personally assumed control of the protest's movements, but failed to take any action whatsoever to prevent or dissuade his fellow demonstrators once they began to loot a grocery store and throw items at the assembled police"; 3) and that he "deliberately led the assembled protest onto a public highway." Pet.App.24a. The court also faulted Mckesson because it concluded his "organization and operation of the protest in an unsafe manner directly created foreseeable violent conduct." Pet.App.27a. The court brushed off the dissent's concerns of overbreadth and claimed that its standard

would not "unnecessarily sweep in expressive conduct." Pet.App.24a.

But it is difficult to see what it is true here that would not also be true in many other public gatherings and protests. Based on the Fifth Circuit's logic, the organizers of everyday gatherings could be held liable merely for organizing events. For example, the owner of baseball team could be liable for a tussle between opposing fans outside the stadium after a charged rivalry game, as the owner assumed control of the crowd attending the game, and it was foreseeable that opposing fans may become violent, particularly where, as is common for public sporting events, alcohol is served at the game and impassioned fans of different teams are brought in close proximity of one another. The same could be said for a protest leader that fails to call off a demonstration despite anticipating the presence of violent counter-protestors.

The Fifth Circuit's decision also effectively deems protests in front of police stations categorically off limits—directly and disproportionately targeting any movement that protests police actions—as apparently arranging a protest at that location is inherently unreasonably dangerous. But the court provided no reasoning explaining *why* protests in front of police stations are more dangerous than other protests, and such a rule cannot be narrowly tailored. The First Amendment does not allow so wide a prohibition with so little reasoning.

Further, the negligence standard imposed here punishes Mckesson and other protest leaders for

engaging, even peaceably, with social movements that have more disorderly wings simply because they would have constructive notice that other members may engage in violent action. The Fifth Circuit relied on the fact that "Mckesson had recently participated in other Black Lives Matter protests in which demonstrators blocked public highways, and in which police officers were injured," purportedly supporting the conclusion that "Mckesson knew or should have known that the protest at issue here . . . would end in a violent confrontation." Pet.App.17a. This "constructive notice" rule will have a disproportionate effect on disfavored dissenters, such as the Black Lives Matter movement. *See* Abu El-Haj, *Defining Peaceably, supra* at 963 (noting that "the Black Lives Matter protests often bear little resemblance to our idealized conceptions of public discourse—as reasoned disquisitions on difficult choices of public policy").[5]

Allowing suppression of Mckesson's peaceful activity simply because he associated with violent factions of a broader social movement puts the Fifth Circuit's decision in line with some of the most broad-based suppressions of political movements in American history. For example, Justice Brandeis'

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[5] That unpopular views are more readily regulated by government entities, even in traditional public forums such as sidewalks, parks, and streets, is illustrated by the fact that *Hill v. Colorado*, 530 U.S. 703 (2000), which upheld a Colorado law prohibiting individuals from discussing anti-abortion issues in public spaces within certain distances of abortion clinics, remains good law. This is despite that *Hill* leaves unprotected core political expression conducted "in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk." *Id.* at 765 (Kennedy, J., dissenting).

famous invocation that "[f]ear of serious injury cannot alone justify suppression of free speech and assembly" and that "[i]t is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it," *Whitney v. California*, 274 U.S. 357, 376–77 (1927) (Brandies, J., concurring), stems from a socially disruptive social movement. The case involved the arrest and prosecution of Anita Whitney for her participation with the sometimes-violent Communist Labor Party of California, even though Whitney herself actively advocated for non-militant political strategies. *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandies Opinion in Whitney v. California*, 29 Wm. & Mary L. Rev. 653, 658 (1988).

And during the civil rights movement, non-violent leaders such as Martin Luther King Jr. often associated with, and protested with, more radical factions. Indeed, during the Memphis Sanitation Workers' Strike of 1968, only months before his assassination, King himself led a demonstration of over 20,000 people to protest the City's treatment of black union workers that ultimately turned violent and led to looting in the city.[6] The Fifth Circuit's articulation of the negligence standard here would have made King liable for any violence at any future demonstration because he would have been on notice that the civil rights movement protests were

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[6] *See* Martin Luther King, Jr. Research and Education Institute, *Memphis Sanitation Workers' Strike* (last visited Oct. 3, 2023), https://kinginstitute.stanford.edu/memphis-sanitation-workers-strike.

foreseeably violent. This Court should pause before allowing a novel interpretation of the First Amendment that would have chilled even King's peaceful political advocacy.

The Fifth Circuit's negligent protest standard will deter leaders of social movements from engaging in legitimate assemblies and protests for fear of being subjected to nearly unlimited liability as soon as any violence results from an event associated with the movement. It further subjects such unpopular movements to a heckler's veto, prohibiting demonstrations by peaceful protestors where counter-protesters initiate violence, as future gatherings would be deemed foreseeably violent. *See* Inazu, *Unlawful Assembly as Social Control*, *supra*, at 21–22 (explaining the overbreadth concerns with tying legitimacy of assemblies to whether individuals were on notice of previous violence). The First Amendment does not tolerate such a one-strike policy for the expression of political dissent.

II. The Fifth Circuit's Decision Drastically Departs from Established First Amendment Protections Guaranteed to Protest Leaders.

Certiorari is also appropriate in this case because the Fifth Circuit's decision departs drastically from this Court's precedent in *Claiborne*, improperly narrowing well-settled First Amendment rights for protest leaders. This departure from the Court's precedent will cause confusion among the lower courts

regarding the protections guaranteed by the First Amendment and is reason alone to grant certiorari.

This Court's decision in *Claiborne* recognized that a person's exercise of the rights of speech and assembly "do[] 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." 458 U.S. at 908. And that decision enunciated a clear line between protected and unprotected speech and assemblies addressing "public issues," "which ha[ve] always rested on the highest rung of the hierarchy of First Amendment values." *Id.* at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). While "[t]he First Amendment does not protect violence," to punish a person for their involvement with "a group having both legal and illegal aims" the individual must "specifically intend[] to accomplish the aims of the organization *by resort to violence*." *Id.* at 919 (emphasis added). Indeed, as Judge Willett recognized in his dissent, *Claiborne* and "a wealth of precedent before and since" protects "raucous public protests—even 'impassioned' and 'emotionally charged' appeals for the use of force . . . unless intended to, and likely to, spark immediate violence." Pet.App.44a; *see also* Pet.App.49a-52a (discussing use of "violence" versus "unlawful" language in *Claiborne* to support conclusion that the line is properly drawn at violence and not unlawfulness).

The Fifth Circuit's holding that Mckesson can be liable for his mere participation in a protest, even when his actions were undisputedly peaceful and

there is no suggestion he specifically intended to aid the violent conduct that injured Officer Doe thus runs afoul of *Claiborne*'s protections. Mckesson cannot be held liable merely for his assembly with the protester that threw the rock injuring Officer Doe. The Fifth Circuit's decision thus conflicts with this Court's precedent on the scope of First Amendment protections, and this Court should grant certiorari to resolve the conflict created by the decision below.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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