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 FIRST AMENDMENT SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONER

Tabatha Abu El-Haj
Thomas R. Kline School of Law, Drexel University
3320 Market Street
Philadelphia, PA 19104

Timothy Zick
William & Mary Law School
613 South Henry Street
Williamsburg, VA 23185

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Fifth Circuit's Crabbed View Of The First Amendment Upends Centuries-Old Decisions Protecting Peaceful Participants At Public Assemblies. 4

A. The Right to Peaceable Assembly Has Long Been Understood to Protect Participation in Even Unruly Assemblies, Absent Significant Violence. 5

B. State Court Common Law Decisions Confirm That Unruly Assemblies, Including Those Engaged in Illegal Activity, Were Considered Peaceable in the Absence of a Conspiracy to Commit Violence. 8

II. The Fifth Circuit's Rule Virtually Guarantees Tort Liability for Protest Organizers, Stifling Critically Important Political Dissent. 16

A. The Fifth Circuit's Negligence Theory Threatens to Transform Every Minor "Unlawful" Act into a Potentially Ruinous Civil Lawsuit. 17

B. Normal Tort Principles Provide No Limiting Principle in the Protest Context, Dramatically Stifling Dissent. 20

CONCLUSION 25

APPENDIX

TABLE OF AUTHORITIES

CASES

Anderson v. City of Wellington,
19 P. 719 (Kan. 1888) 14, 15

Bridges v. California,
314 U.S. 252 (1941) 6

Carmichael v. Allen,
267 F. Supp. 985 (N.D. Ga. 1967) 13

Citizens for Peace in Space v. City of Colo. Springs,
477 F.3d 1212 (10th Cir. 2007) 18

Commonwealth v. Kahn,
176 A. 242 (Pa. Super. Ct. 1935) 10

Cox v. Louisiana,
379 U.S. 536 (1965) 12

Edwards v. South Carolina,
372 U.S. 229 (1963) 12

FEC v. Wis. Right to Life, Inc.,
551 U.S. 449 (2007) 24

Forsyth Cty. v. Nationalist Movement,
505 U.S. 123 (1992) 23

Frazee's Case,
30 N.W. 72 (Mich. 1886) 15

Garcia v. Bloomberg,
865 F. Supp. 2d 478 (S.D.N.Y 2012) 24

Gitlow v. New York,
268 U.S. 652 (1925) 9

Hague v. CIO,
307 U.S. 496 (1939) 7

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) ..... *passim*

NAACP v. Overstreet,
384 U.S. 118 (1966) 24

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 22

Nieves v. Bartlett,
139 S. Ct. 1715 (2019) 20

Powers v. City of Ferguson,
229 F. Supp. 3d 894 (E.D. Mo. 2017) 18

Rollins v. Shannons,
292 F. Supp. 580 (E.D. Mo. 1968) 11, 12

Schlamp v. State,
891 A.2d 327 (Md. 2006) 13

Taylor v. State,
68 S.E. 945 (Ga. Ct. App. 1910) 10, 11

Trotter v. City of Chi.,
33 Ill. App. 206 (Ill. App. Ct. 1889) 3, 16

United States v. Matthews,
419 F.2d 1177 (D.C. Cir. 1969) 13

Vodak v. City of Chi.,
639 F.3d 738 (7th Cir. 2011) 18

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I 6

OTHER AUTHORITIES

Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*,
80 MO. L. REV. 961 (2015) 21

Tabatha Abu El-Haj, *The Neglected Right of Assembly*,
56 UCLA L. REV. 543 (2009) 11, 13, 14, 17

John Inazu, *Unlawful Assembly As Social Control*,
64 UCLA L. REV. 2 (2017) 10

John D. McCarthy & Clark McPhail, *Places of Protest: The Public Forum in Principle and Practice*,
11 MOBILIZATION: AN INT'L Q. 229 (2006) 22

Michael McConnell, *Freedom by Association*,
FIRST THINGS (Aug. 2012) 7

JOHN PHILLIP REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION (1977) 6

Riots, Routs, and Unlawful Assemblies, 3 AM. L. MAG. 350 (1844) 7, 9

Arielle W. Tolman & David M. Shapiro, *From City Council to the Streets: Protesting Police Misconduct after Lozman v. City of Riviera Beach*, 13 CHARLESTON L. REV. 49 (2018) 20

JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES (Henry St. George Tucker, ed., 1899) 8

FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES (3d ed. 1855) 7, 8, 10, 11, 12

LEON WHIPPLE, OUR ANCIENT LIBERTIES: THE STORY OF THE ORIGIN AND MEANING OF CIVIL AND RELIGIOUS LIBERTY IN THE UNITED STATES (1927) 7

JOHN WILDER MAY, THE LAW OF CRIMES (Harry Augustus Bigelow, ed., 3d ed. 1905).....11

TIMOTHY ZICK, SPEECH OUT OF DOORS (2009).....18

Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006).....17

INTEREST OF AMICI CURIAE[1]

Amici are seven nationally recognized professors and scholars of the First Amendment. Each has authored multiple publications on the freedoms of speech, association, and peaceable assembly and the history of those freedoms. Their scholarship and experience lead them to conclude that it is vital for the Court to intervene now to reject the Fifth Circuit's crabbed interpretation of the right of peaceable assembly and to prevent chilling constitutionally protected activities.

As the Petition explains, the Fifth Circuit flatly contradicted this Court's precedents when it green-lit tort damages against a protest organizer simply because a protest participant—on his own accord and absent direction from the protest organizer—committed a violent act. As amici can attest, the decision also represents a sharp break with the robust protection of political assemblies and broad conception of "peaceable" that prevailed for centuries, going back to the early Republic. Given the modern regulatory environment for protests, absent review, the Fifth Circuit's rule will inexorably stifle peaceful political dissent that has, until now, fallen squarely within the core of the First Amendment's protection. The Appendix lists all amici.

---

[1] Counsel of record for all parties received timely advance notice of intent to file and consented to the filing of this brief. S. Ct. R. 37(2)(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit transformed tort liability into a truncheon for opponents to suppress political activism across the ideological spectrum, from gun rights demonstrators to Black Lives Matter protesters. Its holding that the First Amendment does not shield a public speaker at a political protest from a civil negligence claim where a third party causes physical harm—even though the third party's unlawful act was not directed, authorized, or ratified by that speaker—vitiates the promise of the First Amendment. In the American constitutional tradition, while protesters can be subject to reasonable time, place, and manner restrictions, only violence, whether by an individual or by several in concert, nullifies the protections of the First Amendment.

The constitutional significance of the line between violence and nonviolence is cemented in the text of the Constitution, which protects the right to "peaceably" assemble. State supreme court decisions applying the common law crimes of riot and unlawful assembly—crimes that required significant levels of violence—exemplify the broad constitutional protection for street protests, with courts refusing to sanction participants in public assemblies unless they personally engaged in violence that threatened the peace. Nineteenth-century state courts routinely displayed great tolerance for disruptive crowds, providing broad constitutional cover for people gathered outdoors and on the public streets, so long as they did not engage in violence. As an 1889 Illinois appellate court emphasized, "[u]nder a popular

government like ours, the law allows great latitude to public demonstrations, whether religious, political or social, and it is against the genius of our institutions to resort to repressive measures . . . to encroach on [such] fundamental rights." *Trotter v. City of Chi.*, 33 Ill. App. 206, 208 (Ill. App. Ct. 1889) (striking down as unlawful one of the first municipal permit requirements for street parades), *aff'd*, 26 N.E. 359 (Ill. 1891).

DeRay McKesson, like the advocates for racial equality in the mid-twentieth century, "sought to change a social order . . . [t]hrough speech, assembly, and petition—rather than through riot or revolution." *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 912 (1982). Whether one shares his political views, his choice to do so is as American as the Constitution itself. To ensure the continued vitality of the First Amendment, this Court should grant certiorari and reaffirm that absent evidence "that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims," *id*. at 920, the First Amendment precludes the imposition of "[c]ivil liability . . . merely because an individual belonged to a group, some members of which committed acts of violence." *Id*.

The Fifth Circuit's departure from this Court's precedents—as well as centuries of common law and constitutional tradition—creates a grave and urgent risk to political dissent. Hinging its novel theory of civil liability on a protest organizer committing an unlawful act provides no limiting principle in the modern era when protests are meticulously regulated. The sheer volume of regulation virtually guarantees

that today any large gathering will engage in some technical violation of this or that time, place, or manner restriction. Nor do ordinary tort principles regarding the foreseeability of harm provide meaningful controls on the imposition of liability for *other people*'s independent, unprompted violent acts. It would be the rare case where a protest organizer—especially of a large, controversial protest—could reasonably expect that no one in a crowd of thousands would engage in some violent act. The Fifth Circuit's rule thus significantly raises the costs of dissent and threatens to shut down critically important political speech. The Court should intervene to avoid the wholesale stifling of public protest.

ARGUMENT

I. The Fifth Circuit's Crabbed View Of The First Amendment Upends Centuries-Old Decisions Protecting Peaceful Participants At Public Assemblies.

A bedrock principle, dating back to the Founding, is that the right to peaceable assembly protects a participant at a public assembly from being held responsible for other protesters' violence unless that participant either also commits a violent act or incites another to commit a violent act—even if that participant engages in acts that are disruptive or unlawful. By refusing to provide First Amendment protection to a protest leader because "he 'negligently' led a protest that carried the *risk of potential* violence or urged the blocking of a road," Pet. App. 51a (Willett, J., dissenting in relevant part), the Fifth Circuit defied that principle.

There is no question that the individual who injured Police Officer Doe stepped outside the boundaries of constitutional protection by engaging in violence. But until now, centuries of precedent would have shielded protest organizer McKesson's purportedly illegal yet unquestionably nonviolent conduct from punishment or civil damages for another's separate act of violence. Impassioned crowds, angry at perceived abuses of governmental power, are frequently disruptive, yet they have consistently received constitutional protection as peaceable assemblies, even when the protest transgresses some municipal restriction. Properly understood, the Fifth Circuit's decision is a sharp departure from both this Court's precedent and the Founding-era understanding of the right of peaceable assembly, as reflected in the Constitution's text and state court decisions from the nineteenth century onward.

A. The Right to Peaceable Assembly Has Long Been Understood to Protect Participation in Even Unruly Assemblies, Absent Significant Violence.

Discordant "[p]olitical uprisings, from peaceful picketing to lawless riots, have marked our history from the beginning—indeed, from *before* the beginning." Pet. App. 52a (Willett, J., dissenting). When "[t]he Sons of Liberty . . . dump[ed] tea into Boston Harbor almost two centuries [ago]," *id.*, the Americans saw the act as falling within their protected liberties, despite their trespass and defacement of

private property. *See generally* JOHN PHILLIP REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION 90 (1977) (noting that during the Revolutionary period in Boston, the Riot Act was never read by magistrates, who understood the political aims of the revolutionary crowds).

Given the historical importance of public protests, the First Amendment singles out this particular form of expressive conduct for explicit constitutional protection. Moreover, its text draws a sharp divide between violent and nonviolent assemblies by providing for "the right of the people peaceably to assemble," U.S. CONST. amend. I; *see Claiborne Hardware,* 458 U.S. at 916 ("The First Amendment does not protect violence."). That right had a well-understood meaning of excluding violent acts, but otherwise covering unruly and unlawful acts.

The First Amendment sought generally to expand the customary constitutional rights of British citizens to freedom of expression and conscience. *Bridges v. California*, 314 U.S. 252, 265 (1941) ("No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed."). And the right to peaceably assemble was intended to be broader than the British customary right in three important respects.

First, the First Amendment ensured that the right of peaceable assembly included a right to "use . . . *the streets and public places*" for "purposes of assembly

. . . and discussing public questions," as "a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. CIO*, 307 U.S. 496, 515–16 (1939) (Roberts, J., concurring). This "declaration of a freedom of assembly was a break from [English] history," because in Britain, "the people were not free to assemble in the streets and parks without official permission." Michael McConnell, *Freedom by Association*, FIRST THINGS (Aug. 2012), https://tinyurl.com/w3ebodt.

Second, in "its original meaning" the term "*peaceable*" was not "to be confused with 'legal' or 'permissible.'" LEON WHIPPLE, OUR ANCIENT LIBERTIES: THE STORY OF THE ORIGIN AND MEANING OF CIVIL AND RELIGIOUS LIBERTY IN THE UNITED STATES 104 (1927). Merely illegal acts did not necessarily deprive one of constitutional protection. Instead, violent acts were the constitutional deal-breaker.

Third, the bar for the requisite level of violence to render an assembly non-peaceable was high. The First Amendment's shield disappeared only when an assembly had descended into a "riot" or "unlawful assembly," common law crimes that, as explained below, were narrowly construed by American courts and generally applied only to personally violent participants. [2] *See Riots, Routs, and Unlawful*

---

[2] Historically, the only significant departure from this rule occurred in cases where an individual, who had heretofore undertaken no violence, refused to disperse after an order to disperse under a Riot Act had been read. *See* FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 827 (3d ed. 1855) (noting that after the command to disperse an unlawful

Assemblies, 3 AM. L. MAG. 350, 357 (1844) (arguing that American law preserved the common law of riot and unlawful assembly because gatherings "which look to violence and not to reason and the influence of a strong expression of public opinion, do not fall within the protection of the constitutional guarantees"). As summarized in an 1899 treatise, although "the right of the people peaceably to assemble . . . does not prevent interference with the riotous assemblages of the people; *where there is no riotous conduct the government cannot interfere*." 2 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES § 326 (Henry St. George Tucker ed., 1899) (emphasis added).

B. State Court Common Law Decisions Confirm That Unruly Assemblies, Including Those Engaged in Illegal Activity, Were Considered Peaceable in the Absence of a Conspiracy to Commit Violence.

Early American courts are notorious for having routinely held individuals criminally and civilly responsible for their libelous, indecent, obscene, and blasphemous speech. But in stark contrast to their narrow intuitions about individual free speech, these same courts routinely vindicated an expansive

---

assembly, "[t]hose who continue looking on while the active rioters are resisting public authorities . . . ; who refuse to join with authorities . . . are just as much rioters as those most active in the work of violence"); *see also id.* at 822–23, 826–27.

conception of the people's right of assembly, especially for political purposes.

Nineteenth-century state court decisions before the incorporation of the First Amendment against the states, *see Gitlow v. New York*, 268 U.S. 652, 666 (1925), reinforce that the relevant line for purposes of constitutional protection of street crowds is violence, not unlawfulness. The widespread refusal by nineteenth-century state courts to countenance advance-approval requirements for protests confirms that the right of peaceable assembly was understood to sweep broadly, covering unruly and even unlawful crowds except for the few participants who personally engaged in violence.[3]

1. In the early years, constitutional protection was understood to extend to all assemblies that did not fit the common law crimes of riot and unlawful assembly, crimes that early American courts construed narrowly. *See Riots, Routs, and Unlawful Assemblies*, 3 AM. L. MAG. 350, 354 (1844) (American "courts of justice will require the characters of an unlawful assembly to be more distinctly marked" as compared to England).

---

[3] The Court has since accepted the constitutionality of reasonable time, place, and manner restrictions. Nineteenth-century cities did not impose such restrictions on activities associated with the right of assembly, including parades, marches, and outdoor public meetings, however, and when such restrictions were first imposed, courts generally rejected them. *See* Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 545 (2009).

While English common law authorities divided on the scope and breadth of these crimes,[4] American courts, both before and after incorporation, narrowly construed the crimes of unlawful assembly and riot, elevating the importance of proof of imminent violence. *See, e.g.*, *Taylor v. State*, 68 S.E. 945, 946 (Ga. Ct. App. 1910) (Georgia statute was an "*extension* of the offense of riot . . . beyond its common-law definition, so that the commission . . . of a *lawful act in a violent and tumultuous manner* is made a crime") (emphasis added). These state courts interpreted the common law crime of riot as applying to either a lawful or unlawful act so long as the act was undertaken violently. *See Commonwealth v. Kahn*, 176 A. 242, 243 (Pa. Super. Ct. 1935) (construing the crime of riot as "a tumultuous disturbance of the peace by three or more persons assembled and acting with a common intent; either in executing a lawful private enterprise *in a violent and turbulent manner*, to the terror of the people, or in executing an unlawful enterprise *in a violent and turbulent manner*.") (emphasis added); *see also* FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 825 (3d ed. 1855) (clarifying that "[a] riot is a tumultuous disturbance of the public peace by three persons or more assembling together . . . *with an intent mutually to assist one another against any who shall oppose them* . . . and afterwards executing the same in a violent and

[4] *See generally* John Inazu, *Unlawful Assembly As Social Control*, 64 UCLA L. REV. 2, 10-11 (2017) (noting that William Blackstone embraced a narrower conception that required violence while William Hawkins appeared to countenance nonviolent lawbreaking as falling withing the crime).

turbulent manner, to the terror of the people, *whether the act intended is lawful or unlawful*") (emphasis added).

Violence to persons or property was an irreducible minimum requirement of the offense of riot. *See, e.g.*, *Taylor*, 68 S.E. at 946 (holding crime of riot extended only to jointly executed lawful acts "involving violence, and in the execution of which violence was actually employed"); JOHN WILDER MAY, THE LAW OF CRIMES §§ 165–166 (Harry Augustus Bigelow, ed., 3d ed. 1905) (emphasizing that the crime turned on the element of violence, not lawfulness, and that "[t]he Violence Necessary to constitute a riot need not actually be inflicted upon any person" so long as the threat of violence is present through weaponry or context). As an 1855 treatise writer elaborated:

> It must be shown that the assembling was accompanied with . . . circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, using threatening speeches, turbulent gestures, or the like. *If an assembly of persons be not accompanied with such circumstances as these, it can never be deemed a riot, however unlawful their intent, or however unlawful the acts which they commit*.

WHARTON, *supra*, at 825–826 (emphasis added).

The common law crime of unlawful assembly likewise required violence on the part of the individuals involved. In *Rollins v. Shannons*, 292 F. Supp. 580 (E.D. Mo. 1968) (per curiam), *vacated and remanded on other grounds*, 401 U.S. 988 (1971), a federal district court upheld the constitutionality of

Missouri's unlawful assembly statute after finding it was "basically a codification of the common law offense of unlawful assembly," which was "[h]istorically . . . a lesser included offense in the riot laws." 292 F. Supp. at 589. The statute proscribed the assembly of three or more persons "to do any unlawful act, *with force or violence*, against the person or property of another, or against the peace or to the terror of the people." *Id.*

As the *Rollins* court noted, the "essential fault" of the breach-of-the-peace statutes held unconstitutional in *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Cox. v. Louisiana*, 379 U.S. 536 (1965), was "their ability to be applied to prohibit peaceful conduct." 292 F. Supp. at 591. Missouri's unlawful assembly statute, by contrast—like the common law of unlawful assembly—only encompassed acts which violated the state's criminal law *and* which were "intended to be done with force or violence, thus removing [them] from the ambit of peaceful conduct protected by the First Amendment." *Id.*; *see also Owens v. Commonwealth,* 179 S.E.2d 477, 480–81 (Va. 1971) (striking down Virginia's unlawful assembly statute as "unconstitutionally overbroad" in part because it rendered any unpermitted assembly an "unlawful assembly," while contrasting it to "the common law definition [that] expressly requires clear and present danger of violent conduct"); *accord* WHARTON, *supra*, at 825 ("Any tumultuous disturbance of the public peace by three persons or more" could not be charged with unlawful assembly where the group had a "avowed, ostensible, legal or constitutional object").

The scope of liability for common law riot and unlawful assembly was limited, moreover, to the

specific individuals who actually and intentionally joined with others to commit violence. *See, e.g., Carmichael v. Allen*, 267 F. Supp. 985, 996 n.10a (N.D. Ga. 1967) (per curiam) (recognizing that Georgia's riot act applied "solely to acts of violence by two or more persons acting in concert"); *Schlamp v. State*, 891 A.2d 327, 330–333 (Md. 2006) (reversing conviction for uncodified crime of riot after an exhaustive analysis of the requisite level of culpability, as well as violence, under the common law); *United States v. Matthews*, 419 F.2d 1177, 1191 (D.C. Cir. 1969) (Skelly Wright, J., dissenting) (refusing to join a decision upholding the constitutionality of the District of Columbia's riot statute because it "remove[d] any requirement that a defendant personally engage in violent or tumultuous conduct," a significant departure from the common law).

2. Despite being congested and routinely plagued by the inconvenience associated with public parades and processions, nineteenth-century cities did not require people assembling outdoors to obtain permits to access the city streets. "As late as 1881, Chicago, Denver, Detroit, St. Paul, and San Francisco had no permit requirements for assemblies in their streets." Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 545 (2009). Even New York City, did not require permits for street processions until July 7, 1914 or for street meetings until after 1931. *Id.*

Although reasonable permit requirements are accepted today as constitutional, when the first permit requirements for street meetings and parades were adopted, they met with significant judicial skepticism. The widespread reluctance of early courts to allow

authorities to regulate peaceable crowds in advance confirms that the American tradition of peaceable assembly encompassed unruly and even unlawful public gatherings.

The near universal view, among state courts, was that these types of ordinances were void. "All but one of the first state supreme courts asked to review ordinances that required advance permission to gather in public places found them void," the sole outlier being the Massachusetts Supreme Judicial Court. *Id.* at 570.[5]

Anderson v. City of Wellington, 19 P. 719 (Kan. 1888), is illustrative. The precise legal question before the Supreme Court of Kansas was whether a municipal ordinance requiring advance permission to access public streets for parades was "reasonable, not inconsistent with the laws of the state, not repugnant to the fundamental rights, . . . not . . . oppressive, . . . not . . . partial or unfair, . . . and . . . not [in] contraven[tion of] common right." *Id.* at 721. In rejecting the reasonableness of the ordinance, the court stressed how it would "prevent[] a public address upon any subject being made on the streets[,]" or "an unusual congregation of people on the streets, under

[5] These same courts evidenced no similar skepticism when they were asked to approve regulations of individual expression in the streets. Abu El-Haj, *supra*, at 577 (explaining that nineteenth-century state courts upheld analogous time, place, and manner regulations of street music because music did not directly implicate their understanding of the people's right to assemble in public).

any circumstances, without permission." *Id.* This would be "an abridgement of the rights of the people" because it "[took] from the people of a city and the surrounding country a privilege exercised by them in every locality throughout the land—to form their processions and parade the streets with banners, music, songs, and shouts." *Id.* at 721–22.

Equally important, the court rejected the suggestion that the ordinance could be justified on the grounds of preserving order, because "the laws upon the subject of riots, mobs, unlawful assemblies, and nuisances . . . already afford ample protection to the public, and ready processes to prohibit, repress and arrest offenders" who violate those laws. *Id.* at 722.

Many other nineteenth-century courts agreed. The Michigan Supreme Court invalidated an ordinance requiring permission from officials to march through city streets, rejecting the city's proffer that the ordinance was justified by either its authority "to prevent . . . riots, disturbances, and disorderly assemblages" or its power "to control, prescribe, and regulate the manner in which highways, streets, . . . [and] public grounds . . . [are used] within [the] city." *Frazee's Case*, 30 N.W. 72, 74 (Mich. 1886). The court acknowledged the foreseeability that such assemblies were "capable of perversion to bad uses" and "sometimes very great dangers." *Id.* at 75. Yet it emphasized that constitutional protection for such crowds only ceased "[w]hen people assemble in riotous mobs." *Id.*

Likewise, even as an Illinois appellate court acknowledged that a public gathering "may be so conducted . . . as to invite a breach of the peace, or to

render itself a nuisance"—*i.e.*, in modern tort-speak, that some protests have a foreseeable risk of negative consequences—the court emphasized that these are "exceptional" occurrences, and laws governing riot and unlawful assembly already provide sufficient "restraint of law." *Trotter v. City of Chi.*, 33 Ill. App. 206, 208 (Ill. App. Ct. 1889), *aff'd*, 26 N.E. 359 (Ill. 1891).

These early cases show how far the Fifth Circuit's ruling departs not just from this Court's precedent, but from long-established customary constitutional law—embodied in the First Amendment's reference to peaceable assembly—of protecting the right to assemble while policing only those individuals who encourage or engage in riotous violence. The Fifth Circuit's view that stepping into the street in violation of Baton Rouge's municipal laws makes a protest organizer liable for violence that he did not direct, incite, or ratify cannot be squared with the First Amendment and cries out for this Court's review.

II. The Fifth Circuit's Rule Virtually Guarantees Tort Liability for Protest Organizers, Stifling Critically Important Political Dissent.

The Fifth Circuit's repudiation of the historical understanding of peaceable assembly poses an especially daunting threat, given the expanse of modern protest management regulation. With today's detailed time, place, and manner requirements and open-ended "disturbing the peace"-type misdemeanors (measures that nineteenth-century courts would not have countenanced), the Fifth Circuit's purported

limiting principle—premising civil liability for entirely distinct violent acts by third parties on violations of unrelated laws—is no limit at all. Hereinafter, any protest organizer—however careful—will be exposed to the possibility of tort liability on the grounds of foreseeability, and will face the certainty of costly litigation. The Fifth Circuit's decision, if left standing, will stifle important speech on matters of public concern.

A. The Fifth Circuit's Negligence Theory Threatens to Transform Every Minor "Unlawful" Act into a Potentially Ruinous Civil Lawsuit.

In contrast to the nineteenth century, when courts shunned permit requirements for protests and other public gatherings, modern protest organizers face a dizzying array of restrictions and limitations on public speech and assembly. These restrictions consist of detailed permit schemes, spatial tactics such as "free speech zones," various limits on the time, place, and manner of public protest, and public order regulations that police enforce with considerable discretion. *See generally* Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006).

Municipalities today typically regulate all public assemblies before they occur, through detailed permit requirements. Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 548 (2009) (survey of twenty large American municipalities reveals extensive public-gathering permit requirements). Those who wish to assemble to protest special events such as the Democratic National

Convention or meetings of the WTO must also navigate complicated temporary restrictions. *E.g. Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212 (10th Cir. 2007) (upholding a city's security zone around a NATO conference that was "completely closed to all persons except conference attendees," media, hotel employees, and local residents). *See generally* TIMOTHY ZICK, SPEECH OUT OF DOORS (2009).

Beyond such time, place, and manner regulations—generally criminally enforceable in themselves—local governments use a panoply of misdemeanor offenses to regulate public crowds. So even protesters who are exercising their rights in an unquestionably lawful manner face the risk of being charged with an array of public order offenses. Catchall offenses such as "disorderly conduct" or "breach of the peace" are enforced with considerable discretion. Even though such charges are routinely dropped or dismissed by courts, these arrests impact and chill the exercise of First Amendment rights. *See, e.g.*, *Powers v. City of Ferguson*, 229 F. Supp. 3d 894, 897 (E.D. Mo. 2017) (reporting Department of Justice "found that City of Ferguson police officers frequently relied on the failure-to-comply ordinance to arrest individuals without probable cause and to infringe on or retaliate against free expression"); *Vodak v. City of Chi.*, 639 F.3d 738, 740, 744 (7th Cir. 2011) (noting that 900 people swept up in mass arrest were released without charges).

In this heavily regulated and highly charged environment, if technical misdemeanor violations mean a protest organizer "should have known" that a protest will result in some "confrontation between

police and the mass of demonstrators," Pet. App. 12a, then it is effectively *always* reasonably foreseeable that such a confrontation will occur. Allowing the victim of a violent act at a protest to recover damages from the protest organizer based on the allegedly foreseeable consequences of even minor legal infractions provides no boundary for tort liability, forcefully chilling contemporary protest organization and participation.

The breathtaking sweep of the Fifth Circuit's rule, even if limited to criminal acts, can be illustrated by just a few examples where "criminal" acts could justify the imposition of civil liability on a gathering's organizer for the unconnected, unauthorized acts of third parties:

- Failure to abide by the terms of a protest permit by, for example, playing music too loudly;
- Refusal to use a designated "free speech zone";
- Unauthorized use of a street or sidewalk by protest participants; or
- Citation for taking too long to pack up.

Today, "governments . . . regulate our lives finely, acutely, thoroughly, and exhaustively" and "criminal laws have grown . . . to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and

dissenting in part); *see also* Arielle W. Tolman & David M. Shapiro, *From City Council to the Streets: Protesting Police Misconduct after* Lozman v. City of Riviera Beach, 13 CHARLESTON L. REV. 49, 60–66 (2018) (noting breadth of crimes of modern statutory unlawful assembly, failure to disperse, and disorderly conduct, like noise ordinances, give police leeway to stifle public expression, particularly that which is critical of modern policing). If minor infractions of municipal laws mean that a *peaceful* protest organizer can be subject to damages liability for violent acts that he did not direct, encourage, or ratify, the right of peaceable assembly would be shrunk to zero.

B. Normal Tort Principles Provide No Limiting Principle in the Protest Context, Dramatically Stifling Dissent.

The liability regime the Fifth Circuit has created knows no bounds. Normal tort principles of the foreseeability of harm essentially guarantee damages in this context—or at least ruinous litigation—because it is the rare case where a protest organizer could not foresee some violence, however discouraged. This Court has recognized as much. *See Claiborne Hardware,* 458 U.S. at 918–19 (noting that nearly every protest involves both lawful and unlawful actions). Particularly for protests involving important matters of public concern—where First Amendment protection is most urgently needed—there is a higher likelihood of drawing counter-protesters and a robust police response, increasing the odds of generating confrontations at the margins.

Despite the absence of a credible allegation that McKesson "authorized, ratified, or directly threatened acts of violence," Pet. App. 41a (Willett, J., dissenting in relevant part) (quoting *Claiborne Hardware*, 458 U.S. at 929), or met the threshold of incitement, *id.* at 42a–44a, the Fifth Circuit held that the First Amendment did not shield McKesson from damages for a third party's acts because he "should have known" that moving the protest into the street was "likely to provoke a confrontation between police and the mass of demonstrators," *id.* at 12a (majority opinion). But this "reasonably foreseeable harm" standard vitiates First Amendment protection for street protesters everywhere.

There is almost always a "foreseeable" risk of violence associated with outdoor street protests, even those that are predominantly nonviolent. Throughout American history, "outdoor assemblies [have] exist[ed] on a continuum from peaceful to disruptive, and . . . that disruption can range from illegal acts that are principally inconvenient to violent acts against other individuals." Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 965 (2015).

The risk is most foreseeable for organizers of larger, more politically salient demonstrations where police are more likely to be present. Police not only enforce regulations (triggering the Fifth Circuit's "limit") but also a larger police presence makes confrontations between police and protesters (or counter-protesters) more likely. Foreseeability of harm often relates as much or more to the protest

policing methods than to any act or instruction of the protest organizer. *Accord* John D. McCarthy & Clark McPhail, *Places of Protest: The Public Forum in Principle and Practice*, 11 MOBILIZATION 229, 232–34 (2006) (describing police willingness to engage in escalation at protests through the use of less-than-lethal policing tactics). That risk is equally predictable any time there is reason to believe "outsiders" or counter-protesters, whose aim is to co-opt or disrupt the protest event, will show up. This scenario has played out at a number of recent protest events, including the "Unite the Right" rallies in Charlottesville, Virginia, in 2017.

The Fifth Circuit's loose approach to civil liability thus creates nearly endless opportunities for plaintiffs (including injured counter-protesters seeking to chill speech on the other side) to sue protest organizers for money damages resulting from violent actions that the protest organizers did not direct, incite, or authorize—acts they likely were unaware of. Such tort liability raises a host of problems for expressive activity. As the Court has long recognized, tort liability can significantly chill constitutionally protected speech. *See Claiborne Hardware*, 458 U.S. at 916–17; *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964). Moreover, as Petitioner explains (Pet. at 33), the unbounded nature of the tort inquiry invites juries to make decisions based on content bias. And under the Fifth Circuit's approach, tort liability effectively—and impermissibly—shifts responsibility for costs and harms that protest organizers cannot control to protest organizers. *See Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (protesters

cannot be charged for the costs created by counter-protesters that voice their opposition, even counter-protesters whose appearance heightens the risk of violence).

The Fifth Circuit's expansive theory of tort liability, if left to stand, will suppress expression by a diverse array of protesters and protest groups. Pro-life, pro-gun, environmental, social justice, and other protest groups may find themselves defendants in costly negligence suits, based on the unauthorized and un-ratified unlawful acts of participants or counter-protesters. Every organizer of a significant march will face substantial and, in many cases, crippling civil liability. Organizers of the Women's March, the annual protesters of the Court's decision in *Roe v. Wade*, and the youth organizers promoting sensible gun control would all be at risk. Damages in such suits would extend beyond personal injury, to any "foreseeable" property damage or other harm. This would return us to a time when courts routinely imposed stifling civil liability judgments on public protesters. And it would facilitate abuse of negligence law, including suits aimed at silencing protest messages and political movements.

The Court should grant certiorari to prevent tort liability from once again becoming a weapon of suppression. "The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit." *Claiborne Hardware,* 458 U.S at 931–32 (quoting *NAACP v. Overstreet*, 384 U.S. 118, 122 (1966) (Douglas, J., dissenting from dismissal of certiorari)).

* * * * *

"First Amendment freedoms need breathing space to survive." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468–69, (2007) (op. of Roberts, C.J.) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). This includes the freedom of assembly. This nation owes a "huge debt . . . to its 'troublemakers.'" *Garcia v. Bloomberg*, 865 F. Supp. 2d 478, 482 (S.D.N.Y 2012), *rev'd on other grounds sub nom.*, *Garcia v. Does*, 779 F.3d 84 (2d Cir. 2015). "Prudence and respect for the constitutional rights to free speech and free association, . . . dictate that the legal system cut all non-violent protesters a fair amount of slack." *Id.* Permitting nearly universal liability "for the violent act of a rogue assailant" would "impos[e] ruinous financial liability against citizens for exercising core First Amendment freedoms." Pet. App. 53a (Willett, J., dissenting in relevant part). By ignoring the realities of modern protest in which it is exceptionally easy to run afoul of some legal regulation, the Fifth Circuit's novel theory of negligence chills not only "troublemakers," but anyone seeking to take to the streets to peacefully voice their grievances. This is a grave error and an unprecedented departure from the long-standing American tradition of protecting peaceable assembly.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

Tabatha Abu El-Haj
Thomas R. Kline School of Law, Drexel University

Timothy Zick
William & Mary Law School

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC

April 9, 2020

APPENDIX

Tabatha Abu El-Haj, Associate Professor of Law, Thomas R. Kline School of Law, Drexel University.

Ashutosh Bhagwat, Martin Luther King, Jr. Professor of Law and the Boochever and Bird Endowed Chair for the Study and Teaching of Freedom and Equality, University of California, Davis School of Law.

John Inazu, Sally D. Danforth Distinguished Professor of Law and Religion, Washington University in St. Louis School of Law.

Ronald J. Krotoszynski, Jr., John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law.

Gregory P. Magarian, Thomas and Karole Green Professor of Law, Washington University in St. Louis School of Law.

Rodney A. Smolla, Dean and Professor of Law, Delaware Law School at Widener University.

Timothy Zick, John Marshall Professor of Government and Citizenship and Cabell Research Professor, William & Mary Law School.