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 FLOYD ABRAMS, ERWIN CHEMERINSKY, SETH KREIMER, ROBERT POST, AMANDA SHANOR, GEOFFREY R. STONE, NADINE STROSSEN, AND KENNETH P. WHITE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are scholars of the First Amendment. They have an interest in promoting the sound interpretation of the First Amendment in a way that does not dilute the important freedoms of speech, assembly, and association afforded by the Court's precedents.

Amici's names are set forth in the Appendix.

SUMMARY OF ARGUMENT[1]

The right to protest for political change is a cornerstone of our democratic system. The Framers considered the "right of peaceable assembly … to lie at the foundation of a government based upon the consent of an informed citizenry." *Bates v. City of Little Rock*, 361 U.S. 516, 522–23 (1960). Freedom of speech has sustained countless social and political movements throughout our history. Civic activism and democratic participation in this country depend on the continued recognition of a robust right to speak, organize, assemble, and petition the government for redress.

This Court has consistently affirmed the centrality of these rights to the working of democracy. Even when a civil demonstration falls partly outside the bounds of the First Amendment, "the presence of activity protected by the First Amendment imposes

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[1] All parties received timely notice of the filing of this brief. Sup. Ct. R. 37.2(a). No counsel for a party authored this brief in whole or in part, and no entity or person other than *amicus curiae*, made a monetary contribution to its preparation or submission. Sup. Ct. R. 37.6.

restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916–17 (1982).

The decision below contravenes the First Amendment and jeopardizes its protection of the right to protest. Contrary to an unbroken stream of precedent from this Court and other courts of appeals, the Fifth Circuit held that the organizer of a protest may be sued in tort for the undirected, unintended conduct of a person who attended it. As Judge Willett correctly observed in dissent, under the panel's analysis even the lead defendant in *Claiborne Hardware* would receive no First Amendment protection. *See* Pet. App. 55a. The Fifth Circuit's holding defies this Court's precedents and this Court's longstanding recognition that the right to civil demonstration lies at the heart of the First Amendment.

To be clear, the First Amendment does not condone physical violence. A person was injured here, and the Constitution does not excuse his attacker's criminal, tortious, and morally indefensible conduct. But this suit does not target the plaintiff's assailant. It seeks to hold the organizer of a lawful protest vicariously liable for that misconduct. The Constitution does not tolerate a scheme in which citizens face liability for conduct they neither directed nor intended whenever they use protest to express political and social views.

The Court should reaffirm the constitutional freedoms at stake when citizens exercise their right to protest. In this country, ordinary people can

change the path of history. The Fifth Circuit's cramped depiction of the First Amendment's protections bears no resemblance to the right our founders actually adopted based on our country's robust tradition of civil demonstration. Our First Amendment is better, richer, and broader than allowed by the decision below. This Court should correct the Fifth Circuit's dangerous mistake.

ARGUMENT

I. THE RIGHT TO PROTEST FOR POLITICAL CHANGE OCCUPIES A UNIQUE AND VITAL POSITION IN OUR DEMOCRATIC SOCIETY

The story of the United States is a story of dissent. Born from an unwillingness to bow to arbitrary rule, our national ethos has consistently embraced the ability of individuals to change history through their voices. Ours is "the story of a countless number of Americans who prodded, provoked, and pushed the United States to actually be the nation it imagined itself to be." Ralph Young, *Dissent: The History of an American Idea* 1 (2015). And civil protest, protected by the Petition Clause, has often been the vehicle that these citizens have relied on to vindicate American values.

In recognition of its historical and social importance, this Court has consistently found the right to "petition the Government for a redress of grievances" to be central to the functioning of our democratic society. DeRay Mckesson, like so many others before him, invoked this time-honored right when he organized a demonstration to protest police

brutality in Baton Rouge, Louisiana. The Fifth Circuit's subsequent decision in *Doe v. Mckesson*, Pet. App. 1a-71a, permitting Mckesson to be held personally liable for the unrelated and undirected actions of another protestor, impermissibly burdens that right. This decision by a divided panel undermines decades of Supreme Court precedent and threatens to chill future civil demonstration.

A. Demonstration Against The Government Has Served As The Primary Mechanism For Social Change In American History

Social movements throughout our history have utilized assembly and demonstration to effect change. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control/Coal. For Fair Hous. V. City of Berkeley*, 454 U.S. 290, 294 (1981). Colonists hurled chests of tea into the Boston Harbor to oppose their underrepresentation in British government.[2] Abolitionists spoke, wrote, boycotted, and even burned the Constitution[3] in support of their struggle.[4]

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[2] *See Boston Tea Party*, History (July 30, 2019), https://perma.cc/6XH3-SHTZ.

[3] William Lloyd Garrison famously burned a copy of the Constitution in Boston Commons on July 4, 1854, declaring it "an agreement with death and a covenant with hell." Young, *supra*, at 126.

[4] *See Abolition, Anti-Slavery Movement, and the Rise of the Sectional Controversy*, Library of Congress: The African American Odyssey: A Quest for Full Citizenship, https://perma.cc/79W6-RBHG.

Women advocated for equal suffrage; marching on Washington[5] and even illegally voting[6] to spread their message. Workers similarly banded together to object to unsafe conditions, low pay, and rising unemployment through peaceful marches.[7] Pro-life and pro-choice activists each have championed their views through civil demonstration.[8] And anti-war protestors have organized to protest military actions throughout our history.[9]

Begun as a social media response to police violence against Black individuals, Black Lives Matter is a twenty-first-century social movement that advocates for equal treatment and the elimination of racial

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[5] *See* Danielle Cohen, *This Day in History: The 1913 Women's Suffrage Parade*, National Archives: Obama's White House (Mar. 3, 2016), https://perma.cc/6UB7-N888.

[6] Young, *supra*, at 222–23.

[7] *See Coxey's Army*, Encyclopedia Brittanica (Mar. 18, 2019), https://perma.cc/Y3XL-6SZA.

[8] *See About the March for Life*, March for Life, https://perma.cc/L5MC-2PCP; *April 5, 1992: Abortion Rights Advocates March on Washington*, History: This Day in History (July 28, 2019), https://perma.cc/UJX8-JUTG.

[9] *See, e.g.*, Erick Trickey, *When America's Most Prominent Socialist Was Jailed for Speaking Out Against World War I*, Smithsonian Magazine: World War I: 100 Years Later (June 15, 2018), https://perma.cc/SY6A-C8WG (describing Eugene Debs's arrest under anti-sedition laws for advocating against U.S. involvement in World War I); *Vietnam War Protests*, History (June 6, 2019), https://perma.cc/4A8S-4EAW.

inequality in the criminal justice system.[10] Black Lives Matter has furthered these goals through civil assembly and protest,[11] as it did in Baton Rouge in July 2016.

Civil protest formed the backbone of the civil rights movement in the 1950s and 1960s. The day before his assassination, Martin Luther King, Jr. called upon America to protect the First Amendment rights of sanitation workers to demonstrate: "[S]omewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. Somewhere I read of the freedom of press. Somewhere I read that the greatness of America is the right to protest for right."[12] Dr. King reminded the nation of its foundational commitment to the right to dissent. It is critically important for the Court to reaffirm this commitment now.

B. The Court Has Repeatedly Recognized That The Right To Protest Is A Core First Amendment Activity

Affirming the importance of protest throughout American history, this Court has afforded sweeping protection to the right to petition the government—

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[10] *See Herstory*, Black Lives Matter, https://perma.cc/3G87-ZG7X; *What We Believe*, Black Lives Matter, https://perma.cc/3ECV-YMW9.

[11] *See Herstory*, *supra* note 10 (describing Black Lives Matter's organization and advocacy in Ferguson, Missouri in the wake of Michael Brown's death).

[12] Martin Luther King, Jr., I've Been to the Mountaintop (Apr. 3, 1968).

including by organizing protests. In his seminal dissent in *Abrams v. United States*, 250 U.S. 616 (1919), Justice Holmes underlined the importance of protecting unpopular and disruptive speech: "[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Id.* at 630 (Holmes, J., dissenting). This Court has adopted Holmes's understanding of the First Amendment and consistently protected controversial speech from unwarranted government suppression, often in cases involving public civil demonstration. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011) (protecting religious protestors outside of a military funeral against the imposition of tort liability); *Texas v. Johnson*, 491 U.S. 397 (1989) (protecting a protestor from criminal prosecution for flag burning); *Boos v. Barry*, 485 U.S. 312 (1988) (protecting protestors against foreign governments from criminal prosecution); *Claiborne Hardware*, 458 U.S. at 907 (protecting a civil rights boycott from tort liability because it is "a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (protecting students' right to protest the Vietnam War from suppression by a school district); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (protecting protestors of segregation from criminal prosecution for breaching the peace).

In *Cox v. Louisiana*, the Court expressly recognized the connection between civil protest and the protection of our democracy. 379 U.S. 559, 574 (1965) ("[O]ur constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society."). Democracy depends on "the opportunity for free political discussion." *Stromberg v. California*, 283 U.S. 359, 369 (1931); *see also Bates*, 361 U.S. at 522–23 ("[T]he right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry . . . . And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected . . . ." (citation omitted)).

Even protests that create public anger or unrest are constitutionally protected. *See Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."); *see also Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."). We protect the "hazardous freedom" of speech that may lead to anger—or even violence—because it "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.

The right to organize and protest has particular importance in part because of the efficacy of group association: "[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control*, 454 U.S. at 294. Particularly on unpopular or contentious issues, this Court has noted that "[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The decision below undercuts these established First Amendment principles and ignores the constitutional value of civic protest.

C. The Fifth Circuit's Decision Directly Contravenes This Court's Precedents And Exposes Protected Speech To Unacceptable Liability

The Fifth Circuit's ruling violates controlling precedent and ignores the underlying rationale of decades of Supreme Court decisions affording protestors wide-ranging protection. This Court has recognized that the right to protest may be stifled "not only [by] heavy-handed frontal attack" but also "more subtle governmental interference." *Bates*, 361 U.S. at 523. The imposition of unjustified civil liability on protest organizers can be such an interference. Courts have a "special obligation … to examine critically the basis on which liability was imposed" to ensure that potential liability does not unduly impede

the right to organize and petition the government. *Claiborne Hardware*, 458 U.S. at 915; *see also id.* at 916–17 ("[T]he 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*." (emphasis added)). In *Claiborne Hardware*, this Court held that, though states undoubtedly have "broad power to regulate economic activity," they could not "prohibit peaceful political activity such as that found in the boycott." *Id.* at 913. That is because "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914.

Ignoring this Court's direction, the panel majority concluded that Mckesson could be held personally liable for the plaintiff's injuries, despite the absence of any allegations that Mckesson directed, authorized, or ratified the rock-throwing. According to the majority, it was sufficient to allege that Mckesson "organized and led the protest in such a manner that his actions 'were likely to incite lawless action,'" Pet. App. 28a (quoting *Claiborne*, 458 U.S. at 927), without considering—as required by *Claiborne* and its forebears—whether Mckesson's "advocacy [wa]s *directed to inciting or producing imminent lawless action*." *Claiborne*, 458 U.S. at 928 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). The plaintiff did not need to allege Mckesson's intent, the majority postulated, because *Claiborne*'s principles

were limited to protest followers, not leaders: while *Claiborne* requires allegations of "specific intent" to hold "an *associate* liable for unlawful conduct taken in the midst of legitimate expressive behavior," the same protections do not apply to protest *leaders*. Pet. App. 35a. For leaders, the court of appeals concluded, the First Amendment condones negligence liability for others' acts of violence—"mens rea aside." *Id.* at 36a.

Political expression "has always rested on the highest rung of the hierarchy of First Amendment values." *Claiborne Hardware*, 458 U.S. at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)); *see also Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). The imposition of severe civil liability for the exercise of First Amendment rights demands more than allegations of simple negligence, including for protest leaders.

Claiborne Hardware recognized that the leaders even of protests marred by violence do not categorically forfeit their First Amendment protections. Though the state court in *Claiborne Hardware* did not impose "liability on a theory that state law prohibited a nonviolent, politically motivated boycott," "[t]he fact that such activity is constitutionally protected . . . impose[d] a special obligation on this Court to examine critically the basis on which liability was imposed." 458 U.S. at 915. And the Court concluded that the First Amendment's protections extended to the protest leaders there. "While the State legitimately may impose damages for the consequences of violent conduct, it may not

award compensation for the consequences of nonviolent, protected activity. Only those losses *proximately caused* by unlawful conduct may be recovered." *Id.* at 918 (emphasis added).

The panel majority took this final sentence to mean that proximity to *any* unlawful conduct, whether violent or nonviolent, surrenders a protestor's First Amendment protections. *See* Pet. App. 34a. But as Judge Willett pointed out, "[e]ven [the lead individual defendant] of *Claiborne* [*Hardware*] would be liable" under the majority's analysis. *Id.* at 55a (Willett, J., concurring in part and dissenting in part). *Claiborne Hardware* expressly held the Constitution forbids holding protest organizers responsible for the illegal acts of others (including violent ones) unless the leader "authorized, directed, or ratified" the "specific" act. 458 U.S. at 927. The panel majority departed from *Clairborne*'s straightforward rule, instead finding that Mckesson could be liable for plaintiff's injuries without any plausible allegation that Mckesson directed, authorized, or ratified the rock-throwing.

The decision below equally contravenes the foundational associational precedents this Court built upon in *Claiborne Hardware*. As the Court recognized there, a long line of decisions had already held that "[t]he First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another." *Id.* at 918–19 (citing *Scales v. United States*, 367 U.S. 203 (1961), *Noto v. United States*, 367 U.S. 290, 298 (1961) and *Healy v. James*, 408 U.S. 169 (1972)). To hold a member of an organization liable for another

member's violence, the government must show that the individual had "specific[] inten[t] to accomplish [the aims of the organization] by resort to violence." *Scales*, 367 U.S. at 229; *see Healy*, 408 U.S. at 186 ("The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."). For the right to associate to have meaning, it cannot evaporate whenever an associate happens to commit an unsolicited, unwanted act of violence.

The Court's incitement cases teach the same lesson. In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), the Court explained that the "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware*, 458 U.S. at 927. Rather, the Constitution requires proof of specific intent before a speaker—leader or not—can be punished for inciting others' criminal acts. *Id.* at 927-28 (citing *Brandenburg*, 395 U.S. at 447). That requirement "ensure[s] that efforts to prosecute incitement" will "not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core," as the Court's vestigial precedents once allowed. *Counterman v. Colorado*, 600 U.S. 66, 81 (2023) (observing prior incitement cases decided "against a resonant historical backdrop: the Court's failure, in an earlier era, to protect mere advocacy of force or lawbreaking from legal sanction"). After all, "[i]t would be quite remarkable to hold that speech by a law-abiding [speaker] can be suppressed in order to deter conduct

by a non-law-abiding third party." *Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001); *see also De Jong*e *v. Oregon*, 299 U.S. 353, 365 (1937) ("Those who assist in the conduct of [meetings for political action] cannot be branded as criminals on that score."); *Counterman*, 600 U.S. at 81 ("When incitement is at issue, we have spoken in terms of specific intent.").

The First Amendment's protection of protest activity from liability absent specific intent to cause harm is thus not the *exception* to the administration of state tort liability but the *rule* governing such cases. Based on decades of precedent, *Claiborne Hardware* reaffirmed the constitutional limits on a state's ability to constrain the right to collectively protest:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is *necessary* to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.

458 U.S. at 920 (emphasis added); *see also id.* at 912 ("Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain *narrowly defined instances*."); *Counterman*, 600 U.S. at 81 ("A strong intent requirement was, and remains, one way to guarantee history was not repeated."). The decision below strains to find support for its holding in *Claiborne Hardware*. In reality, the Court's cases only reaffirm the importance

of public association and protest and the corollary limitation on government interference with such activities.

Officer Doe is entitled to recover for his injury. But his remedy is owed by the person who assaulted him. Mckesson did not throw a rock. He did not incite another to do so. All he did was lead a protest—with the protection of the First Amendment.

D. *Claiborne Hardware* Strikes The Correct Balance Between Allowing Individual Liability And Protecting Protest Organizers Because Protests By Their Very Nature Cause Public Inconvenience And Frequently Involve Some Form of Civil Disobedience

Claiborne Hardware permits individual liability for wrongdoers but insulates protest organizers from liability stemming from conduct unrelated to their own actions. The Fifth Circuit's rewriting of *Claiborne Hardware* will chill the exercise of the rights of assembly and petition.

Protests necessarily cause disruption and public inconvenience, and some protests may attract aggressive actors on both sides. Violence or destruction of property is a recurrent possibility, particularly at larger protests. Such conduct may occur, even in situations where a protest organizer does not advocate violence, because protests involving political issues create strong feelings in participants, onlookers, and counter protesters. This Court has recognized this reality, but it has nonetheless consistently found that protests should still be

protected. *See Tinker*, 393 U.S. at 508 ("Any word spoken . . . that deviates from the views of another person may start . . . a disturbance."). Indeed, free speech may best serve its function "when it induces a condition of unrest." *Terminiello*, 337 U.S. at 4.

As the potential for unrest and even violence is frequently present, allowing expansive civil liability for protest organizers if they violate minor ordinances casts far too wide a net. As "almost anyone can be arrested for something," *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part), the organizer of a protest will constantly be at risk of this new liability. History is rife with examples of protest organizers who violated laws or court orders while conveying their message. Many civil rights marches defied "orders issued by municipalities and sheriffs."[13] At the lunch counter sit-in movements of the early 1960s, civil rights protestors were arrested after engaging in demonstrations at private businesses across the South to challenge segregation. *See, e.g.*, *Bell v. Maryland*, 378 U.S. 226 (1964) (Black students arrested for criminal trespass for refusing to leave a restaurant). History has vindicated the sit-ins and similar acts of civil disobedience as contributions to American society.

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[13] *See* Marianne Debouzy, *Protest Marches in the United States in the Nineteenth and Twentieth Centuries*, 203 Le Mouvement Social 15, 22 (2003) (discussing examples); *see also* Barbara Harris Combs, *From Selma to Montgomery to Freedom: The Long March to Freedom* 35 (2013) (discussing the famous 1965 march on Selma involved occupation of the public roads over Edmund Pettus Bridge).

It is troubling to contemplate how the Fifth Circuit's negligence liability would have applied to organizers of these marches and sit-ins. These demonstrations invited police action, and although most ended peacefully, it would have been foreseeable that marching on restricted property or trespassing in a restaurant might result in some injury or property damage once police were called. If violence did occur, any organizer would have been financially responsible, and this liability could have crippled efforts to organize further activism. There is no dispute that an individual who violates a law—be it protestor or observer—is responsible for their own conduct. There is a difference in the Constitution's eyes between a person who protested the election results on the Mall on January 6, 2021, and a person who violently stormed the Capitol. Allowing open-ended civil liability for protest organizers would have stifled—will stifle—the political and social movements vital to our Nation's progress.

II. THE FIFTH CIRCUIT'S DECISION IN *DOE V. MCKESSON* WILL CHILL PROTECTED SPEECH

The negligence liability licensed by the decision below will substantially deter individuals from organizing protests related to politically fraught issues. If organizers are vulnerable to liability for the undirected actions of others, they are likely to stop organizing protests altogether. This Court recently reiterated that financial liability has the potential to chill protected speech. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) ("Excessive fines can be used . . . [to] chill the speech of political enemies."). The Court's

intervention is needed to prevent a similar chilling effect here.

The Fifth Circuit's liability rule chills speech by introducing an indeterminate standard of liability. When an individual organizes a protest, they do not know who else will join their cause, or if anyone will act violently. This Court has rejected uncertain standards of liability in similar contexts. *See Snyder*, 562 U.S. at 458 (rejecting a finding of liability for intentional infliction of emotional distress based on the outrageousness of picketing, as the test's subjectivity could be used as an instrument to suppress speech). And it has been wary of overbroad laws that chill speech. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere."). These holdings are consistent with a key First Amendment principle: "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

Here, the chill is particularly profound because the liability is potentially unbounded. Violence sparked at a large protest could be widespread and destructive, and the resulting liability massive. While an organizer like Mckesson may be able to calculate the limited civil liability for trespass or blocking a public road when planning a demonstration, it is impossible to foresee damage to

people or property caused by the undirected violence of others.

In finding that Mckesson ignored the foreseeable danger to "officers, bystanders, and demonstrators," the Fifth Circuit's analysis expressly contemplated that an organizer could be liable to an indefinitely large number of plaintiffs. Pet. App. 16a. Anyone who suffers any type of physical injury or property damage during a protest that violated even a minor traffic law would have a plausible claim against the leader for "negligent protest[ing]." *Id.* at 47a (Willett, J., concurring in part and dissenting in part). The potential cost of defending multiple lawsuits by bystanders or other demonstrators alone may thus be a significant deterrent to engaging in protected activity.

The Fifth Circuit's decision opens a broad swath of First Amendment activity to open-ended liability. The result is that constitutionally protected protests will not occur and protected speech will be silenced. Furthermore, the decision does not provide protest organizers with clear rules to guide their conduct. Any minor negligent infraction can open the door to expensive lawsuits from countless potential plaintiffs. Indeed, if specific intent does not matter, any social media user or sponsor could be liable for the violent acts of others. The Court's cases cannot bend to accommodate that result, and the Court should hold as much here.

III. ORGANIZER LIABILITY WOULD VIOLATE THE RIGHTS TO FREE SPEECH AND ASSOCIATION

In addition to violating controlling precedent regarding organizer liability and chilling the valuable speech of social advocates, the theory of organizer liability accepted by the Fifth Circuit generally infringes the First Amendment rights of organizers to speak and associate freely. The organization of a protest is an act of speech, and as a form of speech regulation, negligence-based liability for organizers cannot pass constitutional muster.

Organizing a protest is also an act of assembly and association, and the plaintiff's theory of organizer liability infringes on those First Amendment rights, because it allows the state to punish association without establishing the intent required by the Constitution.

A. The Fifth Circuit's Theory Of Organizer Liability Is An Impermissible Restriction On Speech.

When Mckesson organized his protest, he was not performing a mere administrative task: he was speaking. He was telling the Baton Rouge Police Department, the city of Baton Rouge, the state of Louisiana, and the United States that he believed that the Baton Rouge Police Department treated Black people poorly. Protesting, like a parade, is speech—which means any government restriction should be evaluated under the most demanding level of review. *See Hurley*, 515 U.S. at 569.

Content-based restrictions on speech are routinely found unconstitutional. While the Fifth Circuit's holding did not approve a content-based discrimination on its face, it will disproportionally affect individuals organizing demonstrations related to controversial issues. The risk of violence is heightened when politically tense topics are at issue, as participants and bystanders will have strong emotional connections to the speech. Under the Fifth Circuit's regime, organizers of controversial protests that may contain individual "bottle throwers . . . [must expect] to pay more." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). In particular, organizers of counter-protests to other demonstrators will be particularly vulnerable to additional liability. Surely, the risk of violence is more "foreseeable" in such circumstances, as two groups of people with diametrically opposed views stand face to face.

This Court has found that similar content-discriminatory restrictions on speech were unconstitutional. In *Forsyth County*, this Court found that states cannot look to the nature of a protest as a basis to vary the fee necessary to acquire a protest permit. *Id.* at 134–35 ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."). The same logic applies in this case. Here, the protestors might not be paying a varying fee to organize a protest, but they are subjected to a sliding scale of liability—potentially dwarfing the $1000 fee at issue in *Forsyth County*—depending on how much controversy their actions will spark. *Id.* at 134.

Even under the more relaxed standard for communicative conduct, this Court has held that content-neutral regulation is acceptable only "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and *if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest*." *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (emphasis added). The liability approved here does not meet even this standard. Organizer liability does not materially further an important government interest. The governmental interest in ensuring that people do not advocate immediate, violent disregard of the law is served by the criminal law, not tort law. It is illegal in virtually every state for an individual to advocate specific, immediate violations of the law.[14] Organizer liability does little to further this interest.

There is also a governmental interest in preventing protests that interfere unduly with the freedom and safety of others, but, again, this interest is furthered by criminal law, not tort law. State and local law regularly include time, place, and manner restrictions that regulate protest activities, and those who violate valid regulations may be penalized.[15]

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[14] *See, e.g.*, LA. STAT. ANN. § 14:28; CAL. PENAL CODE § 404.6; N.Y. PENAL LAW § 240.08.

[15] *See, e.g.*, LA. STAT. ANN. § 14:100.1 (making it a crime to obstruct, among other things, a public highway); CAL. PENAL CODE § 408; N.Y. PENAL LAW § 240.10.

Allowing in addition private citizens to sue organizers for the actions of their protestors adds little; it would neither effectively nor consistently deter illegal actions. Organizer negligence liability completely fails as a deterrent of violent activity because it does not address the violent actors themselves. The practical effect of organizer liability will not be to deter violence, but to deter protests. And, unlike the government, private citizens sue not to enforce a coherent public policy but for personal reasons that may have nothing to do with public goals. Once again, organizer liability does little to further legitimate public interests.

The government has many lawful tools to deter violent protests or incitement to serious crime without punishing speech in this fashion. The impact that organizer liability would have on speech is far "greater than is essential to the furtherance of [the government's] interest" and is therefore unconstitutional. *O'Brien*, 391 U.S. at 377.

B. The Fifth Circuit's Theory Of Organizer Liability Impermissibly Restricts The Right To Associate.

Organizer liability also infringes on the constitutionally guaranteed freedom of association. The punishment of a protest organizer for the undirected, unlawful acts of other protestors is the punishment of constitutionally protected association.

This Court has expressly held that freedom of association is protected by the First Amendment, and the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable

aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Patterson*, 357 U.S. at 460.

Accordingly, as explained above, individuals may not be punished for merely associating with law-breaking groups. *See supra* Part I.C; *Scales*, 367 U.S. at 229 (noting that a "blanket prohibition of association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be impaired"). This protection applies even when the group engages in violence. The state may only impose liability on someone for association alone if it can establish that "the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Claiborne Hardware*, 458 U.S. at 920.

Indeed, punishing the organizer of a protest for the violent acts of other protestors is a clear example of punishing an individual for his association with others. The Fifth Circuit's theory of organizer liability is an unconstitutional violation of the right to association, as the court did not determine that the organizer "held a specific intent to further" the violent aims of the rock thrower. *Id.* In this case, Mckesson neither advocated for violence against the plaintiff nor perpetrated it himself. He simply organized the protest at which the violence took place. Pet App. 5a. The First Amendment requires the plaintiff to show that Mckesson "held a specific intent" to further the rogue protestor's violent aims. *Claiborne Hardware*, 458 U.S. at 920. The plaintiff alleges only that

because McKesson intentionally blocked a public road, he reasonably should have foreseen that violence would occur. This complaint falls well short of the constitutional goal line.

The protection of the rights to speech, assembly, association, and petition is vital for our country's tradition of civic activism to flourish. The imposition of liability on Mckesson for the violent act of another that he did not incite or encourage would violate his First Amendment rights to speak and associate freely. The Fifth Circuit's contrary decision is plainly wrong.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the Fifth Circuit's decision.

Respectfully submitted

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