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 OFFICER JOHN DOE, RESPONDENT

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## QUESTION PRESENTED

Petitioner presents the following question:

> Do the First Amendment and this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), foreclose a state law negligence action making a leader of a protest demonstration personally liable in damages for injuries inflicted by an unidentified person's violent act there, when it is undisputed that the leader neither authorized, directed, nor ratified the perpetrator's act, nor engaged in or incited violence of any kind? Cert. Ptn. (i).

Respondent, John Doe Police Officer, argues that (i) the First Amendment does not protect against tort liability for the reasonably foreseeable consequences of one's own negligent, illegal, and dangerous activity that poses a risk of serious harm to others and (ii) police officers need tort protection from such illegal activity and serious harm.

## RULE 15 STATEMENT

Petitioner through the "Question Presented" avers that "it is undisputed that the leader neither authorized, directed, nor ratified the perpetrator's act, nor engaged in or incited violence of any kind." The Complaint/ Amended Complaint do not allege that McKesson authorized or directed the specific act (this specific person to throw this specific object). They do allege that prior violent conduct created a well known pattern of violence at Black Lives Matter protests and that McKesson ratified the on-going violence and pattern of violence at the prior protests and at the Baton Rouge protest by taking no action to stop the BLM protestors from throwing objects at police. By July 9, 2016, as set forth in the Amended Complain, McKesson was the leader activist of BLM. The pattern was set: out-of-state protesters representing BLM fly into a town, gather, block a highway, engage and entice police, loot, damage property, injure bystanders, injure police. By July 9, 2016, when McKesson organized the Baton Rouge protest/riot—he had no reason to expect a different outcome—police will be injured. Not once did the face of BLM—McKesson—disavow the violence. "By July 9, 2016, Defendants were in Baton Rouge for the purpose of staging a protest. Both past and ongoing protests in other cities staged by Defendants resulted in violence and property loss. DEFENDANTS conspired to violate the law by planning to block a public highway." Plt. Comp. ¶ 10. "DEFENDANTS were in Baton Rouge for the purpose of demonstrating, protesting and rioting to incite others to violence against

police and other law enforcement officers." Plt. Comp. ¶11. ". . . . DeRay McKesson was in charge of the protests and he was seen and heard giving orders throughout the day and night of the protests." Plt. Comp. ¶17. The Complaint references the looting and throwing objects at police and, "Defendant DeRay McKesson was present during the protest and he did nothing to calm the crowd and, instead, he cited the violence on behalf of the Defendant BLACK LIVES MATTER." Plt. Comp. ¶19. "Following the violence, DEFENDANTS took credit/blame for the protest and riot."Plt. Comp. ¶23. "On Sunday, DeRay McKesson told the New York Times, 'The police want protesters to be too afraid to protest.' He suggested that he intended to plan more protests." Plt. Comp. ¶24. The Amended Complaint provides greater detail regarding the history of BLM violence against police in multiple protests led by McKesson, who refused to disavow the violence. See, e.g., ". . . . When confronted with the inexcusable violence, DeRay McKesson justified the violence as looking for justice. He was prompted several times to say that he did not condone the violence, but he would not." Am.Comp.¶9.

Since the Fifth Circuit's last ruling, this action was remanded to district court where Black Lives Matter was dismissed. DeRay McKesson is the remaining defendant. Officer John Doe has been deposed during which he testified that he, along with his team and other teams, was briefed before McKesson arrived and

told that McKesson was the leader. Officer Doe personally witnessed McKesson acting as the leader, ordering protesters into the street, and being present while the crowd gathering in the highway was throwing objects throughout the day and, not once, did DeRay ask the crowd to stand down. The Friday night before the Saturday protest, McKesson met with the New Black Panthers and then again the next morning when the NBP appeared armed with weapons at a City Park before joining McKesson and BLM protesters on the highway. According to Officer Doe, many of the local Black leaders did not welcome the hoard of out-of-state protestors that descended on the City. While livestreaming himself leading the crowd down Airline Highway to block 1-12, DeRay McKesson was arrested shortly after the looting when Officer John Doe was struck with a thrown object and injured. Just prior to his arrest, McKesson was at the Circle K in the street across from Police Headquarters helping himself to a stolen water bottle from the stack. McKesson did nothing to dissuade the ongoing looting or violence.

McKesson represents that he himself did not engage or encourage any violence, when in fact the Complaint alleges that he, as a BLM leader, had on multiple prior occasions ratified violence against police. McKesson misses his mark when he fails to disclose that at the time Martin Luther King street-blocking protests, blocking a public highway was not illegal—it is now.

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OTHER AUTHORITIES

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KARE 11 staff, *Officer suffers spinal fracture during I-94 shutdown*, KARE 11 News, July 10, 2016, https://www.kare11.com/article/news/officer-suffers-spinal–fracture-during-i-94-shutdown/89-268434384 .......................................16

Jason Lange & Lauren Hirsch, *Three Countries Urge Caution Traveling to U.S. Amid Protests, Violence*, July 10, 2016, https://www.reuters.com/article/us-usa-police-travel-idUSKCN0ZQ0RM .......18

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## SUMMARY OF THE ARGUMENT

It is important to note from the outset, McKesson's conduct does not pass the reasonable time, place and manner test under Louisiana state law, an issue foreclosed by the Louisiana Supreme Court. The First Amendment does not protect against tort liability for the reasonably foreseeable consequences of one's *own* negligent, illegal, and dangerous *activity*. This Court did not hold otherwise in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1964). *Claiborne* involved a lawful boycott (and various accompanying activities), in which certain persons (but not all) engaged in violent activity, and a state court held the whole boycott illegal, based on the violent acts of some, and imposed liability on all involved.

Given First Amendment protections, this Court in *Claiborne* had to separate constitutionally protected activities and persons from those not protected. In that context, this Court held that those *not* engaged in illegal acts could not be held liable for *others*' illegal acts, based on their speech, unless the person authorized, directed, or ratified the perpetrator's act, or engaged in or incited violence itself. But here the issue is whether the First Amendment protects one from ordinary tort liability for the reasonably foreseeable consequences of one's *own* negligent, and illegal *activity*, and *Claiborne* did not find First Amendment protection for that. In fact, *Claiborne* recognized protection for *peaceful, lawful* activity, *not* for unpeaceful, unlawful activity of the sort at issue here. (Part I.)

A contrary rule would encourage negligent, unpeaceful, and illegal behavior at the expense of others and, in particular, would expose law enforcement officers to serious harm that tort liability is intended to discourage. (Part II.)

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## ARGUMENT

### I.

### The First Amendment does not protect against tort liability for the foreseeable consequences of one's own negligent, illegal, and dangerous activity posing a risk of serious harm to others.

When a demonstration that could be lawful and peaceful, and thus constitutionally protected (as expression, association, assembly, or petition), is, instead, illegal at its outset having been staged in violation of state criminal law, then transforms into an unlawful, unpeaceful, and dangerous activity—with participants unlawfully blocking a public highway, blocking traffic, confronting police trying to clear the highway, looting a store for objects to throw at police, and throwing objects at police[1]—does the First Amendment protect the leader of that illegal activity from the reasonably foreseeable consequences of his *own* negligent, illegal, and

[1] *Doe v. McKesson*, 71 F.4th 278, 282 (5th Cir. 2023) The Fifth Circuit's use of Amended Complaint allegations is appropriate because amendment was deemed futile under *Claiborne*, which doesn't control, so leave to amend was properly granted.

dangerous *activity* under federal constitutional protections? Particularly, here the conduct is against the backdrop of a pattern of conduct. McKesson may not seriously argue to this Court that while doing the same thing over and over, he expected a different result in Baton Rouge.

No. This is so because (inter alia) (**A**) *Claiborne* involved liability on those engaged in lawful activity for the unlawful acts of *others*, not the consequences of one's *own* illegal acts at issue here, (**B**) *Claiborne* does not preclude liability for the foreseeable consequences of one's *own* illegal acts, which are beyond First Amendment protection, and (**C**) a contrary rule would harm police officers, the public, and the rule of law.

There is nothing un-American or unconstitutional about chilling speech designed specifically and effectively to engage police officers, where time after time the time, the place and manner of the speech has resulted in looting, property destruction, business closures, personal injury, economic loss, bystander and police injury. The time, place and manner of delivering First Amended protected speech matters.

### A. *Claiborne* involved limiting the liability on those engaged in lawful activity for the unlawful acts of *others*, not the foreseeable consequences of one's *own* illegal acts at issue here.

*Claiborne* involved a unique problem and solution not at issue here. The problem was that a state court

had "concluded that [an] entire boycott was unlawful," due to the presence of " 'force, violence, or threats' " by " 'certain of the defendants,' " but not all, and so imposed liability on lawful and unlawful defendants alike among those involved in certain roles and activities in the boycott. 458 U.S. at 895 (citation omitted). This was an overbroad remedy given the presence of some activity protected by the First Amendment.

The solution required the *Claiborne* Court to make two sets of distinctions. First, it had to separate activities protected by the First Amendment from activities not so protected. As discussed in Part I(B), it found that peaceful, lawful activity that falls within First Amendment categories (expression, association, peaceful assembly, petition) is protected, but unpeaceful, illegal activity is *not* protected—*even if* it includes some speech, association, assembly, or petition. The First Amendment does not create a shelter for illegal or tortious conduct.

Second, the *Claiborne* Court had to separate those engaging in peaceful, lawful (and so constitutionally protected) activities from those doing unpeaceful, unlawful (and so constitutionally unprotected) activities.

In separating the lawful from the unlawful, the *Claiborne* Court provided precise guidelines to protect the lawful from liability for the acts of lawbreakers. In that context, *Claiborne* held that the lawful are not liable for the illegal actions of *others* unless they "authorized, directed, or ratified specific tortious activity," and even then liability would be limited to the

consequences of that specific activity. *Id.* at 927. However, those engaging in illegal activity that causes harm may be held liable: "Unquestionably those individuals may be held responsible for the injuries *that they caused*; a judgment tailored to the consequences of their *unlawful conduct* may be sustained." *Id.* at 926 (emphasis added). Here, the conduct was both expected and intended by McKesson.

This case involves the foreseeable consequences of Petitioner DeRay McKesson's *own* illegal actions, not his speech or advocacy. As a result, the legal consequences of his illegal activity is not shielded by the First Amendment and is not protected by *Claiborne*. Here, against the backdrop of previous violent protests turned riots, purposefully blocking public highways, engaging police, looting, injuring bystanders and property and injuring police, McKesson planned and led an unlawful protest situated in front of police headquarter on a public highway for the purpose of "rioting,"[2]

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[2] For example, as the Fifth Circuit described some of the facts alleged in the Amended Complaint (which at this stage must be accepted as true with all favorable inferences to Officer Doe), McKesson "was the prime leader and an organizer of the protest," he "led the protestors to block the public highway," *McKesson*, 945 F.3d at 823, he then "led protestors down a public highway in an attempt to block the interstate," "the protestors followed," 945 F.3d at 828, and "he knew he was in violation of the law and livestreamed his arrest," *id*. In his presence, "some protestors began to throw full water bottles, which had been stolen from a nearby convenience store," and he "did nothing to prevent the violence or calm the crowd, and . . . 'incited the violence.' " *Id*. at 823 (citation omitted). Moreover, he "traveled to Baton Rouge 'for the *purpose* of . . . rioting.' " *Id*. at 832 n.9 (emphasis added by Fifth Circuit) (citing Amended Complaint). Of course, *Claiborne* made

and engaging police and this is when the serious harm to Respondent Officer John Doe occurred for which McKesson may be held liable under Louisiana state law. Consequently, it does not involve the *Claiborne* situation where a person was engaged in peaceful, lawful, and constitutionally protected First Amendment activity and the government (by law) sought to make that innocent person liable for the illegal acts of others. *Claiborne* does not control on this fundamentally factual difference alone.

### B. *Claiborne* does not preclude liability for the foreseeable consequences of one's *own* illegal acts.

*Claiborne* made clear that one may be liable in tort for the reasonably foreseeable consequences of one's *own* illegal acts by holding that (i) unpeaceful, illegal acts are not protected by the First Amendment and (ii) those engaged in unlawful acts are liable for the consequences of their own illegal actions.

Regarding the scope of First Amendment protection, *Claiborne* made clear that, even if activity involves expression, association, assembly, and petition, it is only protected if it is peaceful and lawful. Unpeaceful, unlawful activity is unprotected even if it is accompanied by, or associated with, expressive activity, e.g., chanting slogans while breaking the law. The First Amendment provides no protection for illegal activity.

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clear that "riot[ing]" lacks First Amendment protection. 458 U.S. at 912.

So if, as alleged here, a "demonstration" illegally starts on a public highway and becomes a "riot," the organizer involved loses all First Amendment protection. And that is the end of any *Claiborne* and First Amendment constitutional analysis: Absent First Amendment protection, there is no basis to interrupt the ordinary workings of state tort law imposing liability for negligence.[3]

Of course, *Claiborne* repeatedly emphasized that peaceful and lawful protests, e.g., it began by "not[ing] that certain practices generally used to encourage support for the boycott were uniformly *peaceful* and *orderly*." 458 U.S. at 903 (emphasis added). "The few marches associated with the boycott *were carefully controlled by black leaders*." *Id.* (emphasis added). "The police made *no arrests*—and *no complaints* are recorded—in connection with the picketing and occasional demonstrations supporting the boycott." *Id.* This Court repeatedly emphasized that "peaceful" activity had First Amendment protection. *Id.* at 908 n.43 (right "'peaceably to assemble'"), 909 ("assemble peacefully" and "peaceful march and demonstration"),

[3] The Fifth Circuit found that Officer Doe "plausibly alleged" the elements of tort negligence, *McKesson*, 71 F.4th at 282, so under ordinary rules his "claim for relief is sufficiently plausible to allow him to proceed to discovery," 71 F.4th at 288. And if the allegations are proven, under the 5 elements of the duty-risk analysis McKesson would be liable for Officer Doe's serious physical, economic, and other injuries resulting from being struck in the face by a rock or piece of concrete hurled by a participant in the demonstration that turned into an alleged riot with objects being hurled at police and in which McKesson was seen and heard to be giving orders that others followed. 71 F.4th at 289.

910 ("peaceful pamphleteering"), 912 (not "through riot or revolution"). And state "power to regulate economic activity" does not include "a comparable right to prohibit *peaceful* political activity." *Id.* at 913 (emphasis added). So that is the sort of activity protected by the First Amendment. But that "peaceful" and "carefully controlled" activity is a far cry from the activity at issue here, alleged to be a "riot," which *Claiborne* excluded from constitutional protection. The activity here was neither peaceful nor lawful, so it lacks First Amendment protection, where the reasonable time, place and manner requirement under state law was violated.

Furthermore, even in the context of peaceful, lawful protests protected by the First Amendment, *Claiborne* made clear that violence and threats of violence associated with those protests lack First Amendment protection. *Id.* 458 U.S. at 916. So states may "impos[e] tort liability for . . . losses . . . caused by violence and . . . threats of violence." *Id.*

Of course, states may impose reasonable time, place, and manner restrictions on speech, and speech outside those lawful restrictions lacks constitutional protection. Baton Rouge permissibly barred occupying highways, which meant that even lawful speech would be unprotected there, so the activity in the street was constitutionally illegal and lacked First Amendment protection.

The alleged negligence here flowed from this illegal activity: "Doe will be required to present specific

evidence satisfying each of the five elements listed above, and McKesson will of course be entitled to introduce evidence supporting his contention that he did not breach his duty to organize and lead the protest with reasonable care. The only question before us is whether Doe is entitled to proceed to discovery on his negligence claim. We are compelled to conclude that he is. Having confirmed that Louisiana state law recognizes the negligence theory Doe pursues here, and that Doe plausibly alleges such a claim, we now consider McKesson's argument that imposing liability in these circumstances is prohibited by the First Amendment. We conclude that the First Amendment allows such liability, for largely the same reasons expressed in the prior panel opinion. *Doe v. McKesson*, F.3d 830, 828-32 (5th Cir. 2019)." *Doe v. McKesson*, 71 F.4th 278, 289 (5th Cir. 2023). Thus, Officer Doe adequately alleged that McKesson is liable in negligence for organizing and leading the Baton Rouge demonstration to illegally occupy a highway. The basis of potential liability in this case is McKesson's *actions and conduct* in directing the illegal demonstration, not his speech and advocacy.

Finally, *Claiborne* expressly *said* that states may impose tort liability for one's *own* tortious acts and the reasonably foreseeable consequences thereof. For example: "No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence." 458 U.S. at 916. That was in the context of paragraph discussing the lack of First Amendment for violence and threats of violence, so those actions were the focus of this

statement (as was much of *Claiborne*'s discussion since violence was particularly at issue there). But the doctrine that one is not protected from tort liability by the First Amendment for one's *own* illegal acts (which may include violence and threats of violence) emerges clearly in this statement, and that doctrine is not restricted to violence and threats of violence.[4] This is clear from this Court's often use of "unlawful" where the "precision" that this Court required, *id*. at 916, would require the use of "violence" to establish a rule that only extended to unlawful action that is violent or threatens violence. For example, *Claiborne* said that "[o]nly those losses proximately caused by *unlawful* conduct may recovered." *Id*. at 918 (emphasis added). And it distinguished situations where it said no liability could be imposed from "whether an individual may be held liable for *unlawful* conduct that he himself authorized or incited," with the understanding that liability can arise for "unlawful," not just violent, acts. *Id.* at 920 n.56 (emphasis added).

In sum, because McKesson's *own* activity at issue here was not his speech or advocacy, but rather his unpeaceful, illegal, and dangerous activity—against the proven pattern posing a backdrop of predictability—it lacks First Amendment protection, which ends the analysis. And *Claiborne* also indicated that liability for the reasonably foreseeable consequences of one's *own*

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[4] The Fifth Circuit establishes why this Court did not invent a 'violence/nonviolence' distinction. *McKesson*, 71 F.4th at 297 (citing and discussing the dissent's view, 71 F.4th at 304).

*unlawful* activity is not precluded by the First Amendment.

From the foregoing, it is clear that the relevant[5] analysis of Judge Willett's dissent, *McKesson*, 71 F.4th at 300-314 (concurring in part, dissenting in part), is erroneous—as both the Louisiana Supreme Court and Fifth Circuit majority establish, in *McKesson*, 71 F.4th at 294-297 (majority detailed contrast of dissenting opinion with that of the State of Louisiana and this Court). Essentially, the dissent believes that Louisiana State Law should require intentional conduct.[6] *McKesson*, 71 F.4th at 309. *Claiborne* created a broad categorical rule that shields persons engaged in unpeaceful, illegal, and dangerous activity that poses a reasonably foreseeable risk of serious harm from tort liability for their *own* actions *if* they are in a context that also involves First Amendment protected activity—unless they actually had specific intent to authorize, direct, or ratify a perpetrator's particular violent act. But as the majority notes, this analysis relies on a

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[5] Judge Willett's previous argument questioning tort liability under state law, *McKesson*, 945 F.3d 818, at 836-840, has now been answered by the Louisiana Supreme Court. Notwithstanding, Judge Willet shifts his argument and now argues that state law has little to no application and suggests that the First Amendment insulates McKesson from liability from violations of state law and for the serious injuries caused by his negligent conduct. *McKesson*, 71 F.4th at 302.

[6] Willett writing, "The majority's actual analytical lever—"unlawful conduct"—sweeps far too broadly and would leave the First Amendment as a mere backstop that shields a protest leader from liability only for conduct that state law already deems lawful." 71 F.4th at 308.

purported "violence/nonviolence distinction" and specific intent that is based on a rejection of state law negligence duty risk analysis and misreading of *Claiborne*. *McKesson*, 71 F.4th at 295. ("We struggle to see how a non-violent action that unreasonably causes violence could be categorically disallowed for purposes of *Claiborne*. In short, assuming arguendo that violence is required to make liability accord with the First Amendment—which it is not—the facts alleged here sufficiently satisfy that condition.") *McKesson*, at 295. The apt example previously noted by the Fifth Circuit, *McKesson*, 945 F.3d 818, 830, n.7 ("But that still overreads Claiborne Hardware; if this were the rule, then a protest leader who directs protesters to occupy an empty business could not be held liable for a violent confrontation that foreseeably follows between a protester and a business owner or police officer."). The Fifth Circuit cites the example of *National Organization for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994) at *McKesson*, 71 F.4th at 293.[7]

If in fact *Claiborne* requires "specific intent" and *mens rea* (See, Pet. at 20-23), the allegations of the Complaint make clear that McKesson should be held

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[7] "In doing so, the court carefully distinguished between actions that encourage legitimate expressive activity, which are protected by the First Amendment, and actions that provide for unlawful behavior, which are not. State law may not prohibit 'the organizing of lawful demonstrations which may ultimately include unauthorized unlawful acts.' *National Organization for Women*, 37 F.3d at 657. But '[i]t is well settled that incitement to specific unlawful acts may be prohibited without running afoul of First Amendment guarantees.' *Id.*" *McKesson*, 71 F.4th at 294.

liable for his leadership role in BLM as an activist organizer where BLM itself, as expressed by and through McKesson as a spokes person, possessed unlawful goals and that McKesson held a specific intent to further those illegal aims to strike back at police in retaliation for what BLM/McKesson deemed to be wrongful shootings of minority citizens. McKesson's prior pattern of conduct is his downfall.

The legal/illegal (majority) vs. violent/nonviolent (dissent) distinction is actually based on the dissent's reliance on chancery court opinion that grounded liability in nonviolent protest, while the Mississippi and U.S. Supreme Courts grounded liability solely in the presence of 'force, violence or threats, (see, contrast *McKesson*, 71 F.4th 295 with 304 (citation omitted)), which is *why Claiborne* talked about violence and threats thereof. 71 F.4th at 295. That *Claiborne* was not creating the purported violence/nonviolence distinction adopted by Judge Willet in his dissent is clear because (i) *Claiborne* makes frequent reference to unlawful conduct when, under the dissent's view, it should have spoken of violence and require a specific intent, and (ii) *Claiborne* does not "remove all First Amendment protection whenever protest activity violates state civil or criminal law." 71 F.4th at 299. Consistent with *Claiborne*, the Fifth Circuit explained its holding, "We do not hold that, where a protestor defendant directs some unlawful activity, he may be held liable for whatever consequences follow. We hold only that the First Amendment allows McKesson to be held liable for negligence if Doe proves that McKesson's

breach of duty caused Doe's injury, insofar as the breach foreseeably precipitated the crime of a third party." 71 F.4th at 299, see also, n.11.

## II.

## Police officers need tort protection from negligent, illegal, and dangerous activity posing foreseeable serious harm to them.

Police officers need the tort protection at issue because (*inter alia*) (**A**) harm to police officers from such activity is reasonably foreseeable, (**B**) the First Amendment does not protect one's own unlawful or violent conduct, and (**C**) a contrary rule would harm police officers, the public, and the rule of law.

### A. The violent and illegal activity associated with the Baton Rouge protest, in the broader context of the violent and illegal activity associated with other similar protests organized and led by Black Lives Matter and DeRay McKesson, created a reasonably foreseeable risk of harm to Officer Doe.

"The police blocked the protestors' advance, but the protestors continued to throw water bottles. When they ran out of those, one demonstrator 'picked up a piece of concrete or similar rock like substance' and threw it into the assembled officers. The projectile struck Doe 'fully in the face,' immediately knocking him down, incapacitated. According to the complaint,

Doe's injuries include 'loss of teeth, injury to jaw, [and] injury to brain and head.' The protestor who threw the projectile was never identified." *McKesson*, 71 F.4th at 283. This incident was not isolated, nor unexpected. Almost 48 hours earlier, in Dallas, 5 police officers were gunned down at a BLM protest. The Complaint set forth a chronology of BLM protest after protest attended by and/or led by McKesson of similar violent activity associated with illegally staged protests in city after city as well as other nationwide protests going on at the same time as that in Baton Rouge with similar, if not worse, outcomes as far as violence, mayhem and injury to police. Officer Doe cited prior police-involved shootings of minorities across the country, that, with repetition, resulted in serious and severe physical and pecuniary losses to police officers doing little else but protecting and serving the public. These catastrophic consequences have not been limited to Officer Doe alone, but rather have been visited upon police officers across the United States who are fulfilling a vital service to their communities. In each example, it was not "the police officer's actions," but, instead, "the protest leader's negligence (if any) that caused the officer's injuries." *McKesson*, 71 F.4th at 298. McKesson's pattern of conduct may not be simply ignored under the First Amendment standard.

On August 9, 2014, Michael Brown was shot and killed by a Ferguson, Missouri, police officer. Over the next two weeks, protests quickly turned into riots during which local businesses were both looted and set ablaze, resulting in millions of dollars in damage.

Police officers tasked with protecting the public had bottles and rocks thrown at them, and more than 200 protestors were arrested in the first two weeks of unrest. These riots continued for more than a year, eventually leading to the shooting of two police officers. Associated Press, *Man convicted of shooting two officers during Ferguson protest*, Los Angeles Times, Dec. 9, 2016, https://www.latimes.com/nation/nationnow/la-na-ferguson-shooting-20161209-story.html.

Following the police-involved death of Freddie Gray in Baltimore, protests devolved into rioting, leading to the injury of twenty police officers in the course of their official duties. Am. Compl. ¶ 5.[8] During the chaos in early April of 2015, approximately 300 businesses were damaged, over 200 vehicles and structures were set ablaze, almost thirty stores were looted, and 250 rioters were arrested for their conduct. Just days before Officer Doe was attacked, alongside the continued riots in Ferguson, similar violent protests sprang up around the country through the concerted efforts of McKesson and his Black Lives Matter organization: in St. Paul, Minnesota, twenty-one officers were injured when rioters hurled chunks of concrete and other dangerous projectiles at police, and in one instance, a protestor dropped a concrete block on an officer's head, breaking his neck; in Dallas, five officers were killed and nine were injured when a lone gunman opened fire on the police during a Black Lives Matter protest; and

[8] Amended Complaint citations herein are to the proposed Amended Complaint for Damages: Police Officer Hit in Face with Rock, which is in the Fifth Circuit record document titled Appellant Officer John Doe's Record Excerpt at 55-72 (No. 17-30864).

four Tennessee highways were blocked by Black Lives Matter protesters, leading to six arrests. Am. Compl. ¶¶ 18, 20, 22; KARE 11 staff, *Officer suffers spinal fracture during I-94 shutdown*, KARE 11 News, July 10, 2016, https://www.kare11.com/article/news/officer-suffers-spinal-fracture-during-i-94-shutdown/89-268434384.

Given the context and events surrounding the Baton Rouge protests, the attack on Officer Doe was eminently foreseeable. The Baton Rouge Police on the front line, were in full riot gear to protect the officers making arrests. Plt. Comp. ¶15. The roiling tensions between activists and police had become a national focus, and media coverage of these conflicts dominated the headlines. Even then-President Barack Obama emphasized the fact that "Americans should be troubled by the recent shootings" stating "'[t]hese are not isolated incidents. They're symptomatic of racial disparities that exist in our criminal justice system.'" Christine Wang, *Obama: All Americans Should Be Troubled By Recent Police Shootings*, CNBC, July 7, 2016, https://www.cnbc.com/2016/07/07/president-barack-obama-on-deaths-of-philando-castile-and-alton-sterling.html. The risk was so great to police officers nationwide that the FBI New Orleans office issued a warning emphasizing potential "threats to law enforcement and potential threats to the safety of the general public," stemming from the violent protests. Trey Schmaltz, WBRZ, *FBI Warns of Safety Concerns for Public, Law Enforcement This Weekend*, July 8, 2016, https://www.wbrz.com/news/fbi-warns-of-safety-concerns-for-public-law-enforcement-this-weekend/. And on the

same day Officer Doe was injured, three foreign governments urged caution when traveling to the United States amid the protests. Jason Lange & Lauren Hirsch, Reuters, *Three Countries Urge Caution Traveling to U.S. Amid Protests, Violence*, July 10, 2016, https://www.reuters.com/article/us-usa-police-travel-idUSKCN0ZQ0RM.

But despite this obvious and known risk, McKesson nonetheless organized a protest in the heart of an angry Baton Rouge, and lawlessly lead a group of protesters onto a highway in front of police headquarters while broadcasting himself live on the Internet. In the midst of this maelstrom of protestors clashing with police, protesters were throwing objects including water bottles at the police. One protestor threw a heavy projectile over the front line and hit Officer Doe in the face, severely injuring him. That injury was not merely foreseeable; it was inevitable. McKesson is unable to point to an occasion where he made the slightest attempt to temper the violence.

### B. The Fifth Circuit's decision makes clear that the First Amendment does not protect unlawful or violent conduct.

Just as this incident is but one in a string of protests organized by Black Lives Matter and Mr. McKesson that turned violent, this case is not the first attempt to entice a court to find that the First Amendment protects unlawful, and even violent activity, undertaken during a political protest. But the First

Amendment offers no such refuge to illegal conduct merely because it occurs in association with speech.

Several legal actions have been brought by those protesting purported police misconduct that claim immunity from arrest for unlawful acts because these were in association with protests. See, e.g., *Black Lives Matter-Stockton Chapter v. San Joaquin Cty. Sheriff's Office*, No. 2:18-cv-00591-KJM-AC, 2018 U.S. Dist. LEXIS 130115, at *5 (E.D. Cal. Aug. 2, 2018); *Ahmad v. City of St. Louis*, No. 4:17 CV 2455 CDP, 2017 U.S. Dist. LEXIS 188478, at *2 (E.D. Mo. Nov. 15, 2017); *San Diego Branch of NAACP v. Cty. of San Diego*, No. 16-CV-2575 JLS (MSB), 2019 U.S. Dist. LEXIS 13375, at *21 (S.D. Cal. Jan. 25, 2019); *Abdullah v. Cty. of St. Louis*, 52 F. Supp.3d 936, 943 (E.D. Mo. 2014). McKesson, himself, filed a class action in United States District Court for the Middle District of Louisiana as the representative of a class of persons whose civil rights were violated when he and other protesters were arrested and jailed for blocking a public highway during the protest. Plt. Am. Comp. ¶39. *DeRay McKesson, et al. v. City of Baton Rouge, et al.*, 16-520-JWD-EWD (M.D. La. 08/04/16). But as *Claiborne* made plain, the First Amendment does not shield a protester from liability for illegal conduct separate and apart from any speech and expression.

Officer Doe does not seek to hold DeRay McKesson accountable for his speech or expression, but rather for his illegal actions leading a protest unlawfully onto a public highway and the reasonably foreseeable risk of harm to police officers that illegal activity occasioned.

The Fifth Circuit's decision correctly construed this Court's prior precedent and did nothing more than emphasize that the lawful exercise of speech and assembly is protected by the First Amendment and that unlawful, unpeaceful and violent conduct is not. That clarification was necessary and proper given the misconception of many litigants of the extent to which the First Amendment affords protection to individuals in the area of political protest.

### C. A contrary rule would harm police officers, the public, and the rule of law.

Given that McKesson's activity was illegal, unpeaceful, and dangerous, a finding that such activity is protected from tort liability by the First Amendment would harm police officers, the public, and the rule of law because it would (i) eliminate valuable tort protection; (ii) impose a rule that would lead to broad societal harm in this and similar situations and (iii) justify attacking police responding to these protestors. Here, the police were enticed, as they had been in city after city only to be ambushed by BLM protestors led by McKesson.

First, the loss of tort liability for negligence in this and similar cases would be very harmful. Such liability plays a vital rule-of-law role that should be preserved here and in similar situations. It discourages negligent activity, making even those unconcerned for others think twice about, e.g., leaving snow on walkways, because of the risk of liability. And one who leads angry

people onto a public highway, closing the highway and forcing a confrontation with police, McKesson should think twice before engaging in such illegal and dangerous activity because of the risk of liability. The prudent choice would have been and should have been to lead those protestors onto the parking lot,[9] Independence Park, the sidewalk or other legal, safe, non-obstructing place where the speech was fully protected under the reasonable time, place and manner standard established by state law.

Second, tort liability also assigns losses where they belong—on the wrongdoer, not the victim or the public. That is simple justice. Neither Officer Doe nor the government should absorb the damages for Officer Doe's injuries if a finder of fact determines that the injuries were a reasonably foreseeable consequence of McKesson's own negligent act in planning and leading the protest onto the highway to engage police particularly, where he knew violence against police was foreseeable and, here, more probable than not.

The Petitioner erroneously reads *Claiborne* as imposing a broad rule, applicable here, that immunizes

[9] The police headquarters is in the old Woman's Hospital complex, which has a huge parking area. McKesson could have confronted police in a legal place, but he instead chose to force confrontation and arrests. Had the protest started out legal, likely, there would have been no necessity for arrests and McKesson would not have had police responding in riot gear forming a wall of shields to protect those making the arrests. Instead of the parking lot, McKesson choose the busy four lane highway. What is more is that Independence Park is little more than a block away, McKesson could have staged the protest there.

persons engaged in unlawful activity from liability for the consequences of such illegal activity if this activity also involves expressive activity. So it would radically expand *Claiborne*'s protection of speech, while engaged in peaceful and lawful protest, from the unlawful acts of others, to the foreseeable consequence of one's *own illegal actions*. Such a rule, if recognized, would harm police officers, the public, and the rule of law.

As established above, *Claiborne* did not preclude liability for consequences of one's own illegal activity that lacks First Amendment protection. The Petition *downplays* McKesson's own lawless activity in this case. See, e.g., Cert. Ptn. i (Question Presented makes no mention of allegations of McKesson's own illegal acts and falsely claiming that McKesson neither authorized, directed, nor ratified the perpetrator's act),[10] (Statement ignores many of McKesson's illegal actions). And, instead of focusing on McKesson's own illegal and dangerous activities at issue here, the Petition discusses claimed results in other situations. For example, though the alleged fact is that McKesson led the protestors to block the public highway, *McKesson*, 71 F.4th at 289, which would be his *own* negligent, illegal *action* (not speech or advocacy), and the 'but for" cause of the police confrontation. The

[10] The Complaint/Amended Complaint do not allege that McKesson authorized or directed the specific act (this specific person throw this specific object). Officer Doe alleges that by the time the protests reached Baton Rouge a well known pattern of violence against police and property was the hallmark of BLM protests. McKesson ratified the violence and he used the prior violence to command attention to himself.

Petition posits concerns about those engaged in a lawful demonstration as though this case involves a mere straying onto a public road or veer[ing] onto a highway. Inadvertent straying or veering simply are not at issue here, just as the situation in *Claiborne* is not at issue. Here, the Fifth Circuit held that where a demonstration leader *himself* violates the law in a negligent manner by leading protestors onto a highway, he may be held liable under the ordinary tort law for negligence.

Based on such a non-factual, overbroad focus, the Petition advocates for a broad rule based on the purported need to protect First Amendment activity. But protected First Amendment activity requires no special protection here because it is not at issue. The rule, as the Petitioner would have it, is this: A person who *himself* commits an unpeaceful, illegal, and dangerous *act* (which is not protected by the First Amendment) may not be held liable for a violent act by a third party that is a reasonably foreseeable consequence of the original person's own illegal act because in *Claiborne* this Court held that a person engaging in peaceful, lawful, First Amendment protected activity could not be liable for violent acts of third parties unless he authorized, directed, or ratified that specific tortious activity. That is nonsensical. Under this rule, individuals are free to engage in unpeaceful, unlawful activities themselves in connection with demonstrations time after time, with no concern for ordinary tort liability for the actions of third parties that are a foreseeable consequence of the original person's own unpeaceful, unlawful action.

That rule removes the vital function of negligence-tort law—discouraging negligence and assigning responsibility for losses to the guilty instead of the innocent—when people engage in demonstrations. Under this purported rule, protest leaders are free to engage in unpeaceful, illegal, negligent actions themselves, without the normal concern a citizens should have for the possible harm to other citizens from the foreseeable consequences of their own unpeaceful, unlawful, negligent act. This is extremely dangerous to police officers, who typically bear the brunt of such illegal actions and its consequences, but also to members of the public who may be similarly harmed, and to the rule of law because purported speech protections are asserted to innoculate wrongdoing.

## CONCLUSION

This Court should deny the petition.

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