No. 19-1108

In The
Supreme Court of the United States

DERAY MCKESSON,
Petitioner,

v.

JOHN DOE,
Respondent.

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

BRIEF OF FLOYD ABRAMS, ERWIN CHEMERINSKY, WALTER DELLINGER, GEOFFREY R. STONE, NADINE STROSSEN, AND KENNETH P. WHITE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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 petition, assembly, and association afforded by the Court's precedents.

Amici's names are set forth in the Appendix.

SUMMARY OF ARGUMENT

The right to petition the government 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). This right 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 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 restraints on the grounds that may give rise to damages liability and on the persons who may be held

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[1] Counsel for all parties have consented to this filing. 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.

accountable for those damages." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916–17 (1982).

The Fifth Circuit's decision in *Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019), directly contravenes the First Amendment's protection of the rights to organize, assemble, and petition. With no effort to parse unprotected conduct from fully protected speech, the court held the organizer of the protest personally liable for the undirected conduct of another person. That imposition of vicarious liability flouts this Court's established commitment to broad protections for civil demonstration and strikes at the heart of the First Amendment. Indeed, as Judge Willett observed below, under the panel's analysis even the lead defendant in *Claiborne Hardware* would not be entitled to First Amendment protection. *See Mckesson*, 945 F.3d at 842 (Willett, J., concurring in part and dissenting in part). The Fifth Circuit's decision exposing protest organizers to expansive, negligence-based liability undermines our long tradition of civic engagement and ultimately threatens to chill a broad swath of valuable speech.

The First Amendment does not condone physical violence. A police officer was seriously injured here and the Constitution does not excuse his attacker's criminal, tortious, and morally indefensible conduct, which remains actionable. But our constitutional values are offended when the organizer of a lawful protest who neither committed nor incited tortious action is held vicariously liable for that misconduct. What is at stake here is not the officer's right to seek redress for his injuries but the First Amendment rights of organizers to use protest to express political and social views.

The Court should reaffirm the breadth of the First Amendment freedoms at stake when citizens exercise their right to petition the government. Our nation has championed civil demonstration as a primary mechanism through which ordinary citizens can change the world. The protection of the right to speech, assembly, association, and petition is vital for that tradition of civic activism to flourish. The Fifth Circuit's decision cuts directly against this principle. This Court should correct that dangerous mistake.

ARGUMENT

I. THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS 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*, 945

F.3d 818 (5th Cir. 2019), holding Mckesson 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 used 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*, 54 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] Women advocated for equal suffrage, marching on

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[2] *See Boston Tea Party*, History (July 30, 2019), https://www.history.com/topics/american-revolution/boston-tea-party [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://www.loc.gov/exhibits/african-american-odyssey/abolition.html [https://perma.cc/79W6-RBHG] (last visited Mar. 14, 2020).

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]

The Black Lives Matter Movement is a twenty-first-century embodiment of this American tradition of publicly petitioning the government for redress.

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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://obamawhitehouse.archives.gov/blog/2016/03/03/this-day-history-1913-womens-suffrage-parade [https://perma.cc/6UB7-N888].

[6] Young, *supra*, at 222–23.

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

[8] *See About the March for Life*, March for Life, https://marchforlife.org/about-the-march-for-life/ [https://perma.cc/L5MC-2PCP] (last visited Feb. 29, 2020); *April 5, 1992: Abortion Rights Advocates March on Washington*, History: This Day in History (July 28, 2019), https://www.history.com/this-day-in-history/abortion-rights-advocates-march-on-washington [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://www.smithsonianmag.com/history/fiery-socialist-challenged-nations-role-wwi-180969386/ [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://www.history.com/topics/vietnam-war/vietnam-war-protests [https://perma.cc/4A8S-4EAW].

Begun as a social media response to police violence against black individuals, Black Lives Matter has grown into an organized movement advocating equal treatment and the elimination of racial inequality in the criminal justice system.[10] Black Lives Matter furthers these goals through civil assembly and protest, often in areas that are currently experiencing racial tension and violence.[11]

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.

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[10] *See Herstory*, Black Lives Matter, https://blacklivesmatter.com/herstory/ [https://perma.cc/3G87-ZG7X] (last visited Feb. 29, 2020); *What We Believe*, Black Lives Matter, https://blacklivesmatter.com/what-we-believe/ [https://perma.cc/3ECV-YMW9].

[11] *See Herstory*, *supra* note 10 (describing Black Lives Matter's 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).

B. The Right To Protest Is a Core First Amendment Activity Frequently Recognized by This Court

Recognizing the importance of protest throughout American history, this Court has afforded sweeping protection to the right to petition the government. 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 from 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

segregation protestors from criminal prosecution for breaching the peace).

In *Cox v. Louisiana*, the Court expressly recognized the connection between civil protest and the maintenance 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 (1960) ("[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.").

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 *Claiborne Hardware* 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 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 cannot "prohibit peaceful political activity such as that found in the boycott." *Id.* at 913. This 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 reasoning, the Fifth Circuit concluded that "to counter Mckesson's First Amendment defense at the pleading stage, Officer Doe simply needed to plausibly allege that his injuries were one of the 'consequences' of 'tortious activity,' which itself was 'authorized, directed, or ratified' by Mckesson in violation of his duty of care." *Mckesson*, 945 F.3d 818 at 829. The panel majority "perceive[d] no constitutional issue with Mckesson being held liable for injuries caused by a combination of his own negligent conduct and the violent actions of another that were foreseeable as a result of that negligent conduct." *Id.*

The imposition of severe civil liability for the exercise of First Amendment rights demands more than plausible allegations of simple negligence. 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."). *Claiborne*

Hardware recognized that even protests marred by violence do not categorically forfeit their First Amendment protections. Indeed, even 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. Under *Claiborne Hardware*, even civil demonstrations involving some violent conduct warrant close consideration to determine which elements still deserve First Amendment protection. "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 *any* unlawful conduct, whether violent or nonviolent, surrenders a protestor's First Amendment protections. *See Mckesson*, 945 F.3d at 830 ("The United States Supreme Court did not invent a 'violence/nonviolence distinction' . . . . It merely applied black-letter tort law: Because the only tortious conduct in *Claiborne Hardware* was violent, no nonviolent conduct could have proximately caused the plaintiff's injury.") (citations omitted). But as Judge Willet pointed out, "[e]ven [the lead individual defendant] of *Claiborne Hardware* would be liable under the majority's analysis." *Id.* at 842 (Willett, J., concurring in part and dissenting in part). That analysis rested on a misreading of *Claiborne Hardware*, which expressly held "that the *nonviolent* elements of petitioners' activities are entitled to the protection of the First Amendment." 458 U.S. at 915

(emphasis added). The panel blatantly ignored the "violence/nonviolence distinction" this Court recognized.

The decision below also frustrates the Court's purposefully broad language in *Claiborne Hardware* when discussing the freedoms of speech and association. *Claiborne Hardware* specifically noted 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; *see also id.* at 912 ("Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain *narrowly defined instances*."). The decision below converts *Claiborne Hardware*—with its repeated insistence on the importance of public association and protest and the corollary limitation on government interference with such activities—into precedent for the imposition of broad liability on those who organize them.

The First Amendment's protection of protest activity from liability is not the *exception* to the administration of state tort liability; it is the *rule* governing these cases. *Claiborne Hardware* established a clear rule limiting 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 specific intent to further those illegal aims.

Id. at 920 (emphasis added). The Fifth Circuit's decision trivializes this pivotal constitutional holding.

Officer Doe is entitled to recover for his injury. But his remedy is owed by the rock thrower, not Mckesson. Mckesson did not throw the rock. He did not encourage or incite another to do so. The determinative factual allegation here was simply that he assembled a protest—a *protected* First Amendment right, not a forfeiture of it. In holding that an organizer can be vicariously liable for the violent conduct of another based on the organizer's nonviolent, protected expression, the Fifth Circuit eviscerated *Claiborne Hardware* and exposed protest organizers to unforeseeable civil liability for exercising their First Amendment rights.

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. Under this rule, the rock thrower—the person directly responsible for causing an injury—is responsible for the harm caused. While an organizer who directs followers to throw rocks may also be liable, an organizer like Mckesson who does not advocate violent conduct is not. *Cf. De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) ("If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other

violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge."). 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 will undoubtedly attract potentially aggressive actors on both sides. Violence or destruction of property is a recurrent possibility, particularly at larger protests. Such conduct is highly likely, even in situations where a protest organizer does not advocate violence, because protests involving political issues create strong feelings in participants. This Court has recognized this reality, but it has nonetheless consistently found that protest must 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 violence is frequently present, allowing expansive civil liability for protest organizers if they violate minor ordinances casts 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.[13] History is

[13] In Louisiana, it is a misdemeanor to use sound amplification devices from a motor vehicle on a public street where the sound from such device is audible from a distance of greater than

rife with examples of protest organizers who violated laws or court orders while conveying their message. Indeed, many civil rights marches were "in violation of orders issued by municipalities and sheriffs."[14]

Other iconic protestors have also intentionally violated laws. A telling example is the lunch counter sit-in movement of the early 1960s, when 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.

It is troubling to consider 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

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twenty-five feet and exceeds eighty-five decibels (LA. STAT. ANN. § 14:103.1 (2019)), to wear masks, hoods, or other facial disguises in public places, except on certain occasions (LA. STAT. ANN. § 14:313), and to disturb the peace by appearing intoxicated (LA. STAT. ANN. § 14:103(3)). Under the Fifth Circuit's ruling, if an organizer violates any of these minor regulations, the door to potential liability will open.

[14] *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 involving occupation of the public roads over Edmund Pettus Bridge).

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. If a protest organizer tells followers to trespass or occupy a road, the organizer can be held responsible for violating that particular ordinance. But allowing open-ended civil liability for protest organizers following any minor breech is far too aggressive, and such liability could have potentially stifled many historical movements that helped shape our nation for the better.

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

The negligence liability the decision below licenses 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. Recently, this Court has reiterated the reality 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."). Guidance from this Court is needed to prevent similar chill 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, participant's backgrounds, or if anyone will act violently. Organizers of protests cannot be required to predict the future. 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 massive. Violence sparked at a large protest could be widespread and destructive, and the resulting liability enormous. 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 uncondoned violence of others.

In finding that Mckesson had ignored the foreseeable danger to "officers, bystanders, and demonstrators," the Fifth Circuit's analysis expressly contemplated an organizer facing suit by, and potential liability to, an indefinitely large number of plaintiffs. *Mckesson*, 945 F.3d at 827. 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 842 (Willett, J., concurring in part and dissenting in part). Even if Mckesson can prevail under the "professional rescuer doctrine"[15] on remand, the potential chill created by this decision will remain; the next plaintiff relying on this theory of liability may very well be a bystander rather than a rescuer. The potential cost of defending multiple lawsuits by bystanders or other demonstrators alone will 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 be left unorganized and protected speech unexpressed. Furthermore, the decision does not provide protest organizers with clear rules to guide their conduct. Instead, any minor negligent infraction can open the door to expensive lawsuits from countless potential plaintiffs.

III. The Imposition of 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

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[15] *See Doe v. Mckesson*, 947 F.3d 874, 875 (5th Cir. 2020) (Ho, Cir. J., concurring in denial of rehearing en banc) ("The professional rescuer doctrine … essentially states that a professional rescuer, such as a fireman or a policeman, who is injured in the performance of his duties, 'assumes the risk' of such an injury and is not entitled to damages.").

regulation, negligence-based liability for organizers cannot pass constitutional muster.

Organizing a protest is also an act of assembly and association, and respondent'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 Respondent'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. This is conduct that speaks. *See Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (holding that conduct speaks when "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it").

Government action that restricts conduct that speaks is a form of speech regulation, and content-based restrictions on speech are routinely found unconstitutional.[16] While the Fifth Circuit's holding did not approve a content-based discrimination on its

[16] In *N.Y. Times Co. v. Sullivan*, this Court held that private enforcement of a common law rule is state action for First Amendment purposes. 376 U.S. 254, 265 (1964) ("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.").

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 $1,000 fee at issue in *Forsyth County*—depending on how much controversy their actions will spark. *Id.* at 134.

But even if imposing this liability is treated as content-neutral government action, this Court has held that content-neutral regulation of communicative conduct 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 this standard. First, 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.[17] Organizer tort 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 includes time, place, and manner restrictions that regulate protest activities, and those who violate valid regulations may be penalized.[18] Allowing in addition private citizens to sue organizers for the actions of their protestors adds little; it would neither effectively nor consistently deter illegal protests. 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

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[17] *See, e.g.*, LA. STAT. ANN. § 14:28 (2019); CAL. PENAL CODE § 404.6 (West 2020); N.Y. PENAL LAW § 240.08 (McKinney 2019).

[18] *See, e.g.*, LA. STAT. ANN. § 14:100.1 (2019) (making it a crime to obstruct, among other things, a public highway); CAL. PENAL CODE § 408 (West 2020); N.Y. PENAL LAW § 240.10 (McKinney 2019).

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 "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 Respondent'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 his 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, individuals may not be punished for merely associating with law-breaking groups. *Scales v. United States*, 367 U.S. 203, 229 (1961) (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 respondent nor perpetrated it himself. *Mckesson*, 945 F.3d at 826. He simply organized the protest at which the violence took place. *Id.* at 823. Here, the First Amendment requires the Respondent to show that Mckesson "held a specific intent" to further the rogue protestor's violent aims. *Claiborne Hardware*, 458 U.S. at 920. The Respondent alleges only that because McKesson intentionally blocked a public road, he reasonably should have foreseen that violence would occur. As such, the complaint falls well short of the constitutional goal line.

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, and the Fifth Circuit's decision allowing this possibility is plainly wrong.

CONCLUSION

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

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