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 THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

JOHN W. WHITEHEAD
WILLIAM E. WINTERS
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888

ERIN GLENN BUSBY
Counsel of Record
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS
SCHOOL OF LAW
SUPREME COURT CLINIC
727 East Dean Keeton Street
Austin, TX 78705
(713) 966-0409
ebusby@law.utexas.edu

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus The Rutherford Institute, a nonprofit civil-liberties organization, is committed to protecting the constitutional freedoms of every American and the fundamental human rights of all people. The Rutherford Institute advocates for protection of civil liberties and human rights through *pro bono* legal representation and public education on a wide spectrum of issues affecting individual freedom in the United States. In particular, The Rutherford Institute advocates against government infringement of citizens' rights to freely express themselves.

To ensure the vitality of the First Amendment, The Rutherford Institute urges the Court to grant the petition and reverse the Fifth Circuit, reaffirming that protest organizers cannot be sued for third-party actions that cause injuries during a protest unless allegations satisfy the stringent limitations on liability this Court requires for speech-related torts and crimes like incitement.

[1] Pursuant to Rule 37.2, counsel for *amicus* provided notice to all parties of its intention to file this brief and did so at least ten days before its due date. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Protest speech has shaped American democracy throughout the Nation's history. And to preserve the "breathing space" required to ensure freedom of speech, this Court has placed stringent limitations on criminal and civil laws that directly restrict or indirectly chill speech on matters of public concern—especially speech that criticizes the government.

The Fifth Circuit's negligent-protest tort strikes at the core of protected speech, yet it includes none of the special protections this Court's First Amendment jurisprudence requires. *See, e.g.*, *Counterman v. Colorado*, 143 S. Ct. 2106, 2113-17, 2117 n.5 (2023) (surveying subjective-mental-state requirements imposed by this Court to ensure that speech-related crimes and torts do not infringe First Amendment protections). Instead, it creates vast exposure to civil liability in circumstances that will be present whenever protesters collectively occupy public spaces—and it does so based on ordinary negligence without requiring any showing that a protest organizer subjectively and culpably disregarded the risk of harm from speech that was "'intended' (not just likely) to produce imminent disorder." *Id.* at 2115 (citation omitted). The First Amendment forbids that result.

The Fifth Circuit's negligent-protest formulation does not hinge on any allegation that petitioner was violent or even advocated violence, but focuses instead on the foreseeability of a third party's violent conduct. Pet. App. 26a. It also rests heavily on the foreseeability

of a police response to the protest petitioner organized, *id.* at 9a, 16a—a routine occurrence because protests often rely on unlawful conduct to amplify messages. *See, e.g.*, *id.* at 7a (describing petitioner's breach of duty as occurring by "organizing the protest in such a manner where it was reasonably foreseeable that a violent confrontation with police would result," *i.e.*, "was reasonably foreseeable for police to respond and violence to ensue"). The tort therefore imperils civil disobedience, a hallmark of historical and contemporary protests that violate unjust laws to call attention to such laws' injustice.

In endorsing the theory that petitioner could be civilly liable for a crime committed by a third party during a protest based on negligence principles instead of the heightened First Amendment safeguards for protected speech, the Fifth Circuit focused on petitioner's plan to have the protest block a highway: a strategy to amplify the protest's message and a violation of law likely to attract a police response. *See, e.g.*, *id.* at 9a, 16a. Petitioner certainly could be punished for blocking the highway, but punishing him for an unknown and unencouraged third party's assault on an officer is an entirely different matter. The Fifth Circuit's "analytical lever—'unlawful conduct,'" *id.* at 58a (Willett, J., concurring in part and dissenting in part), and police-foreseeability approach mean the tort will loom over almost any group protest on a matter of heated public debate, and it will threaten to chill speakers across the political spectrum. This Court's intervention is essential to

ensure that protest speech retains the full protection of the First Amendment.

ARGUMENT

I. PROTEST SPEECH FURTHERS PUBLIC DISCOURSE AND PROTECTS DEMOCRACY.

Speech protesting or criticizing the government has played a vital role throughout the Nation's history. The Founders believed that advocacy for political and social change was essential to a free and fair democracy in which power flows from the people to the government. And this Court has emphasized that the protection of speech—even speech that is offensive or advocates lawbreaking—is central to democratic government.

To further those ends, this Court has created special rules to ensure that protected speech is given breathing space and is not chilled by the threat of excessive liability. From the definitions of incitement and true threats, to the application of defamation law, to the permissible grounds for finding malicious interference with business, this Court's precedent requires subjective, culpable mental states that clearly limit both criminal and civil laws that punish speech. The same limiting principle should be applied to any tort that threatens public discourse—particularly one with the far-reaching potential of the Fifth Circuit's negligent-protest tort.

A. The Founders Believed Speech Criticizing The Government Was Essential To Democracy, And This Court's Jurisprudence Reaffirms That Vital Role.

Protest speech—and particularly speech critical of the government—lies at the core of First Amendment protection. Indeed, "[t]he First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Freedom of speech is "essential to free government" because its abridgment would "impair[ ] those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). And this Court has "frequently reaffirmed that speech on public issues occupies the 'highest rung of the heirarchy [sic] of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

The Founders conceptualized government power as derived solely from the people. As James Madison wrote, popular sovereignty means the validity of government actions ultimately depends on the "temperate consideration and candid judgment of the American public." James Madison, *Virginia Report of 1799*, *reprinted in* THE VIRGINIA REPORT OF 1799-1800,

TOUCHING THE ALIEN AND SEDITION LAWS 189, 196 (Leonard W. Levy ed., Da Capo Press 1970) (1850). That principle of popular sovereignty thus requires—and the First Amendment at its core protects—the right of the people to speak openly against the government.

Benjamin Franklin agreed, noting that it is necessary to vest the right to free speech with the people because "[r]epublics and limited monarchies derive their strength and vigour from a popular examination into the actions of the magistrates." Benjamin Franklin, *On Freedom of Speech and the Press*, PA. GAZETTE (Nov. 1737), *reprinted in* 2 BENJAMIN FRANKLIN ET AL., MEMOIRS OF BENJAMIN FRANKLIN 431, 431 (1840). Franklin worried that "[a]n evil magistrate intrusted with power to *punish for words*, would be armed with a weapon the most destructive and terrible." *Id.* In short, "[f]reedom of speech is a principal pillar of a free government: when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins." *Id.*

It is essential, then, that speech related to public discourse "be uninhibited, robust, and wide-open," even if it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270. By its very nature, speech critical of the government "invite[s] dispute" and "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). As

this Court noted in *City of Houston v. Hill*, "the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." 482 U.S. 451, 472 (1987).

B. To Preserve Breathing Space For Protected Speech, This Court Has Required A Subjective, Culpable Mental State Beyond Negligence For Speech-Related Crimes And Torts.

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, it must be given "breathing space" from regulation and government-enforced consequences, even when the speech is unpleasant or unpopular. *Boos v. Barry*, 485 U.S. 312, 322 (1988). And to ensure that breathing space, this Court has required subjective, culpable mental states beyond negligence that strictly limit the scope of laws—civil and criminal—that may restrict or burden speech.

Just last term in *Counterman*, this Court reaffirmed the importance of heightened mental states as a "tool" to "reduce[] the prospect of chilling fully protected expression." 143 S. Ct. at 2115; *id.* at 2113-17 (surveying speech-related crimes and torts). An objective standard like negligence is insufficiently protective of First Amendment rights, a conclusion

that applies to civil laws as surely as it does to criminal laws. *See id.* at 2115-17, 2117 n.5. "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *Sullivan*, 376 U.S. at 265. And civil damages not only involve the use of state power, but also may be an even greater deterrent than criminal punishment. In *Sullivan*, the possible fine for criminal libel was $500, but the jury awarded $500,000 for civil defamation. *Id.* at 256, 277. In *Claiborne*, a state court had held defendants liable for a judgment exceeding a million dollars for tortious interference with business. 458 U.S. at 893. Such crushing potential liability could certainly dissuade a speaker from undertaking controversial but important speech.

Civil and criminal laws directly restricting speech are the most obvious danger to speech protected by the First Amendment. State restrictions on *unprotected* speech are permissible, but only if strictly cabined. For example, laws that forbid incitement of violence or other unlawful action—a legitimate exercise of police power—must be limited to apply only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Intent to cause unlawful action at an "indefinite future time" is not sufficient to impose liability. *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam). Instead, "the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were 'intended' (not just likely) to

produce imminent disorder." *Counterman*, 143 S. Ct. at 2115 (quoting *Hess*, 414 U.S. at 109).

Similarly, despite the long history of criminal and civil defamation laws in America, their permissible scope narrows when the alleged defamation implicates matters of public concern. *See Sullivan*, 376 U.S. at 279-82; Alfred H. Kelly, *Constitutional Liberty and the Law of Libel: A Historian's View*, 74 AM. HIST. REV. 429, 429-30 (1968). Because a strict-liability speech tort would "dampen[] the vigor and limit[] the variety of public debate" on matters of public concern, a heightened scienter standard applies: Plaintiffs must prove "actual malice"—the speaker's knowledge or reckless disregard of a statement's falsity. *Sullivan*, 376 U.S. at 279-80. That standard allows some false statements to go unpunished but is necessary to avoid chilling vigorous debate on important issues. *See id.* at 271-72.

In addition to laws that directly regulate speech, other torts may sweep speech into actionable conduct. When that occurs, "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Claiborne*, 458 U.S. at 916-17. These restraints apply to the tort of intentional infliction of emotional distress, which ordinarily requires a plaintiff to show that injurious conduct was "sufficiently 'outrageous.'" *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 53 (1988). But if a public figure brings suit based on a defendant's speech, the public

figure must show actual malice. *Id.* at 56. As with defamation, "such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.*

The limits on imposing liability for intentional infliction of emotional distress are even tighter if the action causing harm was a protest on matters of "public concern at a public place adjacent to a public street." *Snyder*, 562 U.S. at 456. "Time out of mind[,] public streets and sidewalks have been used for public assembly and debate," so a tort cannot be allowed to effectively prohibit such protest. *Id.* (internal quotation marks omitted). Protest speech can be subject to reasonable time, place, and manner restrictions, but it cannot give rise to liability for being "outrageous" or causing emotional distress, even though that standard applies to non-speech infliction of emotional distress. *Id*. at 456-58. Extra limitations on tort liability are necessary to prevent such laws from chilling public debate. *Id.* at 458.

This Court has applied the same reasoning to the tort of malicious interference with business. In *Claiborne*, Charles Evers, Field Secretary of the NAACP, helped organize and carry out a boycott of white merchants in Claiborne County, Mississippi, to protest racial segregation and inequality. 458 U.S. at 898-900. Throughout the protest, Evers addressed large crowds and made provocative statements, including a warning that, if the protestors caught people "going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902. Although the

boycott and protests were generally peaceful, there were some incidents of violence perpetrated by protestors against Black residents who did not observe the boycott. *Id.* at 903, 905-06. Business owners who suffered losses from the boycott sued defendants including Evers and the NAACP, obtaining a large judgment for malicious interference with business. *Id.* at 889-91, 893-94.

Evers's speech was not incitement because it did not result in imminent violence—any violence occurred much later. *Id.* at 928. Absent direct incitement, this Court held that Evers could not be liable for damages from the boycott because "there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence." *Id.* at 929. "An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause," this Court explained. *Id.* at 928. "When such appeals do not incite lawless action, they must be regarded as protected speech." *Id*. And protected speech is shielded from tort liability as well as from criminal punishment. *Id.* at 916-17, 916 n.51. Therefore, the malicious-interference-with-business award based on Evers's speeches could not stand. *Id.* at 921.

The constraints on liability resulting from speech vary according to the tort and surrounding circumstances—in some cases requiring malice, in others incitement of violence, meaning "the speaker's words were 'intended' (not just likely) to produce

imminent disorder." *Counterman*, 143 S. Ct. at 2115 (quoting *Hess*, 414 U.S. at 109); *Sullivan*, 376 U.S. at 279-80; *Claiborne*, 458 U.S. at 928-29. All restrictions, however, share a common purpose: giving breathing space to speech crucial to self-governance.

II. THE FIFTH CIRCUIT'S NEGLIGENT-PROTEST TORT COLLAPSES NECESSARY BREATHING SPACE AND THREATENS TO CHILL SPEECH.

By increasing the risks faced by leaders whose speech mobilizes protesters to visibly, audibly, and often provocatively occupy public spaces, the Fifth Circuit's negligent-protest tort threatens to chill public discourse, as organizers must balance First Amendment rights to protest against potential liability for third parties' torts that organizers did not encourage, much less commit. That result cannot be squared with this Court's recognition that free speech "is essential to our democratic form of government, and it furthers the search for truth." *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018) (citations omitted).

The threat of this new form of civil liability is certainly grave for the protest leader. But for democracy, even graver is the threat that such individuals will cease to speak in furtherance of organized protest. Their silence would imperil the types of vital protests that drove the historical movements that shaped America into the democracy it is today and that continue to fuel contemporary

movements. The negligent-protest tort therefore inflicts unjustifiable costs not only on protest organizers, but also on democracy itself.

A. The Negligent-Protest Tort Opens The Floodgates To Civil Liability When Movements Seek To Amplify Messages Through Group Protests.

Two features of the negligent-protest theory of liability render it insufficiently protective of speech. First, the Fifth Circuit's adoption of an objective negligence standard marks a dramatic departure from this Court's longstanding insistence on subjective, culpable mental states for speech-related crimes and torts. *See supra* Part I.B. Second, the Fifth Circuit's "analytical lever" for foreseeability of a third-party crime—"unlawful conduct" likely to elicit a police response and heighten the risk of violence[2]—will be the norm because protests, by nature, often involve unlawful conduct. Acts of civil disobedience have been a hallmark of many protest movements and may include organized resistance to the very laws the protesters challenge. *See, e.g.*, MARTIN LUTHER KING, JR., *Letter From Birmingham Jail*, *in* WHY WE CAN'T WAIT 76, 82 (1964) ("[T]here are two types of laws: just and unjust . . . . I would agree with Saint Augustine that 'an unjust law is no law at all.'"). And even when

[2] *See* Pet. App. 58a (Willett, J., concurring in part and dissenting in part). Moreover, any organizational choice alleged to be "unsafe," *id.* at 26a (majority), could trigger liability for third-party violence, *id.* at 17a.

protesters are not directly breaking the laws they protest, they frequently gather, march, or otherwise occupy public spaces in ways that not only garner attention for the protest but also violate state or local laws.

Regardless of form, protests historically have relied on organizers to mobilize collective action and amplify movements' messages. "Political uprisings, from peaceful picketing to lawless riots, have marked our history from the beginning—indeed, from *before* the beginning." Pet. App. 69a-70a (Willett, J., concurring in part and dissenting in part). "The Sons of Liberty were dumping tea into Boston Harbor almost two centuries before Dr. King's Selma-to-Montgomery march occupied the full width of the bloodied Edmund Pettus Bridge." *Id.* at 70a.

When group protests result in participants' arrests for their own violations of law while protesting, that is to be expected. Indeed, arrests can help expose the injustice that compelled the protest, thereby promoting real social change. The 1960s sit-ins organized by groups such as the Student Nonviolent Coordinating Committee (SNCC), for example, were credited with desegregating restaurants in 27 Southern cities within 6 months of the protests and "transformed the agenda of the national civil rights debate." *See* Christopher W. Schmidt, *Divided by Law: The Sit-ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93, 97-102 (2015).

But what if protest organizers throughout history faced not only punishment for their own civil disobedience, but also civil liability for third parties' torts that the organizers never encouraged or committed? With that increased threat of civil liability, some of American history's most iconic protest movements—including the Women's Suffrage and modern Civil Rights Movements—might have unfolded differently.

The July 2016 Baton Rouge Black Lives Matter protest mirrored the form of protests throughout American history. *See* Pet. App. 69a-71a (Willett, J., concurring in part and dissenting in part). Petitioner organized and led the event to protest police practices, blocking a public highway in front of the Baton Rouge Police Department Headquarters in violation of state law. LA. STAT. ANN. § 14:97; Pet. App. 4a-5a. During the protest, an unidentified individual threw a rock-like object at respondent. Pet. App. 5a.

The unidentified rock-thrower could face liability under Louisiana criminal and civil law. *See* LA. STAT. ANN. § 14:34 (aggravated battery); LA. CIV. CODE ANN. art. 2315 (tort liability). And petitioner, like any protester, could face liability if he were to commit any such unlawful acts. But the negligent-protest tort endorsed by the Fifth Circuit threatens a new and very different form of liability stemming from petitioner's organizing and participating in the protest itself. In that advocacy context, Judge Willett explained, "[t]he First Amendment 'imposes restraints' on what (and whom) state tort law may punish." Pet. App. 43a

(Willett, J., concurring in part and dissenting in part) (quoting *Claiborne*, 458 U.S. at 916-17). The negligent-protest tort ignores those restraints, threatening the core of the First Amendment where "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy" except in narrow circumstances that the negligent-protest tort does not require. *See Brandenburg*, 395 U.S. at 447; *see also infra* Part II.B.

The negligent-protest tort is particularly dangerous to free speech because it takes very little to trigger a protest leader's exposure, given that protests are inherently disruptive. The ease of invoking the tort and establishing foreseeability is too likely to chill organizational choices such as amplifying protest messages through advocacy of collective action. And a police response will be even more foreseeable when organizers use a classic tool of civil disobedience—unlawful conduct—such as the crime of blocking a public highway, Pet. App. 2a, 16a, or perhaps even jaywalking, a misdemeanor in some states.[3] *See infra* pp. 18-22. In the context of the Baton Rouge Black Lives Matter protest, for example, state-law violations beyond directing protesters to block the highway (LA. STAT. ANN. § 14:97) arguably could have included allegations that petitioner condoned protesters' littering (*see id.* § 30:2531(A)) or urged walking in the street where a sidewalk was available (*id.* § 32:216). And even if limited by a required criminal predicate

[3] *E.g.*, GA. CODE ANN. §§ 40-6-1, 40-6-92; MONT. CODE ANN. §§ 61-8-104, 61-8-503; OKLA. STAT. tit. 47, §§ 11-102, 11-503.

act, that bar is far too low, as "criminal laws have grown so exuberantly . . . that 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); *see* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314-15 (2012) (estimating ten million misdemeanor cases filed annually).

If laws can be used "not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part). Indeed, "in reaction to protest movements, some states have taken steps to increase penalties" for "historically minor violations of the law" like trespass and blocking traffic. Nick Robinson & Elly Page, *Protecting Dissent: The Freedom of Peaceful Assembly, Civil Disobedience, and Partial First Amendment Protection*, 107 CORNELL L. REV. 229, 244-47 (2021) (documenting increased penalties as seeming attempts to deter protests and civil disobedience). As Judge Willett observed, Fifth Circuit law now suggests that First Amendment protection for protest leaders is a "phantasm, almost incapable of real-world effect" because leaders can be liable "anytime the protest-leader's conduct is 'unlawful' or 'wrongful.'" Pet. App. 56a (Willett, J., concurring in part and dissenting in part). And this would apply even when the organizer had no

awareness of, much less control over, the act that injured the plaintiff.

The burden of organizers' responsibility for potentially staggering adverse judgments, not to mention increased insurance and litigation costs, could smother the grassroots organizing and advocacy that have defined America. *See* Tasnim Motala, *"Foreseeable Violence" & Black Lives Matter: How* Mckesson *Can Stifle a Movement*, 73 STAN. L. REV. ONLINE 61, 76 (2020); Timothy Zick, *The Costs of Dissent: Protests and Civil Liabilities*, 89 GEO. WASH. L. REV. 233, 235 (2021). And the Fifth Circuit's "exotic theory" of negligent-protest liability, had it existed historically, "would have enfeebled America's street-blocking civil rights movement, imposing ruinous financial liability against citizens for exercising core First Amendment freedoms." Pet. App. 69a (Willett, J., concurring in part and dissenting in part).

Due to the dynamics of large groups converging to protest politically and emotionally charged topics, violence looms as a possibility even within peaceful movements. "You might even say that violence is nearly *always* foreseeable when an organizer takes specific action by putting together a large-enough event," Judge Willett observed. *Id.* at 68a. For example, student activists organized SNCC's Freedom Ride of 1961 as an act of nonviolent civil disobedience, traveling through the South on integrated buses to protest state statutes prohibiting integration in interstate-travel facilities. *See* RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL

JUSTICE 141 (2006). Violence erupted, however, when segregationists viciously attacked the Freedom Riders in Alabama, resulting in injuries not only to protesters, but also to bystanders, journalists, and Klansmen. *See id*. at 156-58. Under the Fifth Circuit's theory, it could be argued that those injuries were foreseeable consequences of the unlawful integration of the buses at the direction of SNCC organizers. *See* Zick, *supra*, at 273 (arguing that the negligent-protest theory "authorizes holding leaders accountable for the violence even of those *opposed* to the protest").

Similarly, although Dr. King was a committed proponent of nonviolent protest, his 1968 Memphis march to support striking sanitation workers turned violent when some young men began breaking storefront windows. *See* Pet. App. 70a (Willett, J., concurring in part and dissenting in part). "Had Dr. King been sued, either by injured police or injured protestors," Judge Willett explained, "I cannot fathom that the Constitution he praised as 'magnificent'—'a promissory note to which every American was to fall heir'—would countenance his personal liability." *Id.* at 70a-71a (footnote omitted) (quoting Dr. King's 1963 "I Have a Dream" speech). Yet that is precisely the result the Fifth Circuit's "exotic theory" would yield. *Id.* at 69a.

Violence erupted incident to other historic protests as well, including the 1913 march on Washington organized by leaders of the Women's Suffrage Movement. *See* Lorraine Boissoneault, *The Original Women's March on Washington and the*

Suffragists Who Paved the Way, SMITHSONIAN MAG. (Jan. 23, 2017), https://www.smithsonianmag.com/history/original-womens-march-washington-and-suffragists-who-paved-way-180961869/. As thousands of women, including Helen Keller, journalist Nellie Bly, and activist Ida B. Wells, gathered in the Nation's Capital to advocate for a constitutional amendment guaranteeing women the right to vote, they were often "heckled and harassed by the crowd" of onlookers. *Id*. Pennsylvania Avenue was "completely choked with spectators" who "converge[d]" on protesters and blocked their route. Alan Taylor, *The 1913 Women's Suffrage Parade*, ATLANTIC (Mar. 1, 2013), https://www.theatlantic.com/photo/2013/03/100-years-ago-the-1913-womens-suffrage-parade/100465/. Dozens of marchers were injured, "shoved and tripped by spectators." *Id.* Had the negligent-protest tort been available, anyone injured—whether protesters, medical caregivers, or perhaps even some of the heckling and violent onlookers—could have sued the march's organizers, pointing to street-blocking tactics as the trigger for negligent-protest liability.[4]

Contemporary movements also would be severely threatened by negligent-protest liability, as the same possibility of incidental violence and police presence looms whenever groups gather to challenge

[4] Although organizers had obtained a permit for the march, it is not difficult to imagine the possibility, given the ensuing conflict, that an organizer nonetheless could have been charged criminally for directing protesters "to occupy the roads" on Capitol grounds "in such a manner as to obstruct or hinder their proper use." D.C. CODE § 882 (1911).

governmental action and clash with others on hot-button issues. Student walkouts have become a powerful tool for today's youth to voice concerns over widely debated topics, including COVID-19, immigration, gun control, and climate change. Such walkouts could include the same type of street-blocking features used in historical movements and—whether because of truancy, street-blocking, or other actions—have elicited police responses that increase the likelihood of negligent-protest liability. *See, e.g.*, Mark Kittle, *Wisconsin High School Threatens Students with Truancy and Fines for Protesting Mask Rules*, THE FEDERALIST (May 14, 2021), https://thefederalist.com/2021/05/14/wisconsin-high-school-threatens-students-with-truancy-and-fines-for-protesting-mask-rules/; Jason Scronic, *Take Your Seats: A Student's Ability to Protest Immigration Reform at Odds with State Truancy and Compulsory Education Laws*, 2 FLA. A&M U. L. REV. 185, 186-87 (2007); Melinda Meza, *5 Stockton High School Students Arrested During Protests*, KCRA 3 (Feb. 23, 2018), https://www.kcra.com/article/5-stockton-high-school-students-arrested-during-protests/18705070; Somini Sengupta, *Protesting Climate Change, Young People Take to Streets in a Global Strike*, N.Y. TIMES (Sept. 21, 2019), https://www.nytimes.com/2019/09/20/climate/global-climate-strike-html.

If the risks of a walkout no longer peak at truancy, but also include financially crippling civil damages for injuries caused by a third party, student activists may choose not to organize protests—a costly loss to democracy. Like the student Freedom Riders and

SNCC organizers of lunch-counter sit-ins, the leaders of today's student protests have a vital role to play in furthering public discourse and effecting meaningful change. The negligent-protest tort imperils such contributions, threatening to eradicate the breathing space that enables core protected speech to flourish.

The tort's stifling effects, moreover, will span the political spectrum. In the pre-*Dobbs* abortion context, for example, this Court struck down attempts to limit pro-life protests outside of clinics to preserve the breathing space needed for free speech. *See, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 773-75 (1994); *McCullen v. Coakley*, 573 U.S. 464, 469-70, 497 (2014). These protests involved confrontations on public streets and occupation of public spaces, and "there is no question that this public sidewalk area is a 'public forum,' where citizens generally have a First Amendment right to speak." *Madsen*, 512 U.S. at 790 (Scalia, J., concurring in the judgment in part and dissenting in part). The location of these clinic protests also, however, triggered some of the same often unlawful street-blocking that occurred during the Baton Rouge Black Lives Matter protest and that inhered in many landmark civil-rights protests, making a police response foreseeable. The close proximity between protesters and patients attempting to enter the clinic, the emotionally charged content of protesters'—and counter-protesters'—speech,[5] and the history of violence between these

[5] In *Madsen*, Justice Scalia described exchanges between pro-life and pro-choice proponents in front of the Florida clinic, listing a wide range of expressive activity that was documented

groups[6] may foreseeably "creat[e] the conditions under which a plaintiff is likely to be injured," triggering negligent-protest liability. Pet. App. 37a. The breathing space the First Amendment requires leaves no room for the negligent-protest tort's chilling effects across the political spectrum.

B. Expansive Tort Liability Will Chill Too Much Protest Speech.

By imposing liability on protest leaders for negligently directing a protest, the Fifth Circuit's approach negates the First Amendment protections this Court requires. *See supra* Part I.B. As discussed above, the threat of civil liability restricts freedom of speech just as much as, if not more than, criminal prosecution. *See, e.g.*, *Sullivan*, 376 U.S. at 277. And the negligent-protest tort exposes protest leaders to the possibility of almost limitless liability, which contravenes a robust First Amendment. *See* Pet. App. 15a-18a; *see also Sullivan*, 376 U.S. at 277-78.

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on film without violent encounters. 512 U.S. at 787-90 (Scalia, J., concurring in the judgment in part and dissenting in part). But with one protester yelling, "You are responsible for the deaths of children . . . . You are a murderer," *id.* at 789, and another shouting, "Right to life is a lie, you don't care if women die," *id.* at 787, things could have gone another way.

[6] *See, e.g.*, Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. TIMES (Nov. 29, 2015), https://www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html.

This Court's constraints on outlawing incitement arose from the principle that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy" except in the narrowest circumstances. *Brandenburg*, 395 U.S. at 447. And this same principle animated this Court's protection of speakers from tort liability in *Hustler*, 485 U.S. at 56, and protest leaders from tort liability in *Snyder*, 562 U.S. at 458-59, and *Claiborne*, 458 U.S. at 912-13. In each case, general rules of causation and liability had to be adjusted to serve an overarching purpose: protecting free speech.

The Fifth Circuit's negligent-protest tort cannot be reconciled with either this Court's tests or the reasoning behind them. It does not cabin liability only to incitement, because it restricts speech irrespective of the organizer's intent and absent a showing that resulting harms are imminent. Pet. App. 17a, 35a-36a; *Brandenburg*, 395 U.S. at 447. Contrary to the rule in *Claiborne*, the tort exposes any protest organizer to liability based on harms caused by other protestors, with no requirement that the organizer "authorized, ratified, or even discussed" another's injurious act. 458 U.S. at 924; *see* Pet. App. 25a-26a.

And if liability under the negligent-protest tort is limited only by common-law rules of foreseeability and but-for causation, it presents the same dangers as the civil liability this Court rejected in *Sullivan*, 376 U.S. at 277, and *Claiborne*, 458 U.S. at 918-20—not to mention the chill caused by the threat of costly litigation, successful or not. Civil-damages exposure

for a "negligent protest" would likely exceed any available criminal punishment for the type of violations the court below pointed to as justifying petitioner's liability. For example, in this case, the Louisiana law that prohibited blocking highways allowed a fine of "not more than two hundred dollars" or "imprison[ment] for not more than six months or both." LA. STAT. ANN. § 14:97; Pet. App. 16a. By contrast, respondent seeks damages for pain and suffering, physical injuries, emotional and mental distress, loss of employment, medical bills, inconvenience, future lost wages, and all litigation expenses. Complaint for Damages at 7, *Doe v. Mckesson*, 272 F. Supp. 3d 841 (M.D. La. 2017) (No. 16-00742).

Moreover, a cause of action brought by one party does not preclude causes of action by others injured during a protest, exposing the organizer to almost limitless liability. *See Sullivan*, 376 U.S. at 278. And plaintiffs will not always be law-enforcement officers;[7] nothing in the Fifth Circuit's approach bars suits by fellow protesters who suffer injuries. Nor would it bar suits by counter-protesters who allege that they were

[7] Suits by law-enforcement officers may be particularly problematic. Officers have immense discretion to decide when to respond to a crime. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Accordingly, officers can wield great power over the cost of protesting. *See Juhl v. Airington*, 936 S.W.2d 640, 648 (Tex. 1996) (Gonzalez, J., concurring) (An officer's suit for damages for a back injury sustained while removing abortion protesters would be a "back-door attack by state actors on a constitutional right—the right to political speech.").

injured—a group with great incentive to burden the protest organizer's speech.

The fundamental flaw in the Fifth Circuit's negligent-protest tort is that it collapses the breathing space essential to robust public speech and debate. *Snyder*, 562 U.S. at 458; *Hustler*, 485 U.S. at 52; *Sullivan*, 376 U.S. at 271-72. Tort regimes that impose liability on protest leaders for mere negligence "would have an undoubted 'chilling' effect on" the protests themselves. *Hustler*, 485 U.S. at 52. Avoiding this chilling effect is the underlying purpose of this Court's precedent restricting liability for speech, from direct regulation of speech (as in *Brandenburg*) to speech-based torts (such as defamation) and more general torts (such as intentional infliction of emotional distress and malicious interference with business). *See supra* Part I.B. Allowing a speech-related tort that lacks any such restrictions on liability would seriously undermine that purpose and, in the process, gut the First Amendment guarantees on which a thriving democracy depends.

CONCLUSION

The Court should grant the petition and reverse the judgment of the Fifth Circuit.

Respectfully submitted,

JOHN W. WHITEHEAD
WILLIAM E. WINTERS
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888

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ERIN GLENN BUSBY
Counsel of Record
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS
SCHOOL OF LAW
SUPREME COURT CLINIC
727 East Dean Keeton Street
Austin, TX 78705
(713) 966-0409
ebusby@law.utexas.edu