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

REPLY TO BRIEF IN OPPOSITION

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

Nora Ahmed
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA
P.O. Box 56157
New Orleans, LA 70156

William P. Gibbens
Ian Atkinson
SCHONEKAS, EVANS, MCGOEY & MCEACHIN, LLC
909 Poydras Street, Suite 1600
New Orleans, LA 70112

David T. Goldberg
Counsel of Record
DONAHUE & GOLDBERG LLP
240 Kent Avenue
Brooklyn, NY 11249
(212) 334-8813
david@donahuegoldberg.com

Ben Wizner
Vera Eidelman
Brian Hauss
Emerson Sykes
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONER

The Brief in Opposition does not even mention, much less defend, the rationale of the Fifth Circuit's recent decision: that *Claiborne* is "properly read" to announce a two-tier First Amendment rule, such that a protest leader may be personally liable for an act of violence *someone else* committed during a protest, without any "intent condition." App.35a; s*ee* Pet.16-22. Respondent's reticence is understandable: No court has ever before advanced that startling interpretation, and this Court recently said the opposite. *See Counterman v. Colorado*, 600 U.S. 66, 81 (2023). Nor does respondent speak for the conclusion below that the tort regime, imposing liability for "arranging [a] protest" in breach of a "duty to avoid creating circumstances in which ... another may [foreseeably] be injured," App.3a, exhibits the "precision of regulation" the Constitution demands, App.40a. *See* Pet.26-28.

And the Opposition does not dispute the "undeniabl[e]," *McKesson v. Doe*, 592 U.S. 1, 4 (2020) (per curiam): that whether negligent-protest liability is constitutionally permissible is "important" enough to warrant review. *Id.* That question, which Fifth Circuit judges have debated over hundreds of pages, dividing 8-8 on a petition for rehearing, is no longer even potentially "hypothetical," *id.* at 6. It is squarely presented—and should now be decided—here.

What the Opposition *does* say does not support withholding review. Respondent offers a torrent of factual assertions—which it faults the petition for "downplay[ing]," Opp.22—along with arguments that the Fifth Circuit's decision is distinguishable from *Claiborne* on its facts and that the protest here

"lacked First Amendment protection," *id.* at 8, because petitioner is alleged to have done something "illegal," *id.*, *i.e.*, violating a law addressing traffic impairment.

Those contentions lack merit. The supposedly neglected allegations are *irrelevant*. And the judgment held unconstitutional in *Claiborne* was imposed on the same basis invoked here: Evers' central leadership role in the protest "creat[ed] the conditions," App.37a, for the violence that occurred. (Damages were awarded because Evers violated state law, a feature characteristic of nearly every decision enforcing First Amendment protections.) But respondent's protestations fail in any event to engage with *why* this case is important. As the alarms sounded here by a diverse array of amici confirm, it was not *Claiborne*'s *disposition* that makes it "one of [this Court's] most significant First Amendment [decisions]," *Cloer v. Gynecology Clinic, Inc.*, 528 U.S. 1099 (2000) (mem.) (Scalia, J., dissenting from cert. denial), but rather its rule: In the context of the First Amendment, imprecise and attenuated rules of derivative liability are impermissible, and "precision of regulation," 458 U.S. at 916—and "specific intent"—the Constitution's mandate. *See* Pet.13 (quoting *id.* at 920).

The Fifth Circuit's decision jettisons those protections altogether. This Court's intervention is needed to arrest its dire "implications for [the] First Amendment rights," *Mckesson*, 592 U.S. at 6, of people with controversial opinions and powerful grievances about the established order, and of fellow citizens to hear from them and be persuaded.

I. The undeniably important constitutional question is squarely presented.

It is not always possible to discern what respondent seeks to establish by numerous of the factual assertions with which the Opposition teems. What does emerge clearly is that none states a basis for withholding review.

Respondent's most persistent accusation is that the petition "ignor[ed]" or "downplay[ed]," Opp.22, allegations concerning incidents at other protests, which made the risk of an assault here "eminently foreseeable," to Mckesson, *id.* at 17. The petition did not dwell on these allegations not because they are unanswerable, but because they are *irrelevant* here. The central teaching of *Claiborne*—and of the landmark precedents on which it relies—is that a "like[lihood]" third-party criminality will foreseeably ensue from First Amendment activity is a constitutionally insufficient basis for making a leader liable, unless he *also* intended that it occur. *Counterman*, 600 U.S. at 73 (discussing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

On that point, the Opposition succeeds only in kicking up dust, including with its unserious claim that the question stated on the petition's first page—whether the Constitution and *Claiborne* allow leader liability for a violent act the leader did not himself commit or (*intentionally*) direct, authorize, ratify, or incite—is somehow not presented here. That is the issue the panel decided, having debated it, at length, in multiple opinions from 2019 and 2023.

Respondent has never alleged petitioner *engaged in* violence, or that he "directed" or "authorized" it. *See*

Opp.22 n.10. The Opposition *does* say Mckesson "on[] prior occasions ratified violence," Opp.iv, and failed to "dissuade" water-bottle "loot[ers]" in Baton Rouge, *id.* But *Claiborne* settled that an organizer's silence (or, in Evers' case, post-incident *advocacy* of violence) is not ratification, *see* 458 U.S. at 925 n.69, 929, and it permitted recovery only against a leader who ratified the "specific" act that caused a plaintiff's injury, *id.* at 927—not for "ratifying" some misconduct somewhere. And the Fifth Circuit concluded, unanimously, that respondent stated no plausible basis for alleging petitioner ratified the rock-hurling. *See* App.145a, 150a (applying *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Respondent has never challenged that ruling.

The same holds for the sundry other generic assertions that make brief appearances in the Opposition—*e.g.*, that petitioner "[in]cited," Opp.iii, violence in Baton Rouge. Federal courts do not accept such conclusory allegations just because they are typed in a pleading. *See Twombly*, 550 U.S. at 555. And as Judge Willett highlighted, respondent has never alleged "a single word" uttered by Mckesson "even obliquely referenc[ing] violence," App.66a, a telling void, given respondent's emphasis that he and other officers were closely monitoring Mckesson and "hear[ing] orders" he was "giving." Opp.iii. (Indeed, the officers, having observed petitioner "throughout the day," *id.*, arrested him not for "inciting" or "looting," but for a traffic misdemeanor, and that charge was dismissed, and the arrest record expunged. *See* Pet.32 n.4.).

Of course, had the Fifth Circuit majority viewed these allegations as substantial, it would have

rejected dismissal under *Claiborne*'s core rule—and had no need to venture its unprecedented, intent-free definitions of incitement and ratification. Yet here we are.

II. The Fifth Circuit's First Amendment rule is starkly wrong.

The Opposition does not defend the Fifth Circuit's reasoning nor attempt to make up for the court's failure to consider its First Amendment implications. Rather, respondent principally repeats assertions in the majority opinion below (and its predecessors): (1) that this case and *Claiborne* are factually distinguishable and (2) that no "First Amendment protection" is implicated because impeding street traffic (by protesting or otherwise) is a misdemeanor in Louisiana. *See* La. Rev. Stat. § 14:97. Were the former right, it would still be beside the point: Review is not sought because the decision below misapplied *Claiborne*, but because it gutted it. Respondent's arguments that *Claiborne*'s protection is limited to protests that comply with state law are more sweeping, but wholly untenable.

Respondent's attempt to distinguish this case on the ground that no "expressive activity" is targeted here, Opp.19, misunderstands the bases on which personal liability was imposed and defended—and invalidated—in *Claiborne*. Evers was not, as respondent supposes, sued solely for delivering vituperative remarks. He was identified as the "primary leader[]" and "manager" of a hierarchically organized, years-long protest. *See* 458 U.S. at 897 & n.20, 926. The numerous acts of violence and threats that marred the protest were committed by his

(alleged) subordinates, to advance goals Evers shared. The plaintiffs had no doubt that Evers' *own* conduct in organizing and overseeing the protest "creat[ed] the conditions," App.37a, for those acts, and that liability was warranted on that basis. (The reason this Court carefully examined Evers' speech was that his words so forcefully embraced retribution that they *might have* amounted to the intentional "ratifi[cation]" or "incite[ment]" that could support making him liable for others' wrongs, though were held not to. *See* 458 U.S. at 928-29.)

But even if the two cases' divergent results could be harmonized more plausibly, that would not dispel the conflict necessitating this Court's intervention: between the Fifth Circuit's *rule* and the "constitutional fundamentals" *Claiborne* implements. App.69a (Willett, J.). The restraints on state-law tort liability *Claiborne* enforced were not pulled from thin air. They followed directly from landmark precedents of this Court, which squarely rejected government's power to burden First Amendment activity based on its tendency to increase the risk of—or "create the conditions for"—other persons' wrongdoing and instead demanded "specific[] inten[t]." *See* 458 U.S. at 919 (discussing *Scales v. United States*, 367 U.S. 203, 229 (1961)); Pet.23-25.

The premises of those decisions, as this Court explained, apply fully to cases, like this one and *Claiborne*, seeking to hold protest leaders liable for harms they did not personally inflict: The First Amendment rights at issue—airing outsiders' grievances against "the government and the prevailing social order," *Counterman*, 600 U.S. at 81—are both so essential to self-government and so

vulnerable to direct and indirect suppression that no lesser protection is tolerable. *See id.*; *Claiborne*, 458 U.S. at 913.

The Fifth Circuit's four-times–affirmed rule is entirely unmoored from these basic principles and the polar opposite of this Court's.

Respondent's other drumbeat theme—that no First Amendment protection is implicated here, because the protest allegedly violated state traffic law—cannot withstand scrutiny. *See, e.g.*, Opp.2-4, 6-8. The issue here is not whether a protester can be held liable for blocking the street. It is whether the First Amendment allows Louisiana to make a leader liable for an unrelated person's unsolicited violent act *based on* the leader's violation of a traffic-safety law and the fact that the rock was hurled during the protest. The theory of liability here rests on the protest—it is a protest-specific tort. What connects Mckesson and the unidentified assailant is the protest, and whether he is liable for respondent's injury turns on the nature of the protest (a Black Lives Matter protest of police), the nature of the police response to it, and the fact the rock was thrown during the protest. Respondent's theory is no mere application of regular tort principles; it implicates—and violates—the First Amendment.

As amici highlight, a forfeiture-by-misdemeanor theory would render *Claiborne*'s restraints on ruinous personal liability almost entirely inoperative. *See* Scholars' Br.17 ("almost anyone can be arrested for something" (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part)). Still fewer would-be protestors would hazard the risk if an *allegation* of "illegal[ity]"

enabled a political opponent to hale them into court. And as Judge Willett emphasized, nonviolent, civilly disobedient protests that are proud milestones in the Nation's history would, by definition, be "constitutionally illegal," Opp.8, and thus relegated to the lowest possible First Amendment rung.[1]

The notion that compliance with state law is a prerequisite for protection is refuted by *Claiborne* itself and by nearly every other of this Court's decisions enforcing First Amendment limitations. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011) (violation of state tort law); *Counterman*, 600 U.S. 66 (state criminal law); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (local permit law); *RAV v. St. Paul*, 505 U.S. 377 (1992) (local hate-crime ordinance). *See also* App.56a-57a (Willett, J.). Indeed, *RAV* overturned *on First Amendment grounds* a delinquency judgment for acts that were "illegal" in myriad ways: Punishment was imposed under an ordinance reaching *only* "fighting words," a long-"unprotected" speech category, for misbehavior committed while trespassing on his victim's property. *See* 505 U.S. at 380 & n.1 (listing other laws likely violated); *accord United States v. Stevens*, 559 U.S.

[1] Respondent, unlike the majority below, takes up the example of Dr. King's Selma March. That protest *was* lawful—not because Alabama permitted marching on the highway, but because a federal court had enjoined Alabama officials from arresting marchers under state law. *Williams v. Wallace*, 240 F. Supp. 100, 110 (M.D. Ala. 1965). Historians have documented at least twenty-nine times that Dr. King was arrested, mostly for violating "time, place, manner" regulations, *See* http://tinyurl.com/3dj4wz86, including in Birmingham. S*ee* Martin Luther King, Jr., *Letter from a Birmingham Jail* (1964).

460 (2010) (invalidating ban reaching only depictions of "illegal" animal-killing).

Nor does describing the traffic-interference law as a "time, place, and manner" law help respondent. *But see* Opp.1, 3, 8, 21. Such measures are also subject to First Amendment scrutiny—and invalidation. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). The issue this case presents is not whether Louisiana's traffic law is constitutionally permissible, but whether the First Amendment allows a *tort cause of action* making a leader responsible for a personal injury inflicted during a protest through someone else's unsolicited violent act, *because* Section 14:97 was violated.

The solicitude afforded reasonable, *content-neutral* time, place, manner regulations has no application to *that*. *See Forsyth*, 505 U.S. at 130. Quite remarkably, the state tort remedy makes the "presence of First Amendment activity" an *aggravating* factor—holding protest leaders *more* broadly responsible than others who "create the conditions" for third-party criminality. *See* Pet.27 n.3. And here, as in *Forsyth*, such liability *requires* "examin[ing] the content of the message that is conveyed … and [estimating] the response of others to [it]," 505 U.S. at 134 (citation omitted). Worse, the duty here also is dependent on how provocatively government officials—the very ones whose actions are being angrily protested—will respond, thereby granting "police a virtually unrestrained power" to raise a protest leader's personal jeopardy. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (citation omitted). And unlike in *Forsyth*, 505 U.S. at 136, the financial burdens the Louisiana tort authorizes are

uncertain and limitless, based on a post-hoc finding that the protest was conducted "unreasonably." *Cf. Snyder*, 562 U.S. at 458 (invalidating tort reaching only harms the defendant himself "outrageous[ly]" and intentionally inflicts).

Nor is the Opposition correct in supposing that the First Amendment problems somehow dissipate because the risks here come from the leader's "side." Neither the Louisiana supreme court nor the decision below announced that limitation, insisting on case-by-case elaboration. And it would in any event offend the core prohibition against guilt-by-association, by making a common political view—*e.g.*, opposition to racial injustice—the basis for holding a leader personally liable for violent purposes he and an assailant do not share. *See De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

For those who seek to exercise the right to protest—to take to the streets alongside like-minded others to air and seek redress for sincerely held grievances—the tort here "comes as a wolf." *Morrisson v. Olsen*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). The Fifth Circuit pronounced it "precision of regulation." App.25a.

III. The Court should reinstate the *Claiborne* rule in this case.

The Fifth Circuit's decision is wrong and should not stand. That court surely misread *Claiborne*'s language and mistook its facts. But the court's basic error was to default on the central task of First Amendment adjudication in this area: to ensure that important freedoms do not go unexercised under threat of onerous burdens, justified with reference to

harms others commit. What separates personal culpability from guilt-by-association, and advocacy from incitement, is, at a minimum, an intent to further the unlawful act at issue. That is entirely lacking here, even accepting as true everything respondent alleges. And for that reason, the complaint should have long ago been dismissed. The result of these errors was to supplant for the nearly 40 million residents of the Fifth Circuit the benefit of *Claiborne*'s clear, certain, administrable, and protective rule, installing in its stead a formless "sufficiently close relationship," App.21a, "test," which is none of those things and which jeopardizes the core rights of government critics and people holding dissenting views on controversial subjects.

The need to reinstate *Claiborne* and the reasons for doing so in this case are compelling. Petitioner's defense is in its eighth year, and, absent intervention here, he faces invasive and costly trial-court proceedings, not to mention the risk of a damages judgment—and appeal and yet another petition. "Succeeding" in the district court would still come at a steep personal cost—and would leave standing throughout the circuit the seriously deficient First Amendment rule.

And while the protest-deterring effects of the decision are immediate and far-reaching, this Court's opportunities to re-set the law will be few. Would-be protestors who lack the resources and resolve to hazard litigation and liability have had their voices effectively silenced without any judicial consideration of their First Amendment rights. (There is no practicable means to challenge a tort regime like this one pre-enforcement. *Cf. Whole Woman's Health v.*

Jackson, 595 U.S. 30, 44 (2021).) And as the course of proceedings here attests, the constitutional issue's entwinement with factual and state-law complexities makes it difficult for even a litigated case cleanly presenting the question to reach this Court. (This one, arising from a dismissal at the pleading stage and including an authoritative opinion from a state high court, is a unicorn.)

Nor is there any warrant for *postponing* review pending further consideration by the court of appeals. No input from that court is needed to do what is called-for here: to adjudge the negligent-protest tort incompatible with the First Amendment and reinstate this Court's controlling precedent.[2]

CONCLUSION

The petition for a writ of certiorari should be granted and the Fifth Circuit's decision summarily reversed, or, in the alternative, the Court should set the case for plenary review.

---

[2] One amicus suggests that the Court vacate and remand in light of *Counterman*. FIRE Amicus Br. 3. But "such further proceedings," are neither needed nor "just under the circumstances." 28 U.S.C. § 2106. The passages in *Counterman* that cast light on the Fifth Circuit's errors were *restatements* of the same long-settled principles petitioner pressed below, and petitioner—having weathered one "prolong[ed]" and "expens[ive]," 592 U.S. at 5, round of remand proceedings, culminating in a decision no more faithful to *Claiborne* than its precursors—should not have to pursue yet another in order to vindicate his First Amendment rights.

Respectfully submitted,

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

Nora Ahmed
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA
P.O. Box 56157
New Orleans, LA 70156

William P. Gibbens
Ian Atkinson
SCHONEKAS, EVANS, MCGOEY & MCEACHIN, LLC
909 Poydras Street, Suite 1600
New Orleans, LA 70112

David T. Goldberg
Counsel of Record
DONAHUE & GOLDBERG LLP
240 Kent Avenue
Brooklyn, NY 11249
(212) 334-8813
david@donahuegoldberg.com

Ben Wizner
Vera Eidelman
Brian Hauss
Emerson Sykes
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Counsel for Petitioner

DATED: January 2024